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THE INSTITUTIONS OF THE LAW OF *SCOTLAND*,

Deduced from its Originals,

AND

Collated with the Civil, and Feudal-Laws,

AND

With the Cuſtoms of Neighbouring Nations.

IN FOUR BOOKS.

Dalrymple

By the late JAMES Viſcount of *STAIR*,
Lord Preſident of the Court of Seſſion.

The THIRD EDITION, corrected, and enlarged, with Notes.

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M,DCC,LIX.

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MVSEVM
BRITANNICVM

ADVERTISEMENT.

THE preſent Edition of the INSTITUTIONS of the LAW of SCOTLAND was undertaken with a View to remove, by the Help of ſeveral Manuſcripts, the Obſcurity which every where occurred in the former Editions of this valuable Syſtem of Law; and to add, in Notes, the Alterations which have been introduced ſince the 1693, by Statutes or Acts of Sederunt. The Work was begun by *John Gordon*, Eſq; Advocate; and the firſt eighty five Pages were executed by him. After the Preſs had ſtopped for ſome Time, the Undertaking was compleated by *William Johnſtone*, Eſq; Advocate.

This gentleman was afterwards Sir Wm Pulteney Baronet.

That the eſtabliſhed Authority of the Book might ſuffer no Diminution, by the Alterations in the Text, which were judged proper to be made in this Edition, all theſe Alterations are printed in *Italics*: And ſuch of them as have been made without the Authority either of the Manuſcripts or of the Deciſions referred to in the Book, are, beſides, incloſed by Crotchets; and the former Reading is placed at the Bottom of the Page.

The Deciſions referred to, have been examined. By this means the Quotations have been made correct, the Author's Abridgment of theſe Deciſions illuſtrated, by Additions to the Text; and wherever the Import of the Deciſions ſeemed to have been miſapprehended, this is mentioned in Notes.

The Places of the Book, which treat of the ſame Subject, are marked by References at the Bottom of the Page.

In the Continuation of the Work, it was thought unneceſſary to refer to the particular Manuſcripts upon the Authority of which each Alteration was made. The ſeveral Manuſcripts are now lodged in the Advocates Library.

DEDICATION

Prefixed to the Edition 1681.

To the KING.

May it pleaſe Your Majeſty,

I DO humbly preſent to Your MAJESTY, a Summary of the Laws and Cuſtoms of Your antient Kingdom of SCOTLAND, which can be no where ſo fitly placed, as under the Rays of Your Royal Protection: I am confident it will tend to the Honour and Renown of Your MAJESTY, and Your princely Progenitors, that You have governed this Nation ſo long and ſo happily, by ſuch juſt and convenient Laws, which are here offered to the view of the World, in a plain, rational, and natural Method: In which, material Juſtice (the common Law of the World) is in the firſt place orderly deduced from ſelf-evident Principles, thro' all the ſeveral private Rights thence ariſing, and in the next place the Expedients of the moſt polite Nations for aſcertaining and expeding the Rights and Intereſts of Mankind are applied in their proper places, eſpecially thoſe which have been invented or followed by this Nation. So that a great part of what is here offered is common to moſt civil Nations, and is not like to be diſpleaſing to the Judicious and Sober any where, who doat not ſo much upon their own Cuſtoms as to think that none elſe are worthy of their notice. There is not much here aſſerted upon mere Authority, or impoſed for no other Reaſon but *quia majoribus placuerunt*; but the rational Motives, inductive of the ſeveral Laws and Cuſtoms, are therewith held forth: And though the Application of thoſe common Rules to the variety of Caſes determined by our Statutes, our antient Cuſtoms and the more recent Deciſions of our ſupreme Courts, be peculiar to us; yet even the Quadrancy of theſe to the common Dictates of Reaſon and Juſtice may make them the leſs diſpleaſing, and that no Nation hath ſo few Words of Art, but that almoſt all our Terms are near the common and vulgar Acceptation. Yea the hiſtorical Part, relating to the Helps and Expedients for clearing and ſecuring the Rights of Men out of the Word of GOD, the moral and judicial Law, contained therein, the civil, canon, and feudal Laws, and many Cuſtoms of the neighbouring Nations, digeſted as they fall in with the common Rules of Juſtice, may probably be acceptable to thoſe who may and will allow time for their peruſal. A quaint and gliding Stile, much leſs the Flouriſhes of Eloquence (the ordinary Condiment and Varniſh, which qualify the Pains of Reading) could not juſtly be expected in a Treatiſe of Law, which of all Subjects doth require the moſt plain and accurate Expreſſion. To ballance which, the nauſeating burden of Citations are as much as can be left out.

We do not pretend to be amongſt the great and rich Kingdoms of the Earth; yet we know not who can claim preference in Antiquity and Integrity, being of one Blood and Lineage without Mixture of any other People, and have ſo continued above two thouſand Years; during all which, no foreign Power was

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ever able to ſettle the Dominion of a ſtrange Lord over us, or to make us forſake our Allegiance to Your MAJESTY's Royal Anceſtors, our native and kindly Kings; whereas moſt of the other Kingdoms are Compounds of divers Nations, and have been ſubjugated to Princes of different and oppoſite Families, and oft-times Foreigners. The great Monarchies, which did deſign Univerſality, are all broken in pieces, and there is no Family that can claim a juſt Title to redintegrate any of them. There is no Emperor nor King except YOURSELF, but knows to what other Family their Predeceſſors did ſucceed, and when and by what means. It is evident, what a Mixture hath been in Greece and Italy, in France and Spain, in England and elſwhere. This Nation hath not been obſcure and unknown to the World; but the moſt famous Nations have made uſe of our Arms, and have ſtill in grateful Remembrance, retained Trophies and Monuments of our Courage and Conſtancy. There be few Wars in Chriſtendom, wherein we have not had conſiderable Bodies of Soldiers regimented and commanded by themſelves and oft-times general Officers commanding them and whole Armies of Strangers with great Reputation and Gallantry, which did advance them above the Natives of thoſe Countries where they ſerved. Neither have we wanted the Fame of Learning at home and abroad in the moſt eminent Profeſſions, Divine or Human. And as every where the moſt pregnant and active Spirits apply themſelves to the Study and Practice of Law, ſo thoſe that applied themſelves to that Profeſſion amongſt us, have given great evidence of ſharp and piercing Spirits, with much Readineſs of Conception and Dexterity of Expreſſion; which are neceſſary Qualifications both of the Bench and Bar, whereby the Law of this Kingdom hath attained to ſo great Perfection, that it may without Arrogance be compared with the Laws of any of our neighbouring Nations. For we are happy in having ſo few and ſo clear Statutes. Our Law is moſt part conſuetudinary, whereby what is found inconvenient is obliterate and forgot. Our Forms are plain and prompt, whereby the Generality of the Judicious have with little pains much Inſight in our Law, and do with the more Security enjoy their Rights and Poſſeſſions; which by our public Records are better known than any where, by which we may with the greateſt Aſſurance truſt our Purchaſe, ſeeing no Land-right is effectual againſt Purchaſers by conſent or by Law, but where the ultimate Perfection thereof by Saſine or other Evidents is upon Record, in Regiſters ſet apart for the ſeveral Rights without Mixture of any other, whereof there are authentic minute Books kept with the Records in each Shire and Juriſdiction, whereby with the leaſt Pains or Expence all the Rights, affecting any Land within the Courſe of Preſcription, can eaſily be found. We are not involved in the Labyrinth of many and large Statutes, whereof the poſterior do ordinarily abrogate or derogate from the prior that it requires a great Part of a Life to be prompt in all thoſe Windings, without which no Man with Sincerity and Confidence can conſult or plead, much leſs can the Subjects by their own Induſtry know where to reſt, but muſt give more implicit Faith to their Judges and Lawyers than they need or ought to give to their Divines. And we do always prefer the Senſe to the Subtility of Law, and do ſeldom trip by Niceties or Formalities.

The greateſt Fixation and Improvement of our Law hath been by the Eſtabliſhment of the ſupreme civil Judicature of the Kingdom by King JAMES the Fifth, in the Inſtitution of the College of Juſtice, conſiſting of fifteen Ordinary Senators, in place of the King's daily Council, which followed His Reſidence and Court, and of the Lords of Seſſion who came in their place, and were nominated of the Eſtates of Parliament ambulatory; and the Senators of the College of Juſtice were inveſted with the powers of both, and their perſons and the place of Judicature became fixed, and hath ſo continued near the ſpace of an hundred and fifty Years. This Court was much improven by your MAJESTY's Royal Grand-father, who delighted exceedingly in it, and honoured

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it frequently with His Preſence, while He was in Scotland. So did Your Royal Father when He came to Scotland to be crowned. And Your MAJESTY hath owned and encouraged it more than any.

Your MAJESTY doth not demand or expect great Revenues from this Kingdom. That, which we can be uſeful in to Your MAJESTY, is our perſonal Service and our firm Adherence to Your Crown and Monarchy, and to Your Royal Family, in which we have peculiar Intereſt, and which no Time can communicate to any of Your other Dominions, which they neither can claim nor ſhould envy, That You are of our Nation and have governed us during twenty Centuries and more, and by us you are the moſt antient King in the World, which is the moſt noble and reſplendent Jewel in Your Crown. What Family on Earth can parallel that Motto, which an hundred Years ago was written about Your Royal Enſigns upon Your Palace:

NOBIS HÆC INVICTA MISERUNT
CENTUM SEX PROAVI?

Therefore Your Royal Family hath been betrothed to a Virgin Crown, which never knew another Huſband; and, though it hath been darkened with Clouds and Receſſes, yet never was, and, I hope, never ſhall be in Viduity. The mutual Affection betwixt Your MAJESTY's Royal Family and this Nation is a prime Intereſt to both, which ſhould be much encouraged and improved. Your MAJESTY without juſt ground of Jealouſy to Your other Kingdoms may own a peculiar Care of us, and we ought to avow a ſingular Kindneſs to and Confidence in Your MAJESTY and Your Royal Succeſſors.——This might be ſo promoved, that Your MAJESTY might by Treaties have Armies of this Nation abroad, entertained without Your Charge and ready at Your Call (as you had Dowglas's Regiment in France) which might ſecure Your Peace at Home and make You ſtand in need of leſs Aids from Your People. You might alſo have thriving Plantations abroad, if theſe, who every Year go from this Nation to ſeek their Fortunes abroad, were directed and encouraged. And it is certainly a great Intereſt to keep the Nation at Home in conſtant Affection to Your MAJESTY and amongſt themſelves, that being ſo united and ſenſible of their true Intereſt, they might be ſignificant for Your MAJESTY's Service, which can be but of ſmall effect, while they are diſſatisfied or divided. Your Royal Grand-father did ſopite and extinguiſh the Feuds, which were frequent thro' this Nation, while no place was free of an inteſtine and barbarous War betwixt moſt of the neighbouring Families; whereof little remains but amongſt ſome Clans in the Highlands. There is little Diſcord elſewhere, but the vying or envying for a greater Share of Your MAJESTY's Favour and Countenance. And there was never a King more fitted to prevent and cure thoſe Picques. Beſide the Benignity and Gentleneſs, that hath been ſingular and conſtant in Your Royal Family, no Prince nor Perſon, by the general Acknowledgement of the World, whether Friends or Unfriends, hath ſo little of Suſpicion or Jealouſy, Reſentment, Revenge, Auſterity or Severity, as your ſacred MAJESTY, or more of a noble Enlargement and Openneſs of Heart and Affection.

It is a greater Glory to your Royal Family, that You have been chriſtian Kings, before any other Family in Chriſtendom were Kings; and that You and Your Subjects of Scotland have been leaſt under the Yoke of Rome in Your ſacred or civil Intereſt. Their Arms could never ſubdue You; but they turned on the defenſive; and to exclude Your Valour, two of the moſt famous Emperors, *Severus* and *Hadrian*, were at an incredible Coſt to build two Walls from Sea to Sea, the Foundations of which are yet known, and a great Part of *Hadrian*'s Wall from Carliſle to Newcaſtle is ſtill ſtanding. And, albeit the Roman Art did prevail more than their Arms, in procuring a Subordination and Dependence of this Church to the Biſhops of Rome, and Acceptance of the Service

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and Ceremonies, which they embraced not for many Centuries after they were Chriſtians, yet in their greateſt Devotion to the See of Rome they kept always a conſiderable Reſerve, ſo that it was Barratry (that is, Proſcription, Baniſhment, and Loſs of Lands and Goods) to purchaſe Benefices from the Court of Rome; yea it was not lawful to go to Rome without the King's Licence. And the Roman Yoke hath by the good Providence of GOD been fully rejected by three ſucceſſive Kings during the Space of an hundred twenty three Years; and we have returned to the true, antient and Apoſtolic Faith of Chriſt, warranted by the holy Canon of Scripture. And Your MAJESTY is the King in the World of the pureſt Religion, and it is Your greateſt Glory and Intereſt, to be zealous and valiant for it both at home and abroad, the ſteady Purſuance whereof made a Diſtaff not only peaceable and ſecure at home, but terrible to the Popiſh Kingdoms, abroad.

I have, as diſtinctly and clearly as I could, by this Eſſay, given a view of Law and of our Cuſtoms, and the Deciſions of the Seſſion ſince the Inſtitution of the College of Juſtice, as they have been remarked and reported by the moſt eminent Judges and Pleaders from time to time: which I hope ſhall be more enlarged and improved by others. It hath been my Aim and Endeavour more than twenty Years, in which I have ſerved Your MAJESTY as a Senator of Your College of Juſtice; of which by Your MAJESTY's Favour I have been Preſident near eleven Years. It is but little ſhort of forty Years, ſince I have followed the Study and Practice of Law, conſtantly and diligently, ſo that thoſe, who will not deny me Reaſon and Capacity, can hardly deny my Knowledge and Experience in the Subject I write of. My Modeſty did not permit me to publiſh it, leſt it ſhould be judicially cited, where I ſat: But now, becoming old, I have been prevailed with to print it, while I might over-ſee the Preſs. It was not Vanity and Ambition that ſet me on Work; but, being ſo long a Servant to GOD and Your MAJESTY in the Matter of Juſtice, I thought it my Duty not to ſmother my Thoughts of the immaculate Righteouſneſs of GOD Almighty in his moral Law, and of the Juſtneſs and Fitneſs of Your MAJESTY's Laws, that I might promote Your Honour and Service, and the Good of Your Subjects, which ſhall ever be the ſincere Endeavour of,

Your MAJESTY's

Moſt Humble, moſt Affectionate

And Obedient Servant and Subject,

JA. DALRYMPLE.

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Prefixed to the Edition 1693.

THE former Edition of theſe Inſtitutions being long ago wholly ſold off, and many being deſirous of a ſecond, I did allow the Printer to expede the ſame. And becauſe there are ſeveral Alterations and Additions in this, that were not in the former Edition, I thought fit to give the Reader ſome Account thereof.

Firſt, The former Edition was printed when I was abſent, and the Printer had not provided a ſkilful Corrector, whereby ſeveral Eſcapes in the Impreſſion occurred, and ſome Parts of Sentences in the Copy were left out, and many of the Citations being in Figures in the Copy, were wrong printed, ſo that they could not eaſily be found; I did therefore reviſe them, and correct what I found wrong cited.

Secondly, The former Edition was collected by me in many Years, and deſigned chiefly for my particular Uſe, that I might know the Deciſions and Acts of Seſſion, ſince the firſt Inſtitution of it, and that I might the more clear and determine my Judgment in the Matter of Juſtice. And to that End I made Indexes of all the Deciſions, which had been obſerved by Men of the greateſt Reputation, and did cite the ſame: But conſidering that the antient Deciſions, were before theſe troden Paths, which have ſince come to be fixed Cuſtoms, and that there were not authentic Copies of theſe old Collections; I thought fit, in this Edition, only to relate to the later and more authentic and uſeful Collections.

Thirdly, In the former Edition, I deſigned the Treatiſe to be divided into three Parts, as being moſt congruous to the Subject-matter of Juriſ-prudence. The firſt Part being concerning the Conſtitution of original Rights: The ſecond concerning the Tranſmiſſion of theſe original Rights, amongſt the living and from the dead: The third concerning the Cognition and Execution of all theſe Rights. Yet finding it would be acceptable to divide the Inſtitutions of our Law into four Books, as the Inſtitutions of the civil Law are divided, and eſpecially becauſe there is a more eminent Diſtinction in our Law betwixt heritable Rights of the Ground, and moveable Rights; I have divided this Edition into four Parts. The firſt being of original perſonal Rights: The ſecond of original real Rights: The third of the Conveyance of both: And the fourth of the Cognition and Execution of the whole.

Fourthly, In the former Edition, I made the Titles as comprehenſive as I could, that congenerous Matters might be handled in the ſame Titles; and therefore the whole Treatiſe was contained in 31 Titles: But now I have divided the long Titles in the firſt Book, and put them under more ſpecial Titles, and have divided the Paragraphs, and joined them with the ſeveral Titles accordingly.

Fifthly,

Fifthy, In the former Edition, I made no other Index than the Titles, and Summaries of the whole Paragraphs thereof printed together, which might have gone far towards Satisfaction, when the Method was ſo natural: But now the laſt Part being added, the Titles whereof are ſhort, and needed no Summaries of Paragraphs; I have not re-printed the Paragraphs of the former Parts together, but at the ſeveral Titles: And there is alſo an alphabetical Index of the whole added.

In all which, there is no material Change from what was in the firſt Edition as things then ſtood; ſo that it will ſtill be uſeful, and the Titles may be cited, either by that or this Edition: Though indeed this Edition be in a great part new, by occaſion of new Statutes of Parliament, Acts of Sederunt, and Deciſions ſince the Treatiſe was written, and by an entire Addition of the fourth Part, which was reſolved and expreſt to be added. And yet it is ſtill the ſame Treatiſe, and therefore I thought it not proper to give it a new Dedication.

I have been very ſparing to expreſs my own Opinion in dubious Caſes of Law, not determined by our Cuſtoms or Statutes, but have rather congeſted what the Lords have done, than what my Opinion would have been in theſe Caſes when they were free. But I have uſed more Freedom, in opening the Fountains of Law and Juſtice, and the Deductions thence ariſing, by the Law and Light of Nature and of Reaſon, which is the general Rule of Juſtice for the whole World. And the Law and Cuſtoms of Nations, whether common or peculiar, ſhould do no more, but clear and aſcertain that general Law of Mankind, by deſcribing the Forms, Orders and Expedients, for making it effectual, and altering the Courſe thereof in Things which GOD Almighty hath left in the Power of Men, which by their Contracts or Statutes they may diſpoſe of as they ſee convenient.

I have omitted no material Deciſion of the Lords that I found, eſpecially where they were contrary, and ſeemed to be inconſiſtent, that Judges might not be over-ruled by adducing ſome Deciſions, where others about the ſame time were oppoſite: But I have made uſe of few Deciſions in the laſt Part, which doth more concern the Form than the Matter of Juſtice. And I have truly related what were the Forms, when I came to be a Member of the College of Juſtice, and what Improvement thereof hath been made by Alterations and Additions, as Experience ſhewed to be requiſite.

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THE

THE INSTITUTIONS OF THE LAW of SCOTLAND.

BOOK I. TIT. I.

Common Principles of LAW.

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MY deſign being to give a deſcription of the law and cuſtoms of *Scotland*, ſuch as might not only be profitable for judges and lawyers, but might be pleaſant and uſeful to all perſons of honour and diſcretion, I did reſolve to raiſe my thoughts and theirs to a diſtinct conſideration of the fountains and principles of the peculiar laws of all nations, which common reaſon makes intelligible to the judicious, when plainly and orderly propoſed: and therefore have always in the firſt place ſet forth that common rule of material juſtice, by which mankind ought to govern themſelves, though they had no poſitive ſtatutes or cuſtoms; *then* [a] ſhewing how theſe are thence introduced. I have therefore choſen the method I thought fitteſt for this purpoſe, and the terms moſt intelligible in common uſe; and have, as much as I could, forborn the terms of art. No man can be a knowing lawyer in any nation, who hath not well pondered and digeſted in his mind the common law of the world, from whence the interpretation, extenſions and limitations of all ſtatutes and cuſtoms muſt be brought [aa]. I have therefore begun with the common principles of law, and thence have laid down the method I now follow, and have explained the general terms commonly made uſe of in law. And there is no term of which men have a more common, but confuſed, apprehenſion, than what law is:

[a] Formerly, *and then.* [aa] See below IV. 1. 61.

and yet there be few terms harder to be diſtinctly conceived or deſcribed. The cleareſt conception of it, I can find, is thus:

I. Law is the dictate of reaſon determining every rational being to that, which is congruous and convenient for the nature and condition thereof: and this will extend to the determination of the indifferency of all rational beings. Even God Almighty, though he be accountable to, and controulable by none, and ſo hath the abſolute freedom of his choice, yet doth he unchangeably determine himſelf by his *goodneſs*, *righteouſneſs and truth*; which therefore make the abſolute ſovereign divine law. The ſame is alſo the law of all rational creatures, by which they ought to determine and rule their free actions: but the congruity and conveniency of their nature affords them other dictates of their reaſon, which quadrate not with the divine nature, ſuch as adoration, obedience, common to angels and men. And reaſon doth determine mankind yet further, from the conveniency of his nature and ſtate, to be humble, penitent, careful and diligent for the preſervation of himſelf and his kind; and therefore to be ſociable and helpful, and to do only that which is convenient for mankind to be done by every one in the ſame condition. Whereof the rule in the goſpel is excellent, *Do to all, as you would have them do to you* [b]; which muſt be underſtood, if you were in their caſe, and they in yours. Heathen Philoſophers came not the length of this poſitive law, but only to the negative, *Quod tibi fieri non vis, alteri ne feceris* [c]. Thence alſo are the three common precepts in the *Roman* law, *Honeſte vivere, alterum non lædere, ſuum cuique tribuere* [d]: all which are evidently the common intereſt and advantage of mankind. This is that eternal law, which cannot be altered, being founded upon an unchangeable ground, the congruity to the nature of God, angels and men; and therefore God cannot deny himſelf, or act unſuitably to his divine perfections (and therefore it is ſaid, *Shall not the judge of all the earth do right* [e]*?* and that *it is impoſſible for God to lie* [f],) not by any fatal neceſſity, as if he had not power and freedom enough, but becauſe his goodneſs, juſtice and truth are as certain by his free choice, as are his omnipotency and ſovereignty. This is alſo called *the law of nature*, becauſe it ariſeth from the congruity or conveniency of nature, and thence is known by the light of nature.

II. Correſpondent to thoſe dictates of reaſon (wherein law conſiſts) which are in the underſtanding, there is an inclination in the will to obſerve and follow thoſe dictates, which is *juſtice*; and therefore it is deſcribed *conſtans & perpetua voluntas ſuum cuique tribuendi* [g], where, by the will, is not underſtood the faculty, but the inclination thereof, determined by the law, to give every one that which the law declareth to be due; and it is divided into diſtributive and commutative juſtice. Diſtributive juſtice is the inclination to retribute rewards to the virtuous, and puniſhments to the vitious, proportioned to their actings: which is now almoſt wholly devolved upon publick authority; little remaining but encouragement and praiſe to the virtuous, and diſcouragement and diſcountenance to the vitious, as alſo the reſerved powers of parents and maſters. Commutative juſtice is the inclination to give every man his right; and though the name is taken from the interchange of private rights, yet it reacheth to all preſtations, which are not by way of reward or puniſhment. There being nothing here propoſed but the private rights of men, it is only requiſite to conſider the laws, by which private rights are conſtitute, conveyed or deſtitute: and theſe are either divine or human.

III. Divine law is that mainly, which is written in man's heart, according to that of the Apoſtle [h], *For when the Gentiles, who have not the law*, (to wit, written in the word) *do by nature the things contained in the law, theſe having not the law are a law unto themſelves: which ſhew the work of the law written in their hearts, their conſcience alſo bearing witneſs, and their thoughts the mean while accuſing or elſe*

[b] All things whatſoever ye would that men ſhould do to you, do ye even ſo to them, *Matth.* vii. 12. [c] A ſaying much admired and frequently uſed by the emperor Alexander Severus. *Lampridius in Alex. Sev. c.* 51. Iſocrates had long before expreſſed the ſame thing thus, Ἃ πάσχοντες ὑφ' ἑτέρων ὀργίζεσθε, ταῦτα τοῖς ἄλλοις μὴ ποιεῖτε. *Ad Nicoclem.* [d] § 3. *Inſt. de juſtitia & jure.* [e] *Gen.* xviii. 25. [f] *Heb.* vi. 18. [g] Conſtans & perpetua voluntas *jus* ſuum cuique tribuendi, *pr. Inſt. de juſtitia & jure.* [h] *Rom.* ii. 14 & 15.

elſe excuſing one another. This is the law of nature, known naturally either immediately [*or by the information of reaſon. Immediately* [i]], like unto thoſe inſtincts which are in the other creatures, whereby they know what is neceſſary for their preſervation. So the firſt principles of this natural law are known to men without reaſoning or experience, without art, induſtry or education, and ſo are known to men every where thro' the world, though they keep no communion nor intercourſe together: which is an unanſwerable demonſtration of the being of this law of nature. It is ſaid to be written in the hearts of men, becauſe, *as* [k] law uſeth to be written on pillars or tables for certainty or conſervation, ſo this law is written by the finger of God upon man's heart, there to remain for ever. Such are the common practical principles, that God is to be obeyed, parents honoured, ourſelves defended, violence repulſed, children to be loved, educated and provided for.

IV. With theſe common principles, with which God hath ſent men into the world, he gave them alſo *reaſon*, that thence they might by conſequence deduce his law in more particular caſes: and this part of the natural law is called *the light or law of reaſon*, and is called by *Solomon The candle of the Lord, ſearching the inward parts* [l].

V. This law is alſo called *Conſcience*, which is ſaid in the forecited place to bear witneſs, and thereby our thoughts do either accuſe or excuſe one another, according to the judgment or teſtimony we have of our own thoughts, as good or evil, conſonant to, or diſſonant from the law of nature *ſhining in the heart*; and therefore conſcience relates more to the principles of religion, than of morality. As when mens laws, to exclude evil cuſtoms, make exorbitant penalties, which in ſome caſes judges modify, in others law or cuſtom hath excluded their modification; yet the conſcience of parties moves them not to take theſe exorbitant advantages, from which they can be excluded by the poſitive law of no nation. For inſtance, the law excludes diſcharges of debts, if a term be aſſigned to prove payment, and the term be circumduced; yet a conſcientious creditor ought not to take twice payment. So a great eſtate may be carried away by appriſing for a ſmall ſum: but juſt ones will not for conſcience ſake ſo extend it. This natural law, as it is derived from theſe principles, the nearer it is thereto, it is the clearer; and by the more immediate conſequences it be derived, it is the ſurer: for as the body in its progreſſive motion, from one ſtep to another, walketh ſureſt by the ſhorteſt ſteps; ſo doth the mind in deducing this divine law. Whence it is, that this part of the law of nature is not equally evident to all men; but the more of reaſon they have, the more clearneſs they have of it: which hath made men of reaſon, eſpecially thoſe who have exerciſed themſelves in the inquiry of right, to be had in high eſteem and admiration amongſt men, who, though their invention was not ſo eminent, yet their judgment cloſed and went along with that, as having a native obligation in it. And ſo many times thoſe *reſponſa prudentum*, have been received with as much authority and more heartineſs for laws, than the dictates of ſovereigns. *Cicero* [m] doth excellently ſet forth and diſtinguiſh this natural law from poſitive law; for, ſaith he, *Hæc non ſcripta, ſed nata lex: quam non didicimus, accepimus, legimus; verum ex natura ipſa arripuimus, hauſimus, expreſſimus: ad quam non docti, ſed facti; non inſtituti, ſed imbuti ſumus: ut ſi vita noſtra in aliquas inſidias, ſi in vim, ſi in tela aut latronum aut inimicorum inciderit, omnis honeſta ratio eſſet expediendæ ſalutis* [n].

VI. This law of nature is alſo called *Equity*, from that equality it keeps amongſt all perſons: from that general moral principle, *Quod tibi fieri non vis, alteri ne feceris*, whereby juſt perſons in their deliberations and reſolutions ſtate themſelves in the caſe of their adverſaries, and ſo change the ſcales of the balance; which holds moſt in commutative juſtice. So parents in the duties of children ought to conſider, as if their children were their parents, and what in that caſe they would do to them: and children in their obedience ought to yield all to their parents that they would demand, if they were their children. But equity is alſo taken for the law

[i] Here the words incloſed with crotchets are added to make the ſenſe complete. [k] MSS. [l] *Prov.* xx. 27. [m] *Pro Milone c.* 4. [n] See below, I. 2, 3.

law of rational nature, whereby nothing is to be done, which is not congruous to human nature, and becoming the ſame; and whereby that is followed, which if it were generally obſerved in the ſame circumſtances, mankind would be happy: whereby the common intereſt of mankind is preferred to the intereſt of any part of men; whereas vitious ſelf-love preferreth the intereſt of a part to the intereſt of the whole. This law of the rational nature of man is not framed or fitted for the intereſt of any, as many laws of mens choice be: from the rigour whereof recourſe ought to be had to this natural equity. For though mens laws be profitable and neceſſary for the moſt part, yet being the inventions of frail men, there occur many *caſus incogitati*, wherein they ſerve not, but equity takes place [o]: and the limitations and fallencies, extenſions and ampliations of human laws are brought from equity. And though equity be taken ſometimes for the moderation of the extremity of human laws, yet it doth truly comprehend the whole law of the rational nature; otherwiſe it could not poſſibly give remeid to the rigour and extremity of poſitive law in all caſes.

VII. The law of nature is alſo termed the *moral law*, being the abſolute and adequate rule of the manners of men for all times, places and perſons; and this denomination it hath commonly in oppoſition to the judicial and ceremonial law. The *Roman* law doth ſometimes take the law of nature in a moſt ſtrict ſenſe, as it excludeth the law of reaſon, and as it is founded in the nature of man, in ſo far as it is common with other animals, and therefore they define it to be *quod natura omnia animalia docuit*, as *the conjunction of male and female, or marriage, the procreation* and [p] *education of children* [q], &c. But even in that law the law of nature is extended, and diſtinguiſhed into the original and primitive law, and that which is derived thence, ſuch as for the moſt part is the law of nations. And there is no doubt but there is more of the law of nature founded in the rational nature of man, as he is a rational and ſociable creature: ſo that even that, which appeareth to be in the ſenſitive nature, is truly founded in the rational nature; and therefore is not properly communicable unto the beaſts, who have no law but their natural inſtincts, having only ſome reſemblance of the law of nature, therefore called τὰ μιμήματα τῆς ἀνθρωπίνης ζωῆς [r].

The law of nature, as it is impreſt upon our hearts, ſo in the goodneſs of God it is expreſt in his word, wherein he hath not only holden forth thoſe ſacred myſteries, which could only be known by revelation, as having no principles in nature from whence they are deducible; but alſo, becauſe through ſin and evil cuſtom the natural law in man's heart was much defaced, diſordered and erroneouſly deduced, he hath therefore re-printed the law of nature in a viver character in the Scripture, not only having the moral principles, but many concluſions thence flowing, particularly ſet forth. This analogy of the law of nature, even in the hearts of Heathens, and as it is ſet down in the law of God, evidenceth ſufficiently, that both of them proceed from the ſame omniſcient author.

VIII. Beſides this natural, neceſſary and perpetual law, God hath alſo given to men voluntary and *poſitive laws*, which though not at the pleaſure of men, yet in themſelves are mutable; and as they had a beginning, ſo ſome of them had, and others of them ſhall have an end, when the occaſion, exigence and utility, for which they were conſtitute, ſhall ceaſe. Such were the *ceremonial laws*, which containing a figurative and typical adminiſtration of the worſhip of God, ſhadowing forth Chriſt and his propitiatory ſacrifice of himſelf, now when the ſun of righteouſneſs hath ariſen, theſe ſhadows have flown away, and are in the ſcripture repealed: in lieu whereof is the outward order of the worſhip and government of the Chriſtian church. And the laws of God relating thereto, though we are to expect no change of them while time is, and are as binding to all to whom their lines are gone, as the natural law, yet are they no part of it; for they are not written in the heart of man, nor deducible by reaſon from any ſuch principle. Such are the ſabbath on the firſt day of the week, the particular offices in the church, their authori-

[o] See below, I. 1. 15. [p] MS. G. [q] *pr. Inſt. de jure nat. gent. & civ.* [r] Ariſtot. de hiſt. animal. IX. 7.

uthority and maintenance. For though the law of nature doth teach, that God is to be acknowledged and adored, yet the impowering of ſome certain perſons to be leaders in the publick adoration, and the fixed time thereof, either as it was under the law, or as it is under the goſpel, cannot be reached thence, but had its beginning, and hath been altered. Some alſo do account marriage in the degrees forbidden in *Leviticus* xviii. [s] to be by the poſitive law of God, though they acknowledge it not only to be given to the *Jews*, but to all men: yet the natural and univerſal averſion of marriage betwixt aſcendents and deſcendents, and abhorrence of that brutiſh commixtion, which is obſerved in all nations, whom corrupt cuſtom hath not ſo far depraved, as to forget not only this, but moſt of the uncontroverted laws of nature, do ſufficiently evince the contrary. For if parents and poſterity be all accounted as one degree, there is nothing prohibited by the law of God, but the very next *degrees* [ss] of thoſe who are in the place of parents, as uncles and aunts; or in the place of children, as *nephews and nieces* [t]; or brethren and ſiſters. So that there can be no doubt, but the prohibition of commixtion of aſcendents and deſcendents is purely natural.

IX. The prime poſitive law of God is the *judicial law*, which God by the miniſtry of *Moſes* preſcribed to the people of *Iſrael:* wherein the Lord was pleaſed to be the particular law-giver and judge of that people, whom he had choſen from among all nations for a peculiar people to himſelf, and to whoſe inclinations it is befitted. There are not a few who eſteem the judicial law obliging unto all nations, mainly becauſe it doth not appear in the goſpel to be aboliſhed, as the ceremonial laws are, and becauſe of its excellency beyond the laws of *the* [u] Heathens or other men; who might not only err in expediency, rendring their laws unprofitable, but alſo might make them unjuſt and inconſiſtent with the immutable moral law of nature. Which reaſons do ſufficiently infer, that in the conſtitution of human laws chief reſpect ought to be had to the judicial laws of God; and they aſſumed, where the inclination of the people, and their condition, do not render them inconvenient. But that thoſe laws were accommodate unto the *Jews* proper temper, is evident in the law concerning the bill of divorcement [v], which *Chriſt cleareth* [w] to be permitted for the hardneſs of their hearts [x], which was natural and peculiar to them, of jealouſy and bitterneſs againſt their wives; *for which* [y] the Lord not only appointed *trials natural*, *neither* [y] neceſſary nor accuſtomed elſewhere, by thoſe tokens of virginity for evidencing the wife's faithfulneſs, in not giving a polluted woman for a chaſte, but alſo the extraordinary and miraculous trial by the water of jealouſy: and therefore Chriſt did expreſly abrogate that law, and ſhew us, that *Moſes* did not command to divorce, but for the hardneſs of their hearts only permitted it, and did command that, when the husband would put away his wife, he ſhould give her a bill of divorce. But it doth not follow that the judicial law is in itſelf a law to all nations, or that the Lord purpoſed it ſo to be: but on the contrary it appeareth that his purpoſe was only to deliver it for a peculiar law to *Iſrael*, when he ſaith, *What nation is there ſo great, that hath ſtatutes and judgments ſo righteous, as all this law, which I ſet before you this day* [z]. And again the Pſalmiſt ſaith [a], *He ſheweth his word unto Jacob, his ſtatutes and his judgments unto Iſrael. He hath not dealt ſo with any nation: and as for his judgments, they have not known them* [b]. And therefore the ſame law was not to *Iſraelites* and to ſtrangers, even *though* [bb] proſelytes, as appeareth in the matter of uſury and bondage, which were allowed as to ſtrangers; but the former ſimply forbidden, and the latter limited as to *Iſraelites*. Neither is there any neceſſity of an expreſs abolition of this law in the goſpel, ſeeing it was not given to all nations, and it doth yet bind the *Jews*, ſo far as it doth not build upon the ceremonial law. And therefore, that part of the judicial law, which is founded upon, or conducible to the moral law, may be well received by other nations, to whoſe inclinations the ſame expediencies will agree, as moſt of the criminal laws are. And though they

[s] MS. G. [ss] MSS. A. B. and H. [t] Formerly, *nephews, nieces.* [u] MSS. A. B. and G. [v] *Deut.* xxiv. 1—4. [w] MSS. [x] *Matth.* xix. 8. [y] MSS. [z] *Deut.* iv. 8. [a] MSS. [b] *Pſal.* cxlvii. 19. [bb] MS. G.

could ſuit with the frame and current of the laws already eſtabliſhed, yet would they be far from making up a law to rule any nation now, after man's pravity hath ſo much increaſed vice and deceit; for that, which was ſufficient in the ſimplicity of thoſe times, would come far ſhort in ours.

X. *Human law* is that, which for utility's ſake is introduced by men: which is either by tacit conſent, by conſuetude or cuſtom, or by expreſs will or command of thoſe in authority, having the legiſlative power. And theſe were oft-times written; though ſometimes alſo they were not written, as were *Lycurgus*'s laws, which not only were not written, but a law againſt it, that they ſhould not be written. Hence is the diſtinction of laws in written and unwritten, becauſe of their original; for *ex poſt facto* cuſtoms or other unwritten laws may be written by private perſons, but they were not at firſt written by the law-giver. It is true the law is ſometimes ſtrictly taken in oppoſition to cuſtom, as it comprehendeth equity or the natural law, and the edicts and ſtatutes of nations and their law-givers. And ſometimes more ſtrictly, as in the vulgar diſtinction of law, ſtatute and cuſtom; in which, law ſignifieth equity or the common law, as ſtatutes and cuſtoms do the peculiar recent laws of ſeveral nations. And though that be only the law of man, which is voluntary and poſitive, conſtitute by man; yet equity and the natural law, in ſo far as it is allowed, declared and made effectual by man, is in ſo far accounted among the laws of men.

The laws of men are either common to many nations, or proper to one nation, or peculiar to ſome places or incorporations in the ſame nation, as were the *municipal* laws in the *Roman* republick. And ſuch are ſtill in moſt nations, not only in matters of leſſer moment, but in the higheſt matters of private *right* [c], as in ſucceſſion, which is diverſified in many provinces *of* [d] *France*, *Germany* and the *Netherlands* and *England*, as may be inſtanced in the Gavil-kind of *Kent*.

XI. The law common to many nations is that, which is commonly called *the law of nations*, which ſtands in the cuſtoms owned and acknowledged by all, or at leaſt the moſt civil nations. Which for the moſt part are nothing elſe but equity and the law of nature and reaſon; though in part alſo there be poſitive laws, introduced by common conſent of nations, and which do no leſs oblige thoſe nations, as importing their obligatory conſent, than do the cuſtoms of particular nations and incorporations. Such are the laws of *captivity and bondage of thoſe taken in war*, *the ſafety of ambaſſadors*. Though more guilty of the common quarrel than the reſt of the nations, from whom they are ſent, yet for common utility's ſake, while they act in and conform to that capacity, they are ſafe: otherwiſe there could be no commerce, orderly indiction of war, or pacification. And therefore the *Romans*, when they had to do with barbarous nations, who did not acknowledge this law, did ſend their ambaſſadors to their borders, and there did require reparation, and denounce war, becauſe they could ſafely go no further. And for the ſame reaſon, though ſlavery be againſt the natural law of liberty, yet it is received for conveniency by the nations, being more willing to loſe liberty than life. Such alſo are the laws of *hoſpitality*, or the mutual truſt betwixt the hoſt and the gueſt, whom he hath willingly received in his houſe, whereby neither of them can act any thing prejudicial to the life or liberty of the other, while in that relation. Though otherwiſe they had juſt reaſon, and might do the ſame; yet the doing of it then were a violating of the law of nations. But for the moſt part the law of nations is nothing elſe but equity, and the law of nature and reaſon, which ſtandeth as the common rule among men, appointed of God, by which they may know, and crave each from other their rights; and in caſe of refuſal may vindicate the ſame by force. Wherein they are ſtill regulate by the common law of reaſon, and the cuſtoms of nations, keeping a juſt proportion betwixt the wrong and reparation, though taken by force; and not like *Draco*, who made the puniſhment of all his laws death (*which* [e] therefore were ſaid to be written in blood), *ſo making* [f] the iſſue of every quarrel to be the conqueſt of the debelled, and the ſwallowing up

[c] MS. G. [d] MS. G. [e] MS. A. [f] Formerly, *ſo by making*.

up of all their rights, as if they had pactioned to put them all upon the iſſue of that war, whereas there is nothing in queſtion by either part, but the ſtriving for reſtitution of that right, or reparation of that injury, which the one owneth and the other denieth. This law is chiefly underſtood, when the *common law* is named among us; though the *Engliſh* ſo name the common current of their civil law, as oppoſite to ſtatute and their late cuſtoms. Which is ſometimes ſo taken with us. And oft-times by the common law, we underſtand the *Roman* law, which in ſome ſort is common to many nations.

XII. The law of each ſociety of people under the ſame ſovereign authority, is called *the civil law*, or the law of the citizens of that commonwealth; though that *name* [g] be appropriate to the civil law of the *Roman* commonwealth or empire, as the moſt excellent. And becauſe of that affinity, that the law of *Scotland* hath with it, (as have alſo the laws and cuſtoms of the chief nations, to which the victorious arms of the *Romans* did propagate it, and its own worth even after the ruin of the *Roman* empire *hath commended it*) *even* [h] though it be not acknowledged as a law binding for its authority, yet being, as a rule, followed for its equity, it ſhall not be amiſs here to ſay ſomething of it.

The *Romans* were firſt governed by kings, who gave them laws. Which, being collected by *Papirius* in the time of *Tarquinius Superbus*, were therefore called the *Papirian* law. *Tarquinius* and monarchy being thrown out, the *Papirian* law collected in his time and *his* [i] name, was partaker of his hatred and contempt with the people: and there was no fixed nor written law among the *Romans* [k], till they ſent the *Triumviri*, *Poſtumius*, *Manlius* and *Sulpicius* to the Greek republicks, to underſtand the laws of thoſe commonwealths, and thence to frame a model of government and laws for the *Roman* ſtate. Which they did, and made up the law of the twelve tables: which, being comprehended in few words and marrowy ſentences, *were* [l] all written upon twelve tables, fixed upon the moſt publick market-place at *Rome*, that they might be eaſily known and kept in mind by all the citizens.

Theſe were ſo acceptable and ſatisfactory to the *Romans*, that they have been the foundation and principles of all that great body of law which afterwards they had; all which was ordered according to that ancient law, as extenſions and limitations of it. Which was done at firſt by parts, by the *plebiſcita*, laws enacted by the ſuffrage of the people; or by the *ſenatuſconſulta*; or by the edicts of the *Prætors* [m]; or by the *reſponſes* of the *juriſprudents*, who were authoriſed to give anſwer in dubious caſes, as *Cornelius Naſica*, Labeo, Cato [n], *Proculus*, *Sabinus*, *Gallus*, *Aufidius*, *Manilius*, *Scævola*, *Craſſus*, *Juventius*, *Ulpianus*, *Paulus*, *Julianus* and others; and when the ſovereign power was devolved upon the emperors, by their edicts, reſcripts and decrees; until the *Roman* law increaſed unto ſo great a bulk, that there were thouſands of books of law, in which the brevity and perſpicuity of the twelve tables was then loſt, as now the body of them through the injury of time has periſhed. But at laſt the emperor *Juſtinian* did, by the pains of ſeventeen ſelect *Juriſconſults*, pick out the marrow of all the antient laws, and digeſt them *in* [o] ſome method into the fifty books of the *Digeſts* or *Pandects*: which therefore have the author of every law prefixed to it. He did alſo by *Tribonian* and others collect the reſcripts, decrees, and all the edicts of the emperors, which before were more imperfectly compiled in *the* [p] *Theodoſian codex*, and which thereafter he perfected, and named the *Juſtinianean codex*: as poſterior conſtitutions of the emperors were gathered together in nine collations, which were called *the novel conſtitutions*. *Juſtinian* did alſo cauſe frame the four books of the *Inſtitutes*, as the ſum and elements of the whole law. But as nothing human is ſtable, ſhortly after this greateſt perfection of the *Roman* law, in the time of *Phocas* the emperor, who reigned fourth after *Juſtinian* (*who* [q] died in the year 565.), the *Roman* empire being oppreſt by the irruption of the *Longobards*, the *Roman* law did alſo ly under

[g] MSS. [h] MSS. A. [i] MSS. A and B. [k] *l.* 2. § 1, 2, 3. *D. de origine juris.* [l] MSS. [m] MSS. B. and G. [n] l. edit. and MSS. [o] MS. G. [p] MSS. [q] Formerly, *and.*

der aſhes above the ſpace of five hundred years, until a new ſhape of the *Roman* empire being ſet up in *Germany*, *Lotharius* the emperor, who flouriſhed in the *twelfth* [r] century, did again revive and reſtore the *Roman* law [s]: which thence was every where taught in the ſchools, and enlarged with more vaſt heaps of commentaries and treatiſes than were thoſe of the antient lawyers, though not claiming the like authority.

XIII. In the interim did the *feudal law* or cuſtoms take riſe among the *Longobards* and other nations, who, having expulſed out of *Italy* the *Roman* empire, were willing to change their barbarity, and to be ſucceſſors to the *Romans* in their ſeats and civility; and, that they might maintain their conqueſts, gave out all their lands to their ſoldiers and aſſecles, as benefices to them, for their ſervice and aſſiſtance in their wars: the example of which, and the new intereſt it afforded to ſovereigns, to have all their territories to hold of themſelves, and moſt of their ſubjects by that new relation to become their feudataries and vaſſals, hath given the feudal law wings, whereby it hath ſpread itſelf over moſt of the world.

XIV. In the declining alſo of the *Roman* empire, the biſhop of *Rome*, having mounted himſelf unto the imperial eminence of univerſal biſhop, did, in imitation of the emperors, cauſe compile the *canon law*. And firſt, that part *thereof* [t], which is called the *Decretum*, was perfected by *Gratian* the monk out of the fathers, doctors and councils, though much wreſted and vitiate towards the intereſts and errors of the *Roman* church. And *thereafter* [u] the decretals were compiled by pope *Gregory* IX. out of the decretal epiſtles of the popes: which *Boniface* VIII. augmented by addition of the ſixth book of the Decretals. The firſt whereof is in imitation of the Digeſts, made of the ſentences of the ancient lawyers, and it out of the ſentences of the fathers, doctors and councils of the church: and the latter, in reſemblance of the *codex*, is compacted of the reſcripts of the popes. And that nothing may be improportional to the civil law, unto the *novel conſtitutions* do anſwer the *Clementines* and *Extravagants*.

This pontifical law extended unto all perſons and things belonging to the *Roman* church, and ſeparated from the laity all things that may relate to pious uſes, or which may be claimed to be under the protection of his holineſs, as *orphans*, the *wills* [v] *of defuncts*, the *matters* [w] of *marriage* and *divorce*. All which *by long force and fraud of his fulminations he hath* [x] obtained to be exempted from the civil authority of thoſe ſovereigns who *are* [y] devoted to that ſee. Thoſe *perſons and* [z] things being holy, *are* [a] not to be temerate by the profane hands of princes or free people. And ſo deep hath this *canon law* been rooted, that, even where the pope's authority is rejected, yet conſideration muſt be had to theſe laws, not only as [b] thoſe, by which church benefices have been erected and ordered, but as likewiſe containing many equitable and profitable laws, which becauſe of their weighty matter, and their being once received [c], may more fitly be retained than rejected.

XV. Before we come to the cuſtoms of *Scotland*, there lies this block in the way of all human laws, that ſeeing, as hath been ſaid, equity and the law of nature and reaſon is perfect and perpetual, then all laws of mens conſtitution ſeem not only to be dangerous, in that they may impinge upon the perfect law of God, but alſo to be uſeleſs and unprofitable, ſeeing men may live better and more ſafely by the divine dictates of God written in our hearts, than by the devices of men; ſo that it may be thought, that thoſe, who inſtead thereof, embrace the laws of men, may meet with the reproof of the *Iſraelites*, who were ſaid *to reject God from reigning over them* [d]. This reaſon is ſo preſſing, that if the law of nature and of reaſon were equally known to all men, or that the diſpenſers thereof could be found ſo knowing and ſo juſt, as men would and ought to have full confidence and quietneſs in their ſentences, it would not only be a folly, but a fault to admit of any other law. But the prime *intereſt* [e] of men being to enjoy their rights, not only in

[r] Formerly, *eleventh*. [s] See below, II. 3. 1. [t] MSS. [u] MSS. [v] MS. B. H. and G. [w] MSS. [x] MSS. [y] MSS. [z] MSS. A. B. and H. [a] MSS. A. and G. [b] MSS. B. and G. [c] I. edit. and MSS. [d] 1 *Sam.* viii. 7. [e] MSS. B and G.

in ſafety and ſecurity, but in confidence and quietneſs of mind, that they may clearly know what is their right, and may *ſecurely* [f] enjoy the ſame; therefore human laws are added, not to take away the law of nature and reaſon, but ſome of the effects thereof, which are in our power. And therefore, as by the law of nature man is a free creature, yet ſo as he may engage himſelf, and being engaged, by the ſame law of nature he muſt perform: ſo mens laws are nothing elſe, but the publick ſponſions of princes and people, which therefore even by the law of nature they ought and muſt perform. And therefore they are introduced,

Firſt, For clearing and condeſcending on the law of nature and of reaſon. Such laws can none quarrel, becauſe they do not alter, but declare equity; and that very neceſſarily, becauſe, though equity be very clear in its principles and *in theſi*, yet the deduction of reaſon further from the fountain, through the bias and corruption of intereſt, may make it much more dubious *in hypotheſi*, when it comes to the deciſion of particular caſes in all their circumſtances. And therefore it is neceſſary it be ſo fixed and cleared by ſtatutes and cuſtoms ſuitable thereto, that the people may be ſecured.

Secondly, There be many points of right competent to men in equity, as it may be more profitable for the people to forbear the purſuance of them, than to be at the trouble and the expences of the purſuit (as when human laws do cut off matters of leſs concernment), and in them rather take themſelves to the honeſty of their party, than to compulſion by *remedies* [g] of law. Such are the remuneratory obligations of gratitude, and the inward obligations of the mind, as of *affection*, *love*, *kindneſs*, &c. according to the proverb, *We cannot poind for unkindneſs*. It is not to be doubted but there be more ſuch obligations, than are the obligations relating to outward performances of ſome palpable or ſenſible thing: and it may eaſily appear what vexation it might breed, if not only the latter, but alſo the former might be all purſued and extorted by compulſion of law. And none can think the law of nature injured, becauſe of common conſent men will ſpare themſelves the labour to purſue thoſe things which they may eaſily diſpenſe with. And ſo likewiſe for the ſame reaſon, though by the moral law we are obliged to love our neighbour as our ſelves, from whence ariſe the duties of *charity* and *mercy*, *aſſiſtance* and *relief*; yet for the moſt part men do not compel for the negative of theſe commands, but only for the contrary acts of *injury* by doing evil inſtead of good [h].

Thirdly, For the ſecurity of the people, and anticipation of error and fraud, and that evident probation may be had, men do moſt profitably order deeds to be done in ſuch a palpable and plain form, as it may eaſily appear, whether falſe or not. In which there can be no injury, ſeeing the manner of doing thoſe deeds is free, and in our power. Thus, though the diſpoſitive will of the proprietar be ſufficient to alienate any thing that is his, and to conſtitute the right thereof in another, yet by the civil law and cuſtom of moſt nations delivery or apprehenſion of poſſeſſion for conveying the right of goods is requiſite, and ſaſin is neceſſary for conveying of the rights of lands by the feudal law: and ſo by our cuſtoms aſſignations are not effectual to transfer perſonal rights, till intimation follow. Our cuſtom alſo appoints writ to be made, where it is eaſy and ordinary to be done: and therefore, as the penalty of the neglect or contempt thereof, doth exclude witneſſes in matters of importance, and admitteth only writ, or oath of party, in caſes where writ is accuſtomed. So the *Romans* ordained that, becauſe in the agreements of the people, when they ſtood in mere conference, words were eaſy to be miſtaken by themſelves or witneſſes, therefore the parties ſhould perfect ſuch contracts by a ſolemn ſtipulation, wherein the one party did interrogate, if the other did agree to ſuch terms as he expreſt, and the other immediately repeated his anſwer, cloſing with him in terms: and therefore, if they did not ſo ſtipulate, they refuſed them action thereupon, as a naked paction.

[f] MSS. [g] I. edit. and MSS. [h] See below, I. 3, 5.

Fourthly, Moſt nations for the flouriſhing of their families do otherwiſe diſpoſe of their eſtates and poſſeſſions, and their laws do order them otherwiſe, than the law of nature doth. For the moſt part the heritage, and ſucceſſion in the whole land-rights, belongs to the eldeſt ſon, as the ſtem and line of the family, and the parents are preſumed to provide the reſt of their children with competent portions; though by the law of nature the right of ſucceſſion doth belong to all. And, even *in* [i] this, poſitive law altering the courſe of the law of nature hath its example from the judicial law of God, by which the males exclude the females, and the eldeſt hath a double portion.

Fifthly, According to the humours and inclinations of people, men do lay the heavier penalties upon their tranſgreſſion of ſuch laws, as ſtand in oppoſition thereunto. Which may be altered when thoſe inclinations alter: and when that humour becomes national, they forbear to make or exerce laws againſt them. So the Lord did frame the law of *Moſes* for the humours of that people, in ſome things permitting without puniſhing the tranſgreſſion of the moſt palpable and weighty laws of nature, as in *polygamy* and *divorce*; and alſo extending the proportion of equality obſerved in the law of nature in *reſtitution* and *retribution*, as in theft.

Hence it appears how neceſſary the laws of men are. Yet ſurely they are moſt happy, whoſe laws are neareſt to equity, and moſt declaratory of it, and leaſt altering of the effects thereof, except in caſes eminently profitable, like unto thoſe now pointed at. Yea, and the nations are more happy, whoſe laws have entered by long cuſtom, wrung out from their debates upon particular caſes, until it *came* [k] to the conſiſtence of a fixed and known cuſtom. For thereby the conveniencies and inconveniencies thereof through a tract of time are experimentally ſeen: ſo that which is found in ſome caſes convenient, if in other caſes afterwards it be found inconvenient, it proves abortive in the womb of time, before it attain the maturity of a law. But in ſtatutes the lawgiver muſt at once balance the conveniencies and inconveniencies; wherein he may and often doth fall ſhort: and there do ariſe *caſus incogitati*, wherein the ſtatute is out, and then recourſe muſt be had to equity [l]. But thoſe *ſtatutes are beſt* [m], which are approbatory or correctory of experienced cuſtoms. And in cuſtomary law, though the people run ſome hazard at firſt of their judges arbitrement; yet when that law is come to a full conſiſtence, they have by much the advantage in this, that what cuſtom hath changed [n] is thrown away and obliterate without memory or mention of it: but in ſtatutory written law, the veſtiges of all the alterations remain, and ordinarily increaſe to ſuch a maſs, that they ceaſe to be evidences and ſecurities to the people, and become labyrinths, wherein they are fair to loſe their rights, if not themſelves; at leaſt they muſt have an implicit faith in thoſe, who cannot comprehend them, without making it the work of their whole life.

XVI. Our cuſtoms, as they have ariſen mainly from equity, ſo they are alſo from the civil, canon and feudal laws, from which the terms, tenors and forms of them are much borrowed: and therefore, theſe (eſpecially the civil law) have great weight with us, namely, in caſes where a cuſtom is not yet formed. But none of theſe have with us the authority of law, and therefore are only received according to their equity and expediency, *ſecundum bonum & æquum*. And though it may appear from ſome narratives of our ſtatutes, that the parliament doth own the civil and canon laws to be our law, as in the revocation of King *James* IV. *parl.* 1493. *c.* 51. where it ſaid, *Since it is permitted by the conſtitutions of laws civil and canon that* minors may revoke, *&c.* (So likewiſe notars [o] forgers of falſe writs are ordained to be puniſhed after the diſpoſition of *the* common law, *both canon and civil* [p], *parl.* 1540. *c.* 80, *parl.* 1551. *c.* 22. And in the act eſtabliſhing religion, all acts contrary or conſtitutions canon, civil or municipal are abrogated, *parl.* 1567. *c.* 31.) yet that amounts to no more, than that thoſe laws are an example, after the ſimilitude whereof the parliament proceeded. And though in [q] caſes

[i] I. edit. & MS. G. [k] MSS. [l] See above, I. 1. 6. [m] MSS. B. and G. [n] I. edit. and MSS. B. and G. [o] I. edit. and MSS. [p] MSS. B. and G. and the acts cited. [q] MSS B. and G.

caſes of falſhood the puniſhment be aſſumed, as in the civil *and canon* [r] law, which *will* [s] make that a part of our law, yet it will not infer, that even in ſo far it was our law before, much leſs *in* [t] the whole. And there is reaſon for the abrogation of the canon law at the eſtabliſhing of the proteſtant religion, becauſe in the popiſh church it was held as an authoritative law: but ſince it is only eſteemed a law as to thoſe caſes, that were acted by it, when it was in vigour; and in the reſt, only as our cuſtoms aſſume ſome particulars thereof, according to the weight of the matter. But for the full evidence of the contrary, there is an expreſs and ſpecial ſtatute, declaring this kingdom ſubject only to the king's laws, and to no other ſovereign's laws, *parl.* 1425. *c.* 48. *parl.* 1503. *c.* 79.

Yea the law of *Scotland* regulates the ſucceſſion and rights of *Scotſmen* in *Scotland*, though dying abroad, being reſident there: as was found in the caſe of colonel *Henderſon*'s children, who, having died in *Holland*, legated upon heritable bonds, according to the cuſtom there, yet they were found not to be conveyed by teſtament, but to belong to his heirs, according to the law of *Scotland*. 9. *December* 1623. The like betwixt *Melvil and Drummond*, 3. *July* 1634. *And* [tt] in the caſe of the executors of *William Schaw* Factor at *London*, dying there, it was found that a nuncupative teſtament confirmed in *England*, being contrary to the law of *Scotland*, which admits of none ſuch, was null, and the neareſt of kin were preferred to the executor and univerſal legatar named there, *January the* 19. 1665. *Schaw contra Lewens* [u]. But as to the manner of probation, or ſubſcription, the law of the place regulates [v], 11. *December* 1627. *Falconer contra the heirs of Beaty*; 27. *July* 1633. *Gordon contra Worly*; 15. *February* 1630. *Harper contra Jaffrey*. So a bond by an *Engliſhman* [*and a Scotſman both reſiding in England* [w]] to a *Scotſman* reſiding there, being after the ſtile of *England*, payment thereof was found probable by witneſſes, and by the oath of the cedent, againſt the aſſigny, 28. *June* 1666, *Macmorlan contra Melvil*. Yet a bond, granted by *Scotſmen* to an *Engliſhman* in *England*, found regulate by the law of *Scotland*, and not to be taken away by witneſſes, being after the ſtile of *Scotland*, and regiſtrable in *Scotland*, *December* 8. 1664. *Scot contra Henderſon* and *Wilſon*. But the law of *England* and other foreign nations being matter of fact to us, the ſame was found probable by the declaration of the judges there, *January* 18. 1676. *Cuningham contra Brown*.

The law of *Scotland* (as of all other nations) at firſt could be no other, than *æquum & bonum*, equity and expediency. For it is not to be ſuppoſed, that any nation at their firſt aſſociation and owning of [x] government did appoint poſitive laws; nor could they have cuſtoms anterior to their conſtitution: and yet it is neceſſarily implied, that they muſt ſubmit to, and be governed by a law, which could be underſtood no other, than what their ſovereign authority ſhould find juſt and convenient. It may be, ſome cities at their firſt conſtitution might have enacted laws: but it cannot be found in all the records of antiquity, that ever any nation or country did ſo. Whatſoever be ſaid of the *Salic* law of the *French*, which they hold ſo ancient and fundamental, the ſame is either fictitious or long poſterior to their conſtitution into a nation. And therefore, as in arbitrements parties are underſtood to ſubmit themſelves to arbiters *ſecundum arbitrium boni viri*, ſo nations of old ſubmitted to their princes, chooſing rather to refer their intereſts and differences to the determination of their ſovereigns, than that every one ſhould be a judge to himſelf, and ſhould take and hold by force, what he conceived to be his right, without any ſuperior *judge than himſelf* [y] to appeal to, and thereby live in perpetual war. Whence government neceſſarily implies in the very being thereof a yielding and ſubmitting to the determination of the ſovereign authority in the differences of the people, though one or either party ſhould conceive themſelves injured; that thereby private opinion may give place to publick authority, although they had natural power ſufficient to withſtand the ſame. Otherwiſe they behoved to diſſolve authority and ſociety, and return to the ſovereignty of their

[r] MSS. [s] I. edit. and MSS. [t] I. edit. and MSS. [tt] Formerly, *And lately*. [u] See below III. 8. 35. and 55. [v] I. edit. and MSS. [w] What is within [ ], is ſupplied from the deciſion. [x] MS. G. [y] I. edit. and MS. G.

their private judgment and their natural force, from which they did flee unto the ſanctuary of government; which [y], though it may ſometimes err, yet can be nothing like [z] thoſe continual errors, when every one owns himſelf as [a] ſovereign judge in his own cauſe.

Next unto equity, nations were ruled by conſuetude, which declareth equity and conſtituteth *expediency* [b]. And in the third place, poſitive laws of ſovereigns became accuſtomed, cuſtoms always continuing and proceeding. So that every nation, under the name of law, underſtand their antient and uncontroverted cuſtoms time out of mind, *or* [c] their firſt *and* [d] fundamental *laws* [e]. So the *Romans* accounted their laws of the twelve tables: and when they did expreſs any thing to be *ſuch* [f], *ipſo jure*, they meaned it to be ſuch by that antient law, in oppoſition to their recent cuſtoms, introduced by their pretors and conſtitutions of their people, ſenate and princes. The *Engliſh* alſo by their common law, in oppoſition to ſtatute and recent cuſtoms, mean their ancient and unqueſtionable cuſtoms. In like manner we are ruled in the firſt place by our ancient and immemorial cuſtoms, which may be called our common law; though ſometimes by that name is underſtood equity, which is common to all nations, or the civil *Roman* law, which in ſome ſort is common to very many. By this law is our primogeniture, and all degrees of ſucceſſion, our legitim *portion* [g] of children, communion of goods between man and wife, and the diviſion thereof at their death, the ſucceſſion of the neareſt agnates, the terces of relicts, the liferent of husbands by the courteſy, *the excluſion of deeds on deathbed* [h]; which are anterior to any ſtatute, and not comprehended in any, as being more ſolemn and ſure than thoſe are [i].

In the next place are our ſtatutes, or our acts of parliament, which in this are inferior to our antient law, that they are liable to deſuetude, which never incroaches on the other. In this we differ from the *Engliſh*, whoſe ſtatutes of parliament, of whatſoever antiquity, remain ever in force till they be repealed: which occaſions to them many ſad debates (publick and private) upon old forgotten ſtatutes. But with us the lords of ſeſſion, being by their inſtitution authoriſed with power to make rules and ſtatutes to be obſerved in the manner and order of proceeding [k], and adminiſtration of juſtice, *parl.* 1537. *c.* 43. *parl.* 1540 *c.* 93; therefore, as to the matter of juſtice, their authority by their inſtitution is utterly to decide and determine, but appellation to the king or parliament, *parl.* 1457 *c.* 62. renewed in the inſtitution of the college of juſtice [kk]. Before the firſt inſtitution appeals were in force: in place whereof reduction ſucceeded. So that the lords decreets upon debate, being formal, are irreducible upon alledgeance of iniquity, and extend not only to the interpretation of acts of parliament, but to the derogation thereof, eſpecially ſo far as concerns the adminiſtration of juſtice, which is ſpecially committed to them. Whereby all the old acts of parliament concerning the form of proceſs are in deſuetude: and ſo in ſeveral points [l] more recent ſtatutes. For inſtance, albeit by the act of parliament 1621 *c.* 18. reductions of infeftments are appointed to be ſuſtained by exception or reply; yet the lords ſeeing that this is inconſiſtent with the neceſſary and ordinary form of proceſs, whereby rights cannot be annulled or reduced, till the parties and their authors be called, that the ſame may be firſt produced, therefore they do not take away infeftments by exception or reply, notwithſtanding of the ſaid ſtatute. But there is much difference to be made betwixt a cuſtom by frequent deciſions, and a *ſingle* [m] deciſion, which hath not the like force. Yet frequent agreeing deciſions are more effectual than acts of ſederunt themſelves, which do eaſily go into deſuetude.

Where our antient law, ſtatutes and our recent cuſtoms and practics are defective, recourſe is had to equity, as the firſt and univerſal law, and to expediency, whereby the laws are drawn in conſequence *ad ſimiles caſus*. But if it appear that

[y] I. edit. & MS. G. [z] MS. G. [a] I. edit. and MS. G. [b] MS. G. [c] I. edit. and MS. G. [d] MS. G. [e] I. edit. and MS. G. [f] MS. G. [g] MS. G. [h] I. edit. and MS. G. [i] See below III. 4. 27 and 35. [k] I. edit. & MS. G. [kk] See below IV. 1. 52.—57. [l] I. edit. [m] MS. G.

hat ſuch caſes have been of purpoſe omitted by the parliament, the lords will not *ſuſtain* [n] the ſame. As albeit by the act of parliament 1621. *c.* 6. compoſition to ſuperiors for receiving appriſers be appointed, and the ſame in the next act omitted, as to adjudgers; therefore the lords preſuming thence, from the propinquity of theſe acts, that ſuch compoſitions were omitted of purpoſe, they would not extend the benefit of the ſuperior to a compoſition in adjudications, 21. of *July* 1636. *Grier contra L. Closburn.* But now it is extended to adjudications: and in theſe the ſuperior hath a compoſition by the act of parliament 23. *December* 1669.

How far the civil, canon or feudal law have place with us, hath been already ſaid. But it is not to be thought that the feudal law is our proper law, as *Craig* relates, *lib.* 1. *d.* 8. § *pen.* there being ſcarce any *ſuch* [o] thing as a common feudal law; but it is local, and cuſtomary to every place, and doth not extend to the half of our rights. *Craig* doth very well obſerve near that place [p], that thoſe books called *Regiam majeſtatem* are no part of our law, but were compiled for the cuſtoms of *England* in XIII. books by the Earl of *Cheſter*, and by ſome unknown and inconſiderate hand ſtoln thence, and reſarcinate into thoſe four books which paſs amongſt us. Which though they be mentioned for to be reviſed and reformed with our former ancient laws, *parl.* 1425. *c.* 54. *parl.* 1487. *c.* 115. yet theſe do not acknowledge them, as already become our laws, but as *ſuch* [q], as by alteration thereof may become our law.

The law of *Scotland* in its nearneſs to equity, plainneſs and facility in its cuſtoms, tenors and forms, and in its celerity and diſpatch in the adminiſtration and execution of juſtice, may be well parallelled with the beſt law in Chriſtendom: which will more plainly appear, when the proportion and propinquity of it to equity ſhall be hereafter demonſtrate.

XVII. Before we come to the common principles of law, this queſtion would be reſolved, *Whether law may or ſhould be handled as a* rational diſcipline, *having principles from whence its concluſions may be deduced?* Moſt lawyers are for the negative part, *eſteeming* [r] law, eſpecially the poſitive and proper laws of any nation; incapable of ſuch a deduction, as being dependent upon the will and pleaſure of lawgivers, and introduced for utility's ſake, and ſo frequently alterable, that they cannot be drawn from prior common principles, and keep the artificial method of rational diſciplines: and therefore they reſt ſatisfied with any order, whereby the the particular heads and titles may be found. Whereunto the confuſed order of the civil law (which is the greateſt blemiſh in it) hath been inſtrumental: for there is is nothing more ordinary for learned men, than to maintain their authors, and, through their reſpect to them, not to be ſenſible of their tolerable errors. There is little to be found among the commentaries and treatiſes upon the civil law, arguing from any known principles of right; but all their debate is a congeſtion of the contexts of the law: which exceedingly nauſeates delicate engines, therein finding much more work for *the* [s] memory than judgment [t] in taking up and retaining the lawgiver's will, rather than ſearching into his reaſon. Yet there are not wanting of late of the learnedeſt lawyers, who have thought it both feaſible and fit, that the law ſhould be formed into a rational diſcipline, and have much regreted that it hath not been effectuated, yea ſcarce attempted by any; as *Duarenus de ratione diſcendi docendique juris*, and *Grotius* in his *Prolegomena* [u] to his learned treatiſe *de jure belli ac pacis.* For which there are many pregnant reaſons.

Firſt, As we have hinted before, equity or the law of nature ſtandeth wholly in thoſe practical principles, which are created in and with the ſoul of man, and ariſe in him without reaſoning or debate as naturally, as the heat doth from the fire, or the light from the ſun, and in thoſe rules of righteouſneſs, which are deduced thence by evident reaſon: ſo that law is reaſon itſelf, as *it is verſant* [w] about

[n] MS. G. [o] MS. G. [p] § 11. [q] I. edit. and MS. G. [r] Formerly *commonly eſteeming.* [s] MSS. [t] I edit. and MSS. [u] MSS. [w] I. edit. and MSS.

the rights of men, and therefore called the law of reaſon. And can there be any thing more congruous to a rational diſcipline, than reaſon itſelf, and its principles?

Secondly, God in his goodneſs hath given man a more radiant *ray* [x] of reaſon, and preſerved it more after his fall, about his rights [y] *meum & tuum*, than in any other ſcience or knowledge: which for the moſt part are dubious and conjectural, and attainable only with great pains. But in the matters of right, a man of reaſon, though without education, if not blinded or biaſſed with affection or intereſt, and marred with the ſtatutes and cuſtoms of men (which are but as their contracts and matters of fact to him,) would be able to diſcern right from wrong: though he cannot be ſo diſtinct, as, by reflecting on his own knowledge, to take up, and hold forth the grounds upon which he doth proceed, or to reach matters of intricacy or difficulty, which require more eminent judgment and long experience.

Thirdly, God doth expoſtulate and argue with men, even for *the* [z] moral duties, from thoſe common principles of righteouſneſs, which their conſcience cannot reject, as it is evident every where in his word. And therefore ſeeing the law hath ſuch principles, it may and ought to be held forth, as it is deduced from them.

As to the difficulties, which ſeem to ariſe from the variety and multiplication of poſitive laws, it will ſay nothing. For ſeeing poſitive law is only to declare equity, or make it effectual, and in ſome caſes to lay aſide the effects of it, for the profit of man now in his lapſed eſtate, it may be eaſily ordered, by bringing it to the parts of equity, whereunto it doth relate. And as a man's body may well be deſcribed, though it be not naked and in its pure naturals, and have its hair cut and ordered, and ornaments upon it; all which will fall to be deſcribed as appendicles to the ſeveral parts of the body, which they adorn: ſo equity is the body of the law, and the ſtatutes of men are but as the ornaments and veſtiture thereof; and in the explanation of every part of it, will moſt fitly fall in accordingly. But the beſt demonſtration of this will be ocular, by our delineation of equity and poſitive law together.

XVIII. The principles of law are ſuch as are known without arguing, and to which the judgment, upon apprehenſion thereof, will give its ready and full aſſent; ſuch as, *God is to be adored and obeyed, parents to be obeyed and honoured, children to be loved and entertained.* And ſuch are thoſe common precepts which are ſet forth in the civil law, *to live honeſtly, to wrong no man, to give every man his right.* But here we ſhall ſpeak of the moſt general principles, which have influence upon all the rights of men, leaving the more particular ones to the rights flowing therefrom in their proper places.

The firſt principles of equity are theſe *three* [a]: 1. That *God is to be obeyed by man*; 2. That *man is a free creature*, having power to diſpoſe of himſelf and of all things, in ſo far as by his obedience to God he is not reſtrained; 3. *That this freedom of man is in his own power*, and may be reſtrained by his voluntary engagements, which he is bound to fulfil. Or *to* [b] take them up more ſummarly, the firſt principles of right are obedience, freedom and engagement.

There are alſo three prime principles of the poſitive law; whoſe aim and intereſt is the profit and utility of man. As the natural law is *in æquo*, ſo the poſitive law is *in bono* or *utili*: and upon theſe two legs doth juſtice move in giving every man his right. If man had not fallen, there had been no diſtinction betwixt *bonum* and *æquum*: nor had there been any thing more profitable, than the full following of the natural law. But man being now depraved, and wanting juſtice, or that willingneſs to give every man his right, and apt to fraud or force; therefore in this eſtate it is profitable for him, to quit ſomething of that which by equity is his due, for peace and quietneſs ſake, rather than to uſe compulſion and quarrelling in all things; and to find out expedients and helps to make equity effectual: and therefore to make up ſocieties of men, that they may mutually defend one

[x] MSS. [y] I. edit. and MSS. [z] MSS. [a] MSS. B. and G. [b] MSS.

one another, and procure to one another their rights; and alſo to ſet clear limits to every man's property; and to maintain traffick and commerce among themſelves and with others. So that the three principles of poſitive law may be ſociety, property and commerce. The principles of equity are the efficient cauſe of rights and laws: the principles of poſitive law are the final cauſes or ends for which laws are made, and rights conſtitute and ordered. And all of them may aim at the maintenance, flouriſhing and peace of ſociety, the ſecurity of property, and the freedom of commerce. And ſo the narratives of [c] ſtatutes do commonly bear the motives introductory towards ſome of theſe heads.

XIX. Obedience is that ſubmiſſion and ſequacity of the mind and will of man to the authority and will of his maker, immediately obliging without any ty upon him by himſelf, intimate to him by the law of nature, light of reaſon, and the conſcience, whereby man diſtinguiſheth betwixt right and wrong, betwixt what is duty, and what is not duty. Hence do ariſe thoſe obligations upon man, which are not by his own conſent or engagement, nor by the will of man, but by the will of God. And therefore theſe are fitly called obediential obligations. The firſt and moſt general whereof is, *To love the lord our God with all our heart, and our neighbour as ourſelves: on which*, ſaith our Saviour [d], *hang all the law and the prophets*. Which is a clear demonſtration from his mouth of the dependence of the moral law upon this principle. Such are alſo the obligations betwixt husband and wife, parents and children, and the obligations of reſtitution, reparation, and remuneration: in all which we are engaged, not by our will and conſent. And ſuch are the obligations which the civilians call *quaſi ex contractu*, becauſe they find them obligatory, and yet not by contract, and not adverting to this their riſe from obedience, reduce them to contracts by a *quaſi* [e].

XX. Where obedience ends, there freedom begins: and man by nature is free in all things, where this obedience has not tied him, until he oblige himſelf. It is a great mercy to man, that God hath obliged him only in a few neceſſary moral duties, and has left him free in much more, without any ty upon him as to the matter, but with a liberty *ad contradictoria*, that he may do or not do, and *ad contraria*, that he may do this or the contrary, providing that whatſoever he do, (even where he is free) be ordered and directed to the glory of God. It hath been the opinion of ſome, both learned and pious, that there is nothing indifferent *in actu exercito*, or as it is inveſted with *its* [f] circumſtances, but that then every thing is a duty or a ſin: and that, becauſe *all things muſt be done to the glory of God, and to mutual edification* [g], from whence there is no exception, and ſo are not free [gg]; that we *muſt give account of every idle word* [h]; and that we are obliged *to prove all things, and to hold faſt that which is good* [i]. Which reaſons indeed conclude, that there is nothing free as to this contradiction, either to be done to the glory of God or not, and to edification and uſe or not; but do not conclude that there is duty or neceſſity in the matter *or* [k] action itſelf: *in* [l] which either part of the contradiction may be choſen, ſo that either part be uſeful and ordered to the glory of God. As ſaith the apoſtle [m], *He that regardeth the day, regardeth it unto the Lord, and he that regardeth not the day, to the Lord he doth not regard it*. And likewiſe in that undeniable inſtance of marriage, wherein the apoſtle [n] debating of the conveniency to marry or not to marry, doth conclude, that he that marrieth doth well, but he that marrieth not doth better: whereby both parts of the contradiction are approven; and that, which is leſs profitable, is ſaid to be well done. Therefore there is a great difference betwixt *theſe and* [o] duty which is neceſſary, and wherein we are obliged (though we miſtake or be wilfully ignorant) by the very weight of the matter and abſoluteneſs of the command: wherein the ordering of what is forbidden to God's glory will not juſtify, as *we may not do evil, that good may come* [p]. (As thoſe, who killed the apoſtles, were far from being juſtified

[c] I. edit. and MSS. [d] *Matth.* xxii. 40. [e] See below, I. 7, 2. [f] MS. G. [g] 1 *Cor.* x. 31. and xiv. 26. [gg] I. edit. and MSS. [h] *Matth.* xii. 36. [i] 1 *Theſ.* v. 21. [k] MSS. A, H and G. [l] MSS. B and G. [m] *Rom.* xiv. 6. [n] 1 *Cor.* vii. 38. [o] MS. G. [p] *Rom.* iii. 8.

juſtified, though they thought *they did God good ſervice thereby* [q].) Theſe things are *bona honeſta, & mala inhoneſta:* but matters of expediency are but *bona utilia* or mala inutilia [r], and not *inhoneſta.* And therefore our duty in theſe is that, which we conceive moſt to be for the glory of God, and good of ourſelves and others; but if we do miſtake, and chooſe that which is leſs expedient for thoſe ends, we are certainly free. God ſeemeth to do with men, as princes do with their ambaſſadors, to whom they give ſome expreſs inſtructions, wherein they have no latitude in their negotiations, with power for the reſt to do as they ſhall judge moſt fit upon the place; wherein, if acting *bona fide* they miſtake, and do not that which is moſt fit, they are not culpable. So man being ſent into the world to behold the works of God, and to glorify him, (for doing whereof he hath ſome rules written in his heart by the law of nature, and in the word of God, and for the reſt is allowed to do as he conceiveth moſt conducible thereto, that *whether he eat or drink, or whatſoever he do, he do all to the glory of God*) it were a ſad rack to the conſciences of men, if their *errors* [r] and miſtakes in the matters of expediency were to ly as a guilt upon their conſciences: but that *bona fides* or *conſcientia illæſa*, ſo much ſpoken of in the law, is that which cleareth and acquitteth men in ſuch miſtakes. From this freedom doth ariſe, not only our perſonal freedom and liberty, whereby men are *ſui juris*, but alſo their power of the diſpoſal of other things within their reach, or that dominion which God hath given them over the creatures.

XXI. As freedom began where obedience ended: ſo engagement begins where freedom ends, it being our voluntary obliging of ourſelves, where by nature we are free. Every ſuch obligation is a diminution of that freedom: for thereby we are either reſtrained from that power of diſpoſal of the creatures, or may be conſtrained to ſome performances contrary to our natural liberty. Some hold it not lawful for us, "To give away our native freedom in whole or in part, or "to bind ourſelves where God has left us free, and that ſuch engagements, ex- "cept where they are profitable for us, or for an equivalent cauſe, are not obli- "gatory." Which ſhall be more proper to debate, when we come to the obligations by paction, promiſe, or contract [s], all which do ariſe from the principle of engagement: but it ſhall be ſufficient here to conclude with the law, *That there is nothing more natural, than to ſtand to the faith of our pactions* [ss]. *So* [t] much for the common principles of law.

XXII. As to the object thereof, the formal and proper object of law are the rights of men. A right is a power, given by the law, of diſpoſing of things, or exacting from perſons that which they are due. This will be evident, if we conſider the ſeveral kinds of rights: which are three, our perſonal liberty, dominion and obligation. Perſonal liberty is the power to diſpoſe of our perſons, and to live where, and as we pleaſe, except in ſo far as by obedience or engagement we are bound. Dominion is the power of diſpoſal of the creatures in their ſubſtance, fruits and uſe. Obligation is that, which is correſpondent to a perſonal right, which hath no proper name as it is in the creditor, but hath the name of obligation as it is in the debitor: and it is nothing elſe but a legal ty, whereby the debitor may be compelled to pay or perform ſomething, to which he is bound by obedience to God, or by his own conſent and engagement. Unto which bond the correlate in the creditor is the power of exaction, whereby he may exact, obtain, or compel the debitor to pay or perform what is due: and this is called a perſonal right, as looking directly to the perſon obliged, but to things indirectly, as they belong to that perſon. So dominion is called a real right, becauſe it reſpecteth things directly, but perſons, as they have meddled with thoſe things. By which it is clear, that all rights conſiſt in a power or faculty: the act whereof is poſſeſſion, enjoyment, or uſe; which is a matter of fact, and *not a* [u] point of right, and [w] may be where no right is, as right may be where *this is* [x] not.

XXIII. The

[q] *Jo.* xvi. 2. [r] I. edit. and MSS. [s] See below, I. 10, 10. [ss] *pr. D. de pactis, l.* 1. [t] MS. G. [u] MSS. [w] MS. G. [x] MS. H.

XXIII. The *Roman* law taketh up for its object perſons, things and actions, and according to theſe orders itſelf; but theſe are only the extrinſick object and matter, about which law and right are verſant. But the proper object is the right itſelf, whether it concerns perſons, things or actions: and according to the ſeveral rights, and their natural order *ought to be* [y] the order of juriſprudence; *which* [y] may be taken up in a threefold conſideration, *firſt*, in the conſtitution and nature of rights; 2*dly*, in their conveyance or tranſlation from one perſon to another, whether it be among the living or from the dead; 3*dly*, in their cognition, which comprehends the trial, deciſion and execution of every right by *the* [z] legal remeids. Whereby the whole method may be clearly thus. *Firſt*, Of the nature of thoſe ſeveral rights: and becauſe liberty ſtandeth in the midſt betwixt obligations of obedience, which are anterior, and of *engagement* [a], which are poſterior, (*both which*, *being* [b] of the ſame nature, muſt be handled together) *therefore* [c] liberty muſt have the firſt place; then next obligations obediential, and then conventional; and after theſe dominion in all its parts. And in the *ſecond* place ſhall follow the conveyance of theſe ſeveral rights. And, *laſtly*, the cognition of all *by* [d] judicial proceſs and *execution* [d].

Rights, in reſpect of the matter, are divided into publick and private rights. Publick rights are thoſe which concern the ſtate of the commonwealth. Private rights are the rights of perſons and particular incorporations: of which in *this place* [e].

TITLE II.

Of liberty and ſervitude.

I. *Liberty deſcribed.*
II. *Liberty diſtinct from dominion and obligation.*
III. *The principle whence liberty ariſeth.*
IV. *Reſtraint and conſtraint.*
V. *Liberty is bounded by obedience.*
VI. *Is diminiſhed by delinquence.*
VII. *By Engagement.*
VIII. *By ſubjection.*
IX. *Liberty is loſt by bondage.*
X. *Bondage introduced by the law of nations.*
XI. *Bondage lawful.*
XII. *Manrent.*
XIII. *Manumiſſion.*
XIV. *Patronage.*
XV. *The condition of our ſervants.*
XVI. *Injuries againſt liberty, how redreſſed.*

I. LIberty is that natural power which man hath of his own perſon, whence a free man is ſaid to be *ſuæ poteſtatis*, in his own power: and it is defined in the law [b] to be *a natural faculty to do that which every man pleaſeth, unleſs he be hindered by law or force.*

II. That there is ſuch a right, diſtinct from the dominion of the creatures, and from obligation, it is evident from this, that it can be referred to *neither* [c] of thoſe, and yet it is the moſt native and delightful right of man, without which he is capable of no other right; for bondage exeemeth man from the account of perſons, and brings him *in* [d] *rather* among things, *quæ ſunt in patrimonio noſtro.* And the encroachments upon, and injuries againſt the right of liberty, of all others are the moſt bitter and atrocious; for the non-performance of obligations or duties *due* [e] to us, or the taking away, or detaining the things of our property, are not to be compared with the laying violent hands on our perſons.

III. This right ariſeth from that principle of freedom, that man hath of himſelf and of other things beſide man, to do in relation thereto as he pleaſeth, except where he is tied [f] by his obedience or engagement. And this part of it,

[y] MSS. [z] I. edit. and MSS. [a] MSS. G. & H. [b] MS. G. [c] Formerly, *and therefore.* [d] MSS. [e] MSS. G. [b] § 1. *Inſt. de jure perſon.* [c] MSS. [d] MS. G. [e] MSS. [f] MSS.

which concerneth perſonal freedom, is maintained by that common received principle in the law of nature, of ſelf-defence and preſervation, For, as *Cicero* ſaith [g], *Hoc & ratio doctis, & neceſſitas barbaris, & mos gentibus, & feris natura ipſa præſcripſit, ut omnem ſemper vim, quacunque ope poſſent, a corpore, a capite, a vita ſua propulſarent.* And, as *Gaius* ſaith [h], *Adverſus periculum naturalis ratio permittit ſe defendere* [i]. Which is only to be extended to private and unlawful violence.

IV. Oppoſite unto liberty are reſtraint and conſtraint. Reſtraint hindereth man to be where, and go whither he will: and conſtraint forceth him to do what he will not. Reſtraint is exerciſed by impriſonment and captivity, or in the hinderance of the uſe of things neceſſary for life, as meat, drink, ſleep, *&c.* Conſtraint is exerciſed by beating, wounding, or the like force upon the body, or the fear of it, whereby any thing is extorted.

V. Though liberty be *the* [k] moſt precious right, yet it is not abſolute, but limited: 1*ſt*, by the will of God, and our obediential obligations to him, and to men by his ordinance. And though man hath power of his own perſon, yet hath he no power of his own life, or his members, to diſpoſe of them at his pleaſure, either by taking away his life, or amputation or diſabling *of* [l] any member, either by himſelf, or by giving power to any other ſo to do, unleſs it be neceſſary for preſerving the whole: but he is naturally obliged to God to maintain his life. So likewiſe men may be reſtrained or conſtrained by others, without encroachment upon the law of liberty, in the purſuance of other obediential obligations. As a huſband hath power to reſtrain his wife from her liberty of going where ſhe will, and may keep her within the bounds of conjugal ſociety. So may parents reſtrain their children, and alſo conſtrain them to the performance of moral duties, and that without any engagement. We may alſo without any injury reſtrain a furious perſon, or one who is inferring violence to himſelf in his life or limbs, becauſe this is not againſt any act of his lawful liberty, and is done as a duty in us of love and mercy. But in matters of utility and profit, where the natural liberty is not hemmed in with an obligation, there, unleſs by his own delinquence or conſent, man cannot juſtly be reſtrained, much leſs conſtrained upon pretence of his utility or profit: for liberty is far preferable to profit, and in the matter of utility every man is left to his own choice, and cannot, without injury to God and man, be hindered to do what he pleaſeth, or be compelled to do what he pleaſeth not, in things wherein he is free. As *Grotius* ſaith [m], *Non enim ſi quid alicui eſt utile, id ſtatim mihi licet ei per vim imponere. Nam his, qui rationis habent uſum, libera eſſe debet utilium inutiliumve electio, niſi alteri jus quoddam in eos quæſitum ſit.*

VI. *Secondly* [n], Liberty may be diminiſhed or taken away by our delinquency, in the way of puniſhment: for ſeeing it is a right in our own power, as goods and debts may be forfeited by our delinquence, ſo may our liberty in whole or in part.

VII. *Thirdly*, Our engagements do commonly import a diminution of our perſonal liberty, but much more of that natural liberty of things without us. Whence it is, that the law alloweth perſonal execution, or reſtraint and incarceration of the debitor's perſon, until he do all the deeds that are in his power for the ſatisfaction of his creditor.

VIII. *Fourthly* [o], Liberty is diminiſhed by ſubjection unto authority: for *whereas* [p] man by nature *is* [q] a free creature [q], in his own power [q], he doth then become in the power of others, whether *it* [q] be in the power of a ſociety (where the ſuffrage of the plurality is preferred to the natural and free choice of particular perſons,) or whether the authority be ſtated in a few perſons, or in one ſovereign.

IX. *Fifthly*, Liberty is wholly taken away by bondage, ſlavery or ſervitude, which is diametrically oppoſite to liberty. For as liberty is that power by which men are *ſui juris*, ſo by ſervitude they become *alieni juris*, in the power of another:

[g] *Pro Milone, c.* 11. [h] *l.* 4. § 1. *D. ad l. Aquil.* [i] See above I. 1, 5. [k] I. edit. & MSS. [l] I. edit. & MS. B. [m] *De jure belli ac pac. lib.* 2. *c.* 22. § 12. [n] MSS. B. and G. [o] MS. G. [p] MS. G. [q] I. edit. & MSS.

ther: unto whom they became as the reſt of their goods in their patrimony, and were poſſeſt by them, and might be gifted, legated, ſold and otherwiſe diſpoſed of at their pleaſure [r]. So that maſters had among the *Romans*, and almoſt every where [s] power [s] of life and death of their ſlaves [t]; tho' the conſtitutions of the emperors [u] did reſtrain that power to moderate chaſtiſement [w]. Servants being wholly their maſter's, they could have nothing of their own [x], ſo that *their* [y] *peculium*, which their maſters committed to them to negotiate with, was wholly in their maſter's power, and might be taken away at his pleaſure [z]; neither could they be liable to any obligation [a]; neither could there be any civil action for, or againſt them [b]; neither could they be witneſſes, procurators or arbiters [c]. Yea, they were accounted as nobody [d], or as dead men [e].

X. Bondage was introduced by the law of nations, and it is amongſt the poſitive laws of nations, ſettled by common conſuetude. And it took firſt place in thoſe who were taken in war, who being under the power of their enemies ſword, did loſe their liberty in lieu of their life. Such alſo were thoſe who ſold their liberty, and gave it up, and were content to be perpetual ſlaves; as were the *Jewiſh* bond-men, whoſe ears were pierced with an aul, as the ſymbol of their perpetual and willing ſervitude. The off-ſpring of [f] ſervants remained in their ſervile condition, and by the cuſtom of nations, and the *Roman* law, it followed the mother and not the father, *partus ſequitur ventrem.* And in ſome caſes, both by the judicial law and the *Roman* law, free parents might ſell and give their children into bondage.

XI. Bondage, though contrary to *natural* [g] liberty, yet it is lawful, liberty being a right alienable, and in our diſpoſal, *for* [h] that the natural law conſtitutes us free, but puts no neceſſity on us ſo to continue. And therefore ſervitude is both approven in the old teſtament, and in the new, where it is cleared againſt that obvious objection, that being made free by Chriſt, we ſhould not become the ſervants of men, to which the apoſtle anſwereth [i], *Art thou called being a ſervant* (or ſlave?) continue ſo, for nevertheleſs thou art the Lord's *free man.* But yet chriſtian lenity and mercy hath almoſt taken away bondage except amongſt the *Spaniards*, *Portugueſe*, and other chriſtian nations bordering upon the *Turks*; where, becauſe the *Turks* do extremely exerciſe ſlavery, eſpecially upon chriſtians, their neighbours do the like, that they may have ſlaves to exchange with ſlaves.

Little [k] of ſlavery elſewhere remains among chriſtians, except the *adſcriptitii*: who are not abſolutely ſlaves, but they and their poſterity are bound to ſeveral ſervices to farms and villages, to which, by reaſon thereof only, they are in bondage; and their maſters cannot apply them to other farms, or to other ſervices; but they are fixed to, and follow thoſe farms, and they are conveyed therewith. Such are the *Engliſh* Villains: but in *Scotland* there is no ſuch thing *.

XII. There was formerly a kind of bondage in *Scotland*, called *Manrent*, whereby free perſons became the *men* [l] or followers of thoſe who were their patrons and defenders (and *therefore* [m] theſe were rather *in clientela*, than in bondage:) but it is utterly [n] aboliſhed both by act of *parl.* 1457. *c.* 77. *and parl.* 1555. *c.* 43. and by our cuſtom.

XIII. From ſervitude among the *Romans* did ariſe *Manumiſſion* and the right of patronage. Manumiſſion is the dimiſſion of ſlaves, and the making of them libertines, whereby they became free, but with remaining thankfulneſs, reverence, and obſequiouſneſs, and ſome other duties and offices to their former maſters, then become their patrons: and if they failed therein, they forfeited their new acquired liberty, and returned to their former condition of ſervitude.

XIV. In

* To this place pertains *parl.* 1606 *c.* 11. *anent coaliers and ſalters.*

[r] *l.* 4. § 1. *D. de ſtatu hom. l.* 118. *D. de reg. juris.* [s] I. edit. & MSS. [t] *l.* 1. § 1. *D. de his qui ſui vel al.* [u] *d. l.* 1. § 2. *& l.* 2. *eod. tit.* [w] I. edit. & MSS. [x] *l.* 10. *D. de adquir. rer. dom.* [y] I edit. & MSS. A. G & H. [z] *l.* 4 *pr. D. de peculio.* [a] *l.* 41. *eod. tit. l.* 22. *pr. D. de reg. juris.* [b] *l.* 107. *eod. tit. l.* 7. *C. de judiciis.* [c] *l.* 7. *D. de teſtib. l.* 2. *pr. D. de reg. jur. l.* 20, § 7. *D. qui teſt. fac. poſs. l.* 7. *pr. D. de rec. qui arbit.* [d] *l.* 32. *D. de reg. jur.* [e] *l.* 209. *eod. tit.* [f] I. edit. & MSS. [g] MS. H. [h] Formerly, *ſo.* [i] 1 *Cor.* vii. 21 & 22. [k] I. edit. & MSS. [l] I. edit. & MSS. B. & G. [m] MSS. [n] I. edit. & MSS.

XIV. In theſe therefore ſtood the right of patronage. And from this condition of libertines aroſe that diſtinction of men into thoſe who were always free (who were called *ingenui*,) and [o] thoſe who were bound [o] (called *ſervi*,) and [o] thoſe of a middle condition, who having been ſlaves, became free, and ſo were neither fully free, but had ſome duties lying upon them to their patrons, neither were fully bound as ſervants.

XV. *The* [p] ſervants with us, which now retain that name, are *indeed* [q] free perſons, and have at moſt but hired their labour and work to their maſters for a time, which is a kind of contract betwixt them, of which afterward.

XVI. The cuſtoms of this nation have little peculiar in relation to liberty directly: but the injuries done againſt the ſame, eſpecially *of* [r] conſtraint, fall under the conſideration of delinquencies, and are ſo *puniſhable* [s]. The *Romans* had expreſs laws *de libero homine exhibendo* [t], and *de privatis carceribus inhibendis* [u]. And the *Engliſh* have their action of falſe impriſonment, determining with great exactneſs in what caſes impriſonment is lawful, and in what not; and how remeidable. It is alſo provided in the judicial law againſt ſtealers of men. But amongſt us, as theſe crimes are very rare, ſo if unlawful reſtraint or unjuſt impriſonment ſhould fall out, it remains to be puniſhed amongſt delinquencies, according to the circumſtances and atrocity thereof, and according to equity: *and thence* [w] alſo *a* civil *action* [w] for damage and intereſt ariſeth [w] *.

TITLE III.

Obligations in general.

I. *Perſonal rights and obligations deſcribed.*
II. *Kinds of obligations.*
III. *Obediential obligations deſcribed.*
IV. *Diſtinguiſhed and enumerate.*
V. *Obligations natural and civil.*
VI. *Obligations principal and acceſſory.*
VII. *Obligations pure,* [*ſimple*] *conditional, and to a day.*
VIII. *Conditional obligations diſtinguiſhed and explained.*
IX. *Offer and acceptance.*

RIghts [x] perſonal or obligations, being in nature and time for the moſt part anterior to, and inductive of rights real of dominion and property, do therefore come under conſideration next unto liberty.

I. The ſame right, as it is in the creditor [y] is called a perſonal right, but as it is in the debitor, it is called an obligation, debt or duty, which is retained as the more proper name. Obligation is a legal ty, by which we may be neceſſitate or conſtrained to pay, or perform ſomething [z]. This ty lyeth upon the debitor: and the power of making uſe of it in the creditor is the perſonal right itſelf, which is a power, given by the law, to exact from perſons that which they are due.

II. Obligations by the *Romans* are diſtinguiſhed in four kinds: in obligations *ex contractu, vel quaſi ex contractu, ex maleficio, vel quaſi ex maleficio.* Which diſtinction inſinuates no reaſon of the cauſe or riſe of theſe diſtinct obligations, as is requiſite in a good *and* [a] diſtinct diviſion: and therefore they may be more appoſitely divided, according to the principle or original from whence they flow [b], in obligations obediential, and by engagement, or natural and conventional, *or by the will of God, and by the will of man* [b].

III. Obediential obligations, [c] which are put upon men by the will of God, not by their own will, and ſo are moſt part natural, as introduced by the law of nature, before any addition made thereto by engagement [c] are ſuch as we are bound to perform ſolely by our obedience to God: as conventional obligations are ſuch, as we are bound by and through our own will, engagement or conſent.

IV. Obe-

* We have now an excellent ſtatute for the ſecurity of perſonal liberty, *parl.* 1700, *c.* 6.

[o] MSS. [p] I. edit. & MSS. [q] MS. H. [r] MS. G. [s] MSS. [t] *D.* 43. *tit.* 29. [u] *C.* 9. *tit.* 5. [w] I. edit. & MS. G. [x] I edit. and MSS. [y] MSS. [z] *pr. Inſt. de oblig.* [a] MS. G. [b] I. edit. & MSS. [c] MSS.

IV. Obediential obligations are either by the will of God immediately, or by the mediation of ſome fact of ours; ſuch are obligations by delinquence, whereby we become bound to reparation and ſatisfaction to the party injured, and are liable in puniſhment to God, which may be exacted by thoſe who have his warrant for that effect. Of theſe obediential obligations there be ſome, which ty us to God alone; whereby there is no right conſtitute in man to exact the ſame as his own due, nor any warrant or command given him by God to exact them on his behalf. And ſome, though they conſtitute not a right in man, yet man is commanded and warranted to vindicate them, as the crimes of witchcraft, blaſphemy, beſtiality and the like; for which there is an expreſs command to inflict puniſhment, though there be no injury done therein to man, of which there could be any reparation. For the command, *Thou ſhalt not ſuffer a witch to live* [d], takes place, though the witch hath committed no malefice againſt the life or goods of man. But theſe obligations, being among *the* [e] publick rights, belong to the magiſtrate, on whom is devolved *the authority* [f] to vindicate [g] for God as his vicegerent, & we ſhall not here inſiſt on them, nor on thoſe other obligations, whereby no right of execution is conſtitute in man for vindication, *& quæ ſolum Deum habent ultorem* (ſuch are the love and fear we owe to God, and dependence on, and confidence in him,) *being now* [g] only to treat about the private rights of men. We ſhall therefore inſiſt only on *the* [g] obediential obligations that are betwixt husband and wife, parents and children, tutors and pupils, curators and minors, and the obligations of reſtitution and remuneration, and the obligations of reparation of delinquence and damage: and then we ſhall proceed to conventional obligations.

V. There is another diſtinction of obligations in the law, *viz. in* [h] natural and civil. Natural obligations are thoſe, which have a ty by the law of nature, and do raiſe a right in the *party* [g] to whom they relate: but the civil law or cuſtoms and conſtitutions of men do not ſecond them with legal remedies or executions, but they remain only as bonds upon the good-will and honeſty of thoſe who are thereby bound. Of which there are ſeverals. As *1ſt*, There be many natural obligations which have no civil effect; becauſe they oblige to inward duties of the mind, which law doth not conſider: as *Cicero* ſaith, *Aliter leges, aliter philoſophi——: leges, quatenus manu tenere res poſſunt; philoſophi, quatenus ratione & intelligentia* [i]. Or *ſecondly*, Becauſe though they oblige to outward performances, yet the manner and meaſure is left to the diſcretion and arbitriment of the obliged; as before [ii] hath been ſhown, [k] that in matters of expediency and utility, *though* [k] there be an obligation to do that, which is moſt conducible to thoſe common ends to which we are obliged, yet in the particulars our acting *bona fide* makes us free. Or, *thirdly*, Becauſe, though abſolute obligations ly upon the obliged, yet they relate to duties performable to God, whereof he hath given no power nor command to man [l]. That there be ſome ſuch obligations, that God hath authoriſed or commanded man to vindicate for him, and not all ſuch, may be gathered from his own judicial law, in which many ſuch are expreſt, and many others omitted. *Fourthly* [m], Tho' *the obligation* [m] be to duties relating to man, yet there is no correſpondent right or power of compulſion in *the* [m] man: and ſo the creditor is God, and man is *a* [m] third party, to whoſe behoof the obligation is impoſed, but who hath neither power of exaction for himſelf, nor *of* [n] vindication for God. Such are the obligations of beneficence generally; and particularly of charity to the poor, aſſiſtance to thoſe in hazard, and relief of the oppreſſed [o]. For natural reaſon will teach us that, tho' theſe do naturally oblige us, yet they in whoſe favours they are, cannot compel us. For example, we are bound to give alms to the poor, yet none will affirm that the poor can extort it, or take it by force. 'Tis true, that *in* [p] the poſitive law of *any nation* [q], *or other* [r] conſociation [r], there is in the very nature of the aſſociation a duty of aſſiſtance for the common

[d] *Ex.* xxii. 18. [e] I. edit. & MSS. [f] MSS. A & H. [g] I. edit. & MSS. [h] MS. G. [g] MSS. [i] *De officiis*, III. *c.* 17. [ii] I. 1. 20. [k] MSS. [l] I. edit. & MSS. A. G. & H. [m] MSS. [n] I. edit. & MSS. B. H & G. [o] See above I. 1, 15. [p] MSS. [q] I. edit. & MSS. [r] MSS. A & H.

intereſt, into which they are aſſociate: but that is not a natural, but a voluntary obligation flowing from *the* [t] voluntary aſſociation or union. Likewiſe all *the* [u] people are bound to concur, and aſſiſt legal *execution* [w]; and in ſome places to contribute by ſuch a proportion to the poor: but theſe are only poſitive laws, having the force and nature of contracts. *Fifthly*, [x] Legal compulſion is [x] laid aſide in matters of *ſmalleſt* [y] moment (*nam prætor non curat minima*,) and in ſome things of greater importance, wherein, a way of procedure is preſcribed, and as a penalty of non-obſervance of that order, legal remedies are denied, when done any other way. So naked pactions among the *Romans* were ineffectual, when they did not interpoſe ſtipulation. And with us, agreements requiring writ are ineffectual, and may be reſiled from, unleſs writ be interpoſed. Yea, in moſt matters of importance, obligations with us are ineffectual, unleſs proven by oath of party, or by writ. Civil obligations are thoſe, which have a civil effect and execution, though perhaps they be not naturally obliging; as with us an obligation in writ doth civilly oblige, and hath execution at the inſtance of the creditor's heir or aſſigny, though the debt was paid to the cedent or defunct, becauſe the debitor hath not been ſo cautious as to *take* [a] *and* keep a diſcharge in writ. But moſt part of obligations are both natural and civil: and there are many ſuch particular obligations which will occur in their proper places.

VI. There is a third diſtinction of obligations in principal and acceſſory: ſuch are the cautionary obligations of ſurety and pledges, which are acceſſory to all other obligations; of which in their proper places likewiſe.

VII. The fourth diſtinction of obligations is in thoſe, which are pure, [*ſimple*,[aa]] conditional and to a day. Conditional obligations are ſuch as [b] depend upon a condition: and ſo are but obligations in hope, till the condition be exiſtent. But obligations to a day are ſuch, as are preſently binding, but the effect or execution thereof is ſuſpended to a day. Betwixt which there is this main difference, that in conditional obligations the condition muſt neceſſarily be uncertain, either as being in the power of man's will, or *as* [c] an accidental event. For if the condition be a thing certainly to come, tho' it may be conceived under the terms of a conditional obligation, yet it is indeed an obligation to a day. As if *Titius* be obliged to pay *Mævius* ten crowns, if an eclipſe ſhall be ſuch a day, upon which day, by the certain rules of aſtronomy, it is known that it is [d] to be, though perhaps it was uncertain to either, or both parties, yet it is not a conditional obligation, but the time of *the* [e] eclipſe is the term thereof. So likewiſe, if the condition be impoſſible *de facto*, or impoſſible *de jure*, that is, unlawful (*nam id* [f] *poſſumus quod de jure poſſumus*,) then tho' the obligation be conceived in terms conditional, yet becauſe the condition is not depending, and in itſelf uncertain, the obligation is not truly conditional, but is void and *illuſory* [g], becauſe of the *impoſſibility* [h] of the condition. And if the obligement be founded on natural affection or charity, if the condition adjected may be an occaſion to move the obtainer to do wrong, the obligation is valid and pure, and the condition is void, *and* [i] as not adjected. [k] As when parents give bonds to children on condition, that they marry not, or that they marry ſuch a perſon, thoſe bonds are valid: and the condition is void, as againſt the freedom of marriage, which the natural affection of parents obliges them not to violate. But if ſuch a condition be impoſed by any other, who hath no natural obligation, the condition is valid. Hence it appears, that ſuch obligations, as are without *a condition* [l], are pure; and ſuch are ſimple which are not clogged with the running of a courſe of time, the adjection whereof is always in favours of the debitor, as to the intervenient time, and in this alſo in favours of the creditor, that he needs uſe no interpellation or requiſition *of* [m] performance, *ſed dies interpellat pro homine*, and the day being paſt, the debitor is *in mora*. But in ſimple obligations delay is only upon demand, and

[t] MSS. A. G & H. [u] I. edit & MSS. [w] MSS. [x] MSS. [y] I. edit. & MSS. [a] MSS. [aa] The word [*ſimple*] is added. [b] MSS. [c] MSS. B. and G. [d] I. edit. [e] I. edit. & MSS. [f] I. edit. & MSS. [g] MSS. B and H. [h] Formerly *legal impoſſibility*. [i] MSS. B. & G. [k] MS. G. [l] MS. H. [m] MS.

and whenſoever it is required, upon non-performance the debitor is *in mora*. Obligations *ad diem incertum*, are in effect conditional (*nam dies incertus habetur pro conditione*,) as a ſum payable at ſuch an age. Which is frequently in proviſions of children: if they dy before that age, the ſum is not due to their repreſentatives, even after they might have attained that age; as was found *January* 17. 1665, *Edgar contra Edgar*; *February* 22. 1677, *Belſhes* of *Tofts contra Belſhes* [n].

VIII. A conditional obligation doth neceſſarily imply an uncertainty, and a dependence of the effect of the obligation upon the exiſtence of the condition; for, if the condition fail, the obligation is void. And oft-times obligations are conceived in conditional terms, though in effect there be no uncertainty of the condition, as to the being thereof, though it may be uncertain, as to the contractor's knowledge: as in obligations, where the condition is made of ſomething paſt; or ſomething that cannot but come, the coming whereof is the term of performance, and not a condition, and it is an obligation to a day, and not conditional. As on the contrary a conditional obligation may be, when it is not yet conceived in terms conditional: as when it is conceived to a day, if it be uncertain whether by the courſe of nature that day will ever come, it is no term but a condition. Theſe uncertain conditions are of two kinds: voluntary, which depend upon the free choice of ſome perſons; and caſual, which depend upon the caſual event of that, which cannot naturally be foreknown. Amongſt voluntary conditions, theſe are not to be numbered, which conſiſt in the *mutual* [o] obligations of the creditor, which he is poſitively obliged to perform, and ſo are not looked on by the contractors, as an uncertain event in his choice: and therefore, though frequently ſuch obligations in mutual contracts are conceived by way of proviſion or condition, and ſo may ſtop the effect or execution of ſuch obligations, till the creditor's part be performed; yet that is rather, as the failzie or delay of the mutual cauſe of the obligation, than as the non-exiſtence of a condition. And therefore ſuch contracts may, and ordinarily do receive execution by poinding and appriſing, before the performance of thoſe proviſions: which executions are not null, but will be preferred by their dates to others, proceeding upon pure obligations or to a day after the day is paſt. Yea, the other creditors cannot object the non-implement of the proviſions, except they had intereſt, in ſo far as the fulfilling thereof would be to their behoof: which certainly they could do, if they were proper conditions; as they can do, when the condition is caſual, or when it is voluntary, not being a a part of the creditor's mutual obligement. In like manner the end and intent of an obligation, or the manner of performance thereof, is ordinarily expreſt as a condition, tho' theſe be not real conditions, rendering the obligation uncertain.

A condition is oft-times implied in an obligation, though it be not expreſt: as when a tocher is promiſed, this tacit condition is implied, if the marriage hold. And the condition may either be expreſt or implied, as relating to the contracting, or to the performing of the obligation. As if the debitor ſaid, on ſuch conditions I ſhall become obliged, *it* [p] differeth from this, that I oblige myſelf to pay or perform, when, or upon condition that ſuch things ſhall exiſt. For in this caſe there is a preſent contract, tho' the effect be uncertain, and therefore arreſtment and inhibition might be uſed thereupon. But in the former the very engagement is uncertain: as if one ſhould promiſe to *Titius*, if he married *Mævia*, that he ſhould contract with him for ſuch a tocher; before ſuch a marriage contracted or ſolemnized, neither arreſtment nor inhibition would be granted thereupon [pp].

IX. An offer hath the like implied condition of the other party's acceptance, (and in that it differs from an abſolute promiſe:) ſo that if the acceptance be not adhibite preſently, or within the time expreſt in the offer, in which the other party hath liberty to accept, there ariſeth no obligation, as was found *June* 25. 1664. *Allan contra Collier*. And in mutual contracts the one party ſubſcribing is not obliged, till the other ſubſcribe, as being his acceptance. And a cautioner ſubſcribing

[n] See below I. 5. 6. [o] I. edit. [p] F. *which*. [pp] Se below, I. 17. 15. & IV. 20. 29.

ſcribing is not obliged, unleſs the principal party ſubſcribe, that being implied as a tacit condition of his being cautioner [q].

TITLE IV.

Conjugal obligations.

I. *Marriage a divine contract.*
II. *Marriage is from the law of nature.*
III. *Thence alſo is monogamy.*
IV. *The degrees of lawful marriage.*
V. *The perpetuity of marriage.*
VI. *How marriage is formally conſtitute.*
VII. *Diſſolution of marriage by death. Adultery.*
VIII. *Deſertion and adherence.*
IX. Jus mariti.
X. *The husband's obligations.*
XI. *The power of the husband by the civil law.*
XII. *By the cuſtom of neighbour-nations.*
XIII. *By the cuſtom of* Scotland.
XIV. *The wife's eſcheat.*
XV. *The husband's concourſe.*
XII. *A wife's obligation how far effectual.*
XVII. *Communion of goods and debts of man and wife.*
XVIII. *Donations betwixt man and wife revocable.*
XIX. *Diſſolution of marriage within year and day.*
XX. *Divorce.*
XXI. *Rights ariſing from the diſſolution of marriage.*
XXII. *Privileges of wives.*

THE firſt obligations, God put upon man towards man, were the conjugal obligations, which aroſe from the conſtitution of marriage before the fall. From whence have ariſen rights of the greateſt conſequence, as the husband's power over the wife and her goods; the *natural* [a] ſociety of families (which is the only ſociety immediately inſtitute of God in the law of nature:) and from whence is the power of parents over *their* [b] children; and the oeconomical government of families, which of all others was the moſt abſolute and full, extending not only to the determination of civil rights, but to the puniſhment of all crimes, till by the union of greater civil ſocieties many of thoſe powers have been devolved upon the common authority of the ſocieties. And therefore theſe conjugal obligations deſerve the firſt conſideration.

I. Tho' marriage ſeem to be a voluntary contract by engagement, becauſe the application of it is, and ought be of the moſt free conſent, and becauſe in matters circumſtantial it is voluntary, as in the ſucceſſion of the iſſue, and the proviſion of the wife and children; yet that marriage itſelf and the obligations thence ariſing are *jure divino and natural* [c], appears thus. *Firſt*, Obligations ariſing from voluntary engagement take their rule and ſubſtance from the will of man, and may be framed and compoſed at his pleaſure: but ſo cannot marriage, wherein it is not in the power of the parties, though of common conſent, to alter any ſubſtantial, as to make the marriage for a time, or take the power over the wife from the husband, and place it in *her or* [d] any other, or the right of proviſion *and* [e] protection of the wife from her husband, and ſo of all the reſt. Which evidently demonſtrateth, that it is not a human but a divine contract.

II. *Secondly* [f], That marriage ariſeth even from the primitive law of nature, and that *as* [ff] it is the conjunction of two ſingle perſons, is evident not only from that natural affection, which all ſorts of men in all places of the world (where no common example or conſent can reach) have unto a married ſtate; but that (as the lawyers ſay) [g] it is founded in the common nature of man with other creatures, who have a reſemblance of it in themſelves. (And it is given for the very example of the natural law, as contradiſtinct from the law of reaſon, and law of nations.) For moſt part of the living creatures live and converſe in pairs, and keep

[q] See below, I. 10. 3 & 5. [a] MSS. [b] MSS. A. & H. [c] MSS. [d] I. edit. & MSS. [e] MSS, A. B & H. [f] MSS. [ff] I. edit. & MSS. A. B. & H. [g] MSS.

eep the common intereſt of their offspring, as is clear in all fowls (whoſe wings ave freed them from man's controul,) *and* [h] many of the beaſts of the field. And is like, all of them would be ſo inclined, if their natural liberty were not re-rained by man, by purſuing ſuch as are wild, and making uſe of the tame, as they ay be moſt profitable, preſerving moſt of the female for increaſe, and deſtroying he male.

III. *Thirdly*, The affection of the property and chaſtity of women, and *the* [i] ani-moſity and jealouſy, that ariſeth in men naturally upon the breach thereof, *do* [k] e-vince, that by the law of nature every man ought to content himſelf with his own wife, and women not to be common. For as no man can endure the communi-cation of his own, ſo it muſt neceſſarily follow, that he ſhould not encroach up-on another's property [kk]. And ſeeing nature holds not out a proportion betwixt the male and the female, whereby every man might appropriate moe, it muſt there-fore ſubſiſt in one: and ſo was the firſt inſtitution by God; and all the poſterior directions in his word are for a man and his wife, and not his wives. And as the man hath not power over his body, but the wife [l], ſo it were an abſurd incon-ſiſtency, if that power were in many, and ſo behoved to reſolve in a management by the common conſent of the wives.

IV. *Fourthly*, The degrees in which marriage is allowed or forbidden, are by divine inſtitution: for the next degree collateral is only forbidden. For of aſcen-dents and deſcendents there is properly no degree, the great grandmother be-ing in that regard as near as the mother. And ſo the next collateral to all aſcen-dents and deſcendents is in the ſame degree with brothers and ſiſters: and uncles and aunts, nephews and nieces, are alike in the propinquity of blood with theſe; and the great grandmother's ſiſter with the mother's ſiſter. Elſe if theſe were different degrees, there would many degrees interveen betwixt a perſon and his great grand-aunt. But that there is a natural abhorrence of that promiſcuous com-mixtion of blood is commonly acknowledged over all the world, as to all aſcen-dents and deſcendents. And as to the next collaterals, the word of God clear-eth it not to have been a poſitive law given to the *Jews*, but to have been a com-mon law to the *Gentiles* alſo. And therefore *Lev.* xviii. where the degrees of marriage are expreſt, and unlawful *commixtions* [m] forbidden, it is ſubjoined, *v.* 24 and 25. *Defile not you yourſelves in any of theſe things: for in all theſe the nations are defiled, which I caſt out before you. And the land is defiled: therefore I do viſit the iniquity thereof upon it.* But unleſs theſe *degrees of prohibite* [mm] mar-riage were a part of the law of nature written in man's heart, or a common po-ſitive law known to all nations, the Lord, who hath declared that he will judge men by the law which is known, would not *have* [n] judged the *Canaanites* for the tranſgreſſion *thereof* [nn].

V. *Fifthly*, The perpetuity of marriage is alſo evident by our Saviour's ſentence againſt arbitrary divorce, which was permitted by the law of *Moſes* for the hardneſs of that people's hearts. But the Lord cleareth up the ancient law of nature, *from the beginning it was not ſo* [o], which ſheweth the perpetuity of that law, and that it was before the judicial law. And therefore he concludeth, that whoſoever putteth away his wife, except for fornication, is an adulterer, if he marry ano-ther while ſhe liveth.

VI. For underſtanding of theſe conjugal rights, it will be neceſſary to con-ſider, 1*ſt*, the conſtitution of marriage: 2*dly*, the diſſolution of it; 3*dly*, the rights and intereſts thence ariſing. For the *firſt*, Marriage is defined by *Modeſtinus* [p] to be the conjunction of man and woman to be comforts for all their life, with a communication of rights divine and human. So the eſſence thereof conſiſts in the conjugal ſociety: the ſpecial nature of which ſociety appeareth by the ſtate, intereſt and terms that the married perſons have thereby.

It may be queſtioned whether the conjunction, wherein marriage conſiſts, be a

[h] I. edit. & MSS. [i] MSS A, B. & H. [k] MS. A. [kk] *Homer Il.* IX. *verſ.* 340— 342. [l] 1 *Cor.* vii. 4. [m] MS. G. [mm] I. edit. & MSS. [n] F. *ſo have.* [nn] F. *of it.* [o] *Matth.* xix. 8. [p] *l.* 1. *D. de rit. nupt.*

conjunction of minds by mutual conſent to the married ſtate, and that whether privately or in the publick ſolemnity; or whether it requireth not a conjunction or commixtion of bodies. For clearing whereof conſider, that it is not every conſent to the married ſtate that makes matrimony, but a conſent *de præſenti*, and not a promiſe *de futuro matrimonio*: for this promiſe is only the eſpouſals, which are premiſed to marriage, [q] that ſo ſolemn an act might be with due deliberation. And therefore though, as other promiſes and pactions, eſpouſals are naturally obligatory, and effectual alſo by the canon law, whereby the eſpouſed perſons may be compelled to perfect the marriage, unleſs there ariſe ſome eminent diſcovery of the corruption or pollution of either party, or defect or deformity, through ſickneſs or [r] accident [s]; yet by the civil law, there is place for either party to repent and renounce the eſpouſals [t]. Which is alſo the cuſtom of this nation: for marriage uſes not to be purſued before ſolemnization, *rebus integris*. So that the *marriage* [u] itſelf conſiſts not in the promiſe, but in the preſent conſent, whereby they accept each other as husband and wife: whether that be by words expreſly; or tacitely by marital cohabitation or acknowledgment; or by natural commixtion, where there hath been a promiſe or eſpouſals preceeding, for therein is preſumed a conjugal conſent *de præſenti*.

The publick ſolemnity is a matter of order, juſtly introduced by poſitive law, for the certainty of ſo important a contract, but not eſſential to marriage. Thence ariſes only the diſtinction of publick *or* ſolemn, *and* [w] private or clandeſtine marriages: and though the contraveeners may be juſtly puniſhed (as in ſome nations by the excluſion of the iſſue of ſuch marriages from ſucceſſion,) yet the marriage cannot be declared void, and annulled; and ſuch excluſions ſeem very unequal againſt the innocent children. But by our cuſtom cohabitation, and being commonly repute man and wife, validates the marriage, and gives the wife right to her terce, who cannot be excluded therefrom, if ſhe was reputed lawful wife, and not queſtioned during the husband's life, till the contrary be clearly decerned, *parl.* 1503, *c.* 77. So alſo a contract of marriage was found valid, againſt the husband's heir, though the marriage was never ſolemnized in kirk nor congregation, *Hope, husband and wife, Barclay contra Napier*. So likewiſe in the ſame caſe, *Nicolſon de nuptiis* [x], a contract of marriage was found valid, and the man thereby obliged to ſolemnize the marriage, ſeeing he had procreate children with the woman, and by his miſſives had acknowledged he had married her, though by a contract, poſterior to the contract of marriage, ſhe had renounced the ſame [y].

As to the other point, though the commixtion of bodies ſeem neceſſary for the conſtitution of affinity ariſing from marriage, yet the opinion of the canon law is true, *conſenſus, non coitus, facit matrimonium* [z]. But this conſent muſt ſpecially relate to that conjunction of bodies, as being then in the conſenter's capacity: otherwiſe it is void. So the conſent of perſons naturally impotent, or of *a* dubious *kind, as* [a] hermaphrodites, where the one ſex doth not eminently predomine, doth not make marriage. And the common eſſentials of conſent muſt alſo here be obſerved: ſo that who cannot conſent, cannot marry, as idiots and furious perſons. *So* [b] neither they, who have not the uſe of reaſon as infants; *or* [c] who are not come to diſcretion, *as pupils* [c], (unleſs *malitia ſuppleat ætatem,*) that is, when the perſon is within the years of pupillarity, commonly eſtabliſhed in law to be fourteen in males and twelve in females. Yet ſeeing marriage is a natural obligation, and not annullable by poſitive *law* [d], as to it regard muſt be had, whether the parties be truly come to diſcretion and capacity, whereof the commixtion of bodies is ſufficient evidence. And this alſo is the ſentence of the canon law [e]. *Error* [f] alſo in the ſubſtantials *makes* [f] void the conſent, unleſs future conſent ſuperveen; as it did in *Jacob*, who ſuppoſed that he had married and received *Rachel*, but by miſtake got *Leah*, yet was content to retain her, and ſerve for the other alſo [ff].

But

[q] MSS. [r] MSS. [s] *c.* 2. *&* *c.* 7, X. *de ſponſal.* *c.* 3. X. *de conj. lepros.* [t] *l.* 1. C. *de ſponſal.* [u] MSS. [w] MSS. [x] I. edit. & MSS. [y] See below, III. 3, 42. [z] *can.* 1. *&* 2. XXVII. *q.* 2. [a] MSS. [b] MSS. [c] MSS. A, B. & H. [d] I. edit. & MSS. [e] *c. ult.* X. *de deſponſ. imp.* MSS. A. & B. [ff] See below, I. 9, 9. & IV. 40, 24.

But errors in qualities or circumſtances vitiate not, as if one, ſuppoſing he had married a maid, or a chaſte woman, had married a whore. So then it is not the conſent to marriage, as it relateth to the procreation of children, that is requiſite; for it may conſiſt, though the woman be far beyond that date: but it is the conſent, whereby ariſeth that conjugal ſociety, which may have the conjunction of bodies as well as of minds; as the general end of the *conſtitution* [g] of marriage is the ſolace and ſatisfaction of man, for the Lord ſaw that it was not fit for him to be alone, and therefore made him an help meet for him. Yet though this capacity ſhould never be actuate, as if perſons, both capable, ſhould after marriage live together, and it ſhould be known *and* [h] acknowledged that all their lives they did abſtain, yet were the marriage valid as to the conjugal rights on either part. If it be asked, whether the conſent of parents be eſſential to marriage: the common ſentence will reſolve it, *multa impediunt matrimonium contrahendum, quæ non dirimunt contractum* [hh]. So that conſent is neceſſary *neceſſitate præcepti, ſed non neceſſitati medii*: though by human conſtitution ſuch marriages may be diſallowed, and the iſſue repute as unlawful; but the marriage cannot be annulled, *l.* 11. *D. de ſtat. hom. l.* 13. § 6. *D. ad L. J. de adult.* By which laws, not only the iſſue of ſuch marriages are excluded from ſucceſſion, but the marriage itſelf is inſinuate to be null: which human conſtitutions cannot reach; though the magiſtrate or miniſter, celebrator of the marriage, may refuſe to proceed without conſent of the parents. As by the law and cuſtom of *Holland ord. pol. art.* 3. it is ſtatute, that before the celebration of marriage, there be three proclamations in the church or in the court; and that where the parties are *minor* [i], they be not married without conſent of their parents, and where they are both *major* [i], intimation muſt be made to *the* [i] parents, who if they appear not, their conſent is preſumed, and if they do appear and diſſent, they muſt condeſcend upon the reaſons, that it may be cognoſced whether they be ſufficient or not: and if the marriage do otherwiſe proceed, they account it null. Marriage is alſo void and inconſiſtent, when contracted within the degrees preſcribed, *Lev.* xviii, whereby the next degree collateral is only prohibite, both in conſanguinity and affinity; which makes thoſe joined in affinity in the ſame degree, as being by marriage one fleſh. Neither can marriage conſiſt, where either party is married before. But the excluſion of further degrees by the canon law (as of couſin-germans,) *and* [k] of certain degrees in eccleſiaſtical affinity, *and* [k] the prohibiting marriage to thoſe *in ſacris*, are thoſe unlawful devices, which cannot alter this divine contract, but become a cheat, putting parties in the pope's power to approve or diſapprove, as his avarice or intereſt leads. Neither do the civil conſtitutions of princes annul or diſſolve marriage: whatever they may operate, as to the intereſt of the married perſons, or their ſucceſſion. As were the prohibitions of marriage, between thoſe of conſular dignity and plebeian perſons; between tutors and their children, and pupils; yea between *Jews* and Chriſtians: for even diverſity of religion cannot annul it.

VII. The diſſolution of marriage is only *natural* [l] by death. Adultery and deſertion do not annul the marriage, but are juſt occaſions upon which the perſons injured may annul it, and be free: otherwiſe if they pleaſe to continue, the marriage remains valid. All do agree, that adultery hath ſome effect upon marriage. The canon law doth not thereupon diſſolve it, that the party injured may be free to marry again, but only granteth ſeparation. But our Saviour's precept cleareth the contrary: who in relation to the cuſtom that then was of divorce for light cauſes, (*wherein it was ordinary for either party to marry* [m]) reſolves, that putting away was not lawful, except in the *caſe* [n] of adultery, and ſo in that caſe approves the divorce, even as then uſed [nn]. It may be doubted, whether the adulterer, after the diſſolution of the marriage upon his default, may marry again. But though poſitive law, as a penalty upon adulterers, may hinder their marriage with the *adulterers* [o] or *others*, *and* [o] declare ſuch marriage, as to ſucceſſion and civil effects, void;

[g] MSS. [h] MSS. B & G. [hh] See below I. 17. 14. [i] I. edit. [k] F. *or.* [l] I. edit. [m] MSS. [n] MS. G. [nn] *Matth.* xix. 9. [o] MS. B.

void; yet can it not ſimply annul it [p]. With us marriage betwixt the two committers of adultery is declared null, and the iſſue inhabilitate to ſucceed to their parents, *parl.* 1600. *c.* 20. [pp] But otherwiſe even the perſon guilty may marry again.

VIII. The ſecond ground of diſſolution of the marriage is wilful deſertion: which is grounded upon the anſwer of the apoſtle [q] concerning the *marriages* [r] of chriſtians with infidels, which he declares valid, unleſs the unbeliever depart, in which caſe he declares the chriſtian not to be under bondage: which cannot have any ſpecialty, as to the party deſerted as a chriſtian, and therefore muſt infer a general rule, that all married perſons wilfully deſerted are free. But this ſeems inconſiſtent with Chriſt's reſolution, making adultery the only exception. Which is eaſily cleared, by adverting, that Chriſt's determination is not general of the diſſolution of marriage, but of putting away by divorce, and ſo concludes no more, but that the putting away of the wife is unlawful, unleſs for adultery: but the wilful deſerter is not put away, but goeth wilfully away. Yet from *Matth.* v. 32. xix. 9. and *Luke* xvi. 18. it would appear, that by deſertion the marriage is not diſſolved, and that the perſon deſerted may not marry again; becauſe it is ſaid, That *whoſoever marrieth her that is put away* (or deſerted) *committeth adultery*. But Chriſt ſpeaks of thoſe put away by the *Jewiſh* divorce, which, though permitted without puniſhment for the hardneſs of the *Jews* hearts, was now under the goſpel taken away: ſo that the perſon, ſo put away, remained in marriage, and taking her in marriage by another became puniſhable as adultery. By the law of *Scotland* diſſolution of marriage for non-adherence, or wilful deſertion, is expreſly ordered, *parl.* 1573. *c.* 55. *That the deſerter, after four years wilful deſertion without a reaſonable cauſe, muſt be firſt purſued and decerned to adhere, and being thereupon denounced, and alſo by the church excommunicate, the commiſſaries are warranted to proceed to divorce.* But *the man's* [s] ſimple abſence will not be accounted a wilful deſertion, if he be following any lawful employment abroad, being content to accept and entertain his wife; for ſhe is obliged to follow him whereever he is.

IX. The rights ariſing from marriage are, 1. the *jus mariti*, or conjugal power of the husband over the wife, her perſon and goods, and therewith by conſequence the obligement for her debts. 2. His power, and the wife's ſecurity, whereby during the marriage ſhe cannot oblige herſelf. 3. The husband's obligement to entertain the wife, and provide for her after his death. 4. Her intereſt in his goods and moveable eſtate at the diſſolution of the marriage.

Jus mariti, as a term in our law, doth ſignify the right that the husband hath in the wife's goods. Yet it may well be extended to the power he hath over her perſon, which ſtands in that oeconomical power and authority, whereby the huſband is lord, head and ruler *of* [t] the wife, by the expreſs ordinance of God, *Gen.* iii. 16. where the Lord ſays to *Eve*, *thy deſire ſhall be towards thy husband, and he ſhall rule over thee*. Which though it may ſeem as a penalty impoſed upon her, for being firſt in the tranſgreſſion, and ſo not to be of the natural *and* [u] moral law, which is perpetual, yet it is no more than a conſequence of the moral law: whereby marriage being inſtitute before the fall, the woman was made for the man, and not the man for the woman; and therefore in *their* [w] conjugal ſociety, being but of two, the determination of things indifferent of their intereſt behoved to be in the man, and [x] in ſo far the precedency and government of the wife; but when through the fall the greateſt meaſure of infirmity befel her, as being firſt in the tranſgreſſion (whereby ſhe became the weaker veſſel,) there was need, not only of a determination in things free, but an exaction of duties, wherein ſhe became leſs knowing and willing. Therefore, from that conſequence, and not by any new impoſition, the man became to have dominion over her, and power to make her to do thoſe duties, which in her innocency ſhe would have done of

[p] MSS. [pp] See below III. 3. 42. [q] 1 *Cor.* vii. 15. [r] I. edit. and MSS. A, B. & G. [s] MSS. [t] MSS. [u] MSS. [w] MSS. [x] MSS.

of her own accord. This power oeconomical, as hath been ſaid before, did naturally comprehend all authority, till moſt of it was devolved upon magiſtracy. Yet by this power, the husband may ſtill contain the wife within the compaſs of the conjugal ſociety; and her abode and domicil followeth his; and he hath right to recover her perſon from any, that would withdraw or withhold her from him, except in the caſe of an allowed ſeparation for his injuries and atrocities, for which ſhe might not be with him in ſecurity and ſafety.

From this power the husband hath over the wife's perſon, and conjugal ſociety involved in the nature of marriage, ariſes *the husband's power of, and right to the goods of the wife* [y]. According to the nature of ſociety, *there is* [y] a communion of goods betwixt the married perſons; which ſociety, having no determinate proportion in it, doth reſolve into an equality: but ſo that, through the husband's oeconomical power of government, the adminiſtration during the marriage of the whole is alone in the husband. Whereby he having the ſole and unaccountable adminiſtration, his power may rather ſeem to be a power of property, having indeed all the effects of property during the conjugal ſociety, yet is no more than is above expreſt.

This right of the husband in the goods of the wife is ſo great, that hardly can it be avoided by the pactions of parties, whereby if any thing be reſerved to the wife during the marriage, to be peculiar and proper to her, excluding the *jus mariti*, the very right of *the* [z] reſervation *becomes* [a] the husband's *jure mariti, and* [a] makes it eluſory and ineffectual, as always running back upon the husband himſelf; as water thrown upon an higher ground doth ever return. And therefore a wife, before her contract of marriage, having diſponed a part of her jointure, and taken a backbond for employing of it for the uſe of her future *ſpouſes and her families* [aa] jointly, though the husband by his contract of marriage renounced his right thereto [*jure mariti* [aa];] yet he was found to have the power to manage it to the uſe of the family, *February* 9. 1667, *Lord Collington and L. Ratho contra tenants of Innertyle, and Lady Collington.* Nevertheleſs by private pactions the intereſt *in* [b], and diviſion of the goods of married perſons after the diſſolution of the marriage, may be according to their pleaſure, as they agree. And alimentary proviſions, in caſe the husband cannot, or will not aliment the wife, are ſo perſonal to the wife, that *inhærent oſſibus*, and *they* [c] *recur* not to the husband or his creditors, though conſtitute by the husband without fraud of creditors, much more when conſtitute by any other.

Jus mariti is a legal aſſignation to the wife's moveable rights, needing no other intimation but the marriage; and is preferable to any voluntary right, prior to the marriage, if not intimate before the marriage, *December* 18. 1667, *Auchinleck contra Williamſon and Gilleſpie.*

X. Beſides the *inward* [d] obligations of the married perſons, which are naturally in the minds and affections of each to other, there is outwardly the obligation of cohabitation or adherence, of which formerly; and the obligation of the husband to aliment and provide for the wife in all neceſſaries for her life, health and ornament, according to their means and quality. To which he is naturally bound, though he had no means, but were to acquire the ſame; *for if any provide not for his own family, he is worſe than an infidel* [e]: yet the civil effect thereof is only to give *to the wife* [f] aliment and entertainment according to the man's means and quality; and ſo he is *only* [g] bound civilly *quoad poteſt*. Hence it is, that the aliment or furniſhing of the wife is a debt of her husband's (not only for what is *given* [h] by merchants and others *hoc nomine* in the husband's life, but even her mournings after his death, if it be proper for her quality to have mournings,) *and burdens* [g] the executors of the husband, and not the wife, *November* 12. 1664, Lady *Craigcaſſie contra Neilſon; July* 7. 1675, *Wilkie contra Moriſon.*

XI. The *Roman* law hath exceedingly varied in this matter from the natural

[y] I. edit. & MSS. [z] MSS. A. B & H. [a] MSS. [aa] Deciſ. cited. [b] MSS. [c] F. *recur.* [d] MSS. [e] 1 *Tim.* v. 8. [f] MSS. [g] MSS. A. B. & H. [h] MSS. A. & G. [g] MS. G.

law. For with them the wife was not *in poteſtate viri*, but either *in poteſtate patris*, or *ſui juris*: and her goods remained fully her own, unleſs they had been conſtitute by her in a tocher, of which the husband had the adminiſtration and profit during the marriage *ad ſuſtinenda onera matrimonii*; and in which, after diſſolution of the marriage, he had no intereſt, except by paction *de lucranda dote*; and for ſecurity whereof the wife had *donationes propter nuptias* equivalent. Only *in dote æſtimata*, the husband had power to diſpoſe of the tocher for the value, to which it was eſtimate of conſent, to be paid at the diſſolution of the marriage. All the other goods of the wife were *paraphernalia*, whereof ſhe had the ſole power and right.

XII. The *cuſtom* [h] of moſt nations, even where the *Roman* law hath much weight, *is* [h] in this matter returned to the natural courſe: as is obſerved by *Chaſſanæus* [i] and *Duarenus* [k] in relation to the cuſtom of *France*; *Weſenbecius* [l] and *Covarruvias* [m] in reference to the cuſtoms of the *Germans*, *Spaniards*, and moſt part of the nations of *Europe*. *Gudelinus* [n] ſheweth the ſame to be the *condition* [o] of the *Netherlands*, in which they do almoſt in every thing agree with our cuſtoms. Yet if the marriage diſſolve within year and day without a living child, all returns on either ſide, which was done in contemplation of the marriage, like to the general courſe of the civil law [p].

XIII. By the cuſtom of *Scotland* the wife is in the power of the husband. And therefore, *firſt*, The husband is tutor and curator to his wife: and during her minority no other tutor or curator needs to be conveened, or concur to authoriſe her; ſo it was decided, *French contra French and Cranſton*, *Hope de minoribus*. But on the contrary, the wife is in no caſe conveenable without calling the husband: and though ſhe be married during the dependence, the husband muſt be cited upon ſupplication, and the proceſs [q] continued againſt him, for his intereſt, *Spotiſwood, husband and wife*, *Baillie contra Roberton*.

XIV. Yea, a wife's eſcheat or liferent falls not upon *an* [r] horning execute againſt her during the marriage, becauſe, being then under the power of her husband, ſhe hath no power of herſelf to purſue, ſuſpend or relax, *February* 16. 1633. *Stewart contra Bannerman*: and this was found, though the decreet was an ejection committed both by man and wife. Yet where the horning is upon a deed proper to the wife, as to divide *her* [s] conjunct-fee-lands, horning is valid, *Nicolſon, reverentia maritalis*, *Duff contra Edmonſton* [t]; or where the horning was upon a delinquence, as on lawborrows, *Hope, husband and wife*, Lord *Roxburgh contra Lady Orkney*.

XV. In like manner a wife cannot purſue or charge without concourſe of her husband. And ſo letters not raiſed at his inſtance were reduced, though he concurred thereafter, *July* 27. 1631, *Napier contra Rollock*; *Spotiſwood, husband and wife, inter eoſdem*. The like in a reduction of an heritable right, done by the wife's father on death-bed: which was not ſuſtained, unleſs the husband had concurred, or had been called, in which caſe, if he refuſed to concur without juſt reaſon, the lords would authoriſe the wife to inſiſt, *July* 8. 1673, *Hacket contra Gordon* of *Chapleton*. But we muſt except from this rule, if the husband were inhabilitate or forfeited, *Haddington* 1622 [u], *Hamilton contra Stuart*; or [w] the wife [w] authoriſed by the lords upon ſpecial conſideration, the husband refuſing to concur, *January* 9. 1623, *Marſhal contra Marſhal*: or that ſhe were purſuing her husband himſelf, againſt whom ordinarily ſhe hath no action *but* [x] in ſingular caſes, *ut ſi vergat ad inopiam*, or in caſe he had diverted from her, *December* 21. 1626. *Lady Foulis contra her husband*: or if a wife with concourſe of her friends, at whoſe inſtance execution was provided by her contract, were purſuing reduction of a deed, done by her husband in prejudice thereof, during *his* [y] life, *February* 12. 1663, *Lockie contra Paton*: Or that the obligation in its own nature

[h] MSS. H & G. [i] *Ad conſuetud. Burgundiæ tit.* 4. [k] *Ad D. de rit. nupt.* [l] *In paratit. ad D. de rit. nupt.* [m] *Ad lib.* IV. *decretal. part.* II. *c.* 7. [n] *De jure noviſſimo lib.* I. *c.* 7. [o] MSS. A. B & H. [p] See below, I. 4. 19. & II. 6. 19. [q] I. edit. & MSS. [r] MSS. H. & G. [s] MSS. [t] I. edit. & MSS. [u] I. edit. & MS. G. [w] I. edit. [x] MSS. [y] MSS. A. & G.

ture require execution in the husband's life, as an obligement to infeft the wife in particular lands. But if it be a general obligement to employ money for her, or to infeft her *in lands* [z], *&c. wherein* [a] the husband may at any time *in* [a] his life perform, the wife will have no action againſt him: neither will ſhe get inhibition upon ſupplication, unleſs the lords grant the ſame upon knowledge, that the huſband is becoming in a worſe condition, or that the wife hath quit a preſent infeftment for an obligation of another, in which caſe the lords granted inhibition, *July* 13. 1638. *Lady Glenbervy contra her husbaud.* This delay of execution, where a term is not expreſt, is upon conſideration of merchants, who ordinarily having no other means than the ſtock with which they trade, it would ruin them, if they were neceſſitate to employ it on ſecurity, ſo ſoon as they are married; and is not to be extended to others. *Secondly* [b],

XVI. It was a privilege of women amongſt the *Romans per ſenatuſconſultum Velleianum*, that the obligations, by which they became ſurety, or interceded for others, were void: but our cuſtom is, that a wife's obligation for debt, or perſonal obligement, contracted during the marriage, is null [bb]. *And* [c] even, though the bond *was* [d] granted by her and her husband, containing an obligement to *pay annualrent to* [e] the creditor, *as well not infeft as infeft* [e], out of their lands [f], the bond as to the wife, and an appriſing thereon as to her *proper* [g] lands was found null: but here there was no ſpecial obligement *of infeftment* [g] of annualrent, or wadſet of the wife's lands, but generally *to pay the annualrent* [g] out of both their lands, *March* 24. 1626, *Greenlaw contra Galloway.* The like *Hope, husband and wife, Douglas of Tofts contra Elphinſton and Hamilton.* The like *January* 30. 1635, *Mitchelſon contra Mowbray:* in *this* [h] caſe the bond being granted by the man and wife, and thereupon appriſing deduced, *which* [h] ſhe did judicially ratify upon oath never to come in the contrary, yet the bond and infeftment, as to her liferent, was found null, ſeeing there was nothing to inſtruct her ratification, but the act of an inferior court, whereof the warrant was not produced. But a wife's obligation with her husband conjunctly and ſeverally, obliging them to pay, and alſo to infeft in an annualrent out of either of their lands, was found null as to the wife in the obligement to pay, but not as to the obligement to infeft, *December* 15. 1665, *Eleis contra Keith.* Neither was a wife found liable for furniſhing to the houſe in her husband's abſence forth of the country, which did only affect her husband, *Spotiſwood, husband and wife, Howiſon contra Lady Laurenſton.* The like *January* 29. 1631, *Porter contra Law.* The like, though the cauſe of the bond was money advanced for the wife's neceſſary aliment, for which no proceſs was granted againſt her till her husband was firſt diſcuſſed, *December* 21. 1629, *Aiton contra Lady Halkerton.* And alſo a wife's obligation without conſent of her husband was found not to affect her, but him, though ſhe was not *præpoſita negotiis*, but becauſe ſhe was *perſona illuſtris*, and her husband out of the country, *Hope, husband and wife, Ruſſel contra E. of Argyll:* but a wife's bond for neceſſary habiliments for her body found to oblige herſelf, and not her husband's executors (for as to theſe ſhe may contract,) *Hadington, July* 6. 1610. *Wiſe contra Lady Halyrudhouſe.* This muſt be underſtood where the wife has an aliment conſtitute by her husband, or ſome other right exempt from his *jus mariti.* And it was ſo *found* [hh] *in the caſe of Gairns Merchant contra Arthur, December* 19. 1667; *and February* 23. 1672. *Neilſon contra Arthur.*

This privilege of wives was extended to obligations or diſpoſitions made by a wife, though before compleating the marriage, being after contract and *proclamation* [i], whereupon marriage followed, *January* 29. 1633, *Scot* contra *Brown.* The like ſpecially where the *proclamation* [i] was not only at the husband's pariſh church, but *at* [k] the wife's, *July* 8. 1623 *Macdougal contra Aitkin* *. The like of a diſpoſi-

* In this caſe reduction at the husband's inſtance, of a bond, granted by the wife after contract of marriage and proclamation of banns in the man's pariſh church, but before the proclamation at *Edinburgh*, where ſhe and the creditor dwelled, was refuſed.

[z] MS. D. [a] MS. G. [b] MSS. A. B. & H. [bb] See below I. 11. 3. [c] MS. B. [d] MSS. A. B & H. [e] Dec. [f] MSS. [g] Dec. [h] MS. G. [hh] F. *lately found.* [i] 1. edit. & MSS. [k] MS. G.

poſition in favours of the wife's children after the contract and one proclamation, *July* 5. 1611, *Fletcher in Dundee contra*

Yet wives obligations relating to their delinquence are not void, but only ſuch as relate to their *contracting* [l]. So a wife was found obliged to fulfil an act of a kirk-ſeſſion, under a penalty that ſhe ſhould forbear another man's company, which was found not to affect her husband's goods, but her own, *Hope, husband and wife, Bell contra Hog, and the kirk-ſeſſion of St. Cuthbert's.* Here alſo are excepted obligements relating to diſpoſitions of lands, annualrents or liferents: of which hereafter.

XVII. As to the *husband's* [m] and wife's *intereſts* [n] in their goods, by our cuſtom without any voluntary contract there ariſes betwixt them a communion of all moveables, except the habiliments and ornaments of the wife's body, which, tho' they be ſuperfluous, and the husband inſolvent, are not arreſtable for his debts contracted thereafter. [o] The husband hath the full and ſole adminiſtration of all moveable goods belonging or accreſcing to the wife during the marriage, and the rents and profits of heritable rights, as being moveable. And therefore an heritable bond was found to belong to the husband *jure mariti*, becauſe he was married before the term of *Whitſunday*, at which [p] *it was* [q] payable, *June* 15. 1627, *Nicolſon* and *Lyle* contra *Lyle*; *where* [r] *the ſame* [s] was found to belong to the executors of the firſt husband, though the term of payment was after his deceaſe, and not to the wife or her ſecond husband. Alſo a legacy, left to a wife, was found to belong to her husband, *Hope, de legatis, Lawſon contra Bannatine, &c.* Likewiſe a husband was found to have right to a bond, blank in the creditor's name, which the wife during the marriage put in the hands of a third party, who filled up his own name therein, though the husband and wife were voluntarily ſeparate, *February* 11. 1634, *Drummond contra captain Rollock.* Except aliments duly and competently provided for the wife, which are not arreſtable for the husband's debt. And a husband himſelf was found to have no acceſs to a ſum provided to a wife by *his* [t] father for her aliment, *July* 4. 1637, *Tennent contra Futhie.*

This communion of goods by our cuſtom extended not to the wife's heritable rights, as lands, annualrents, heritable bonds, nor to liferents, but only to the rents and profits thereof during the marriage, which the wife cannot prejudge by any deed during the marriage. But as to the ſtock and profits, ſhe may diſpoſe thereof, to take effect after the diſſolution of the marriage: as to which the wife may oblige herſelf perſonally in clauſes relative to ſuch rights, as clauſes to infeft, clauſes of warrandice, and clauſes of requiſition of ſums for which her lands are wadſet, ſuch obligements being effectual againſt the wife. And this is the difference betwixt theſe and other perſonal obligements of the wife *ſtante matrimonio*, which, even though the husband conſent, are null, and oblige her not.

In the heritable rights of wives bonds bearing annualrent, though without a clauſe of infeftment, are comprehended: for theſe remain heritable *quoad fiſcum & relictam* by the act of *parl.* 1661, *c.* 32. And therefore a proviſion by a father to his daughter, bearing annualrent at five *per cent.* was found not to fall under the husband's *jus mariti*, *June* 28. 1665, *Pitcairn contra Edgar*; *July* 4. 1676, *Rollo contra Brownley.*

The *jus mariti* is ſo effectual as to the moveable goods of the wife, that though a liferenter in the contract of *her ſecond* [u] marriage reſerved a part of her liferent lands to be ſolely at her own diſpoſal, and that the husband in the ſame contract of marriage renounced his *jus mariti* thereanent, yet that renunciation was found to be his *jure mariti*, and ſo the profits of her liferent were affected by his creditors, (it not being conſtitute as a formal and proportional aliment,) as was found *in the caſe of the creditors of Mr. Andrew Hamilton contra Lady Carberry his wife*; *and* [w] *July* 13. 1678, *Nicolſon contra Inglis.*

From

[l] I. edit [m] MSS. A. B and H. [n] MSS. B. & H. [o] I. edit. & MSS. [p] MSS. A. & H. [q] I. edit. & MSS. & dec. [r] MS. B. [s] MS. G. [t] Dec. [u] MS. G. [w] F. *and lately.*

From this communion of goods it follows that there is *alſo* [x] a communion of debts, whereby the husband is liable for the wife's debt, though it ſhould exceed both [y] her and his moveables [y]. But this was not found to hold in *criminal things* [z] *and matters of wrong* [a]. And ſo the husband was found not liable for a ſpulzie, or wrongous intromiſſion, committed by his wife without his knowledge or approbation during the marriage, *February* 2. 1628, *Scot contra Banks and Weil*; *Spotiſwood husband and wife*, *inter eoſdem* [b]: *this was* [c] done *ſtante matrimonio* without the husband's conſent. And yet the husband, found liable for the damage of a mill demoliſhed by his wife, as being *præpoſita negotiis*, and by his domeſtick ſervants, tho' he was out of the country himſelf, *Spotiſwood*, *husband and wife*, *laird of Ludquhairn contra Earl Mariſchal*. Neither was a husband found liable for the penalty of the contraveening *an* [d] act of a kirk-ſeſſion *ut ſupra*. [d] A husband was found liable for his intereſt for his wife's tutor-compts, not only *for* [e] what ſhe was liable for during her widuity, but during the time of a former husband, his *ſucceſſors* [ee] being [ee] firſt diſcuſt as to what was done in his time; yea, without the diſcuſſing of the ſucceſſors of the *former* [ef] husband *primo loco*, where the intromiſſion was before both marriages, 28. *March* 1629, *Matthiſon contra L. Wariſton*, but prejudice to the defender to purſue the heirs of the *former* [ef] husband as accords, *February* 18. 1663, *Dunbar of Hemprigs contra Lady and Lord Fraſer*. But a husband was not found liable for furniture given by merchants to his wife without his conſent, ſhe having gone to *London* without his warrant, except in ſo far as her ordinary expences would have amounted to, if ſhe had ſtaid at home, (though her husband had not inhibite her,) *July* 6. 1677. *Allan contra Earl and Counteſs of Southesk*.

After inhibition againſt wives, the husband is not liable for any thing they contract, except what is furniſhed ſuitable to their quality, and where the husband cannot inſtruct that he ſufficiently provided his wife otherways, *July* 25. 1676, *Campbell contra Laird of Ebden*. The like was found *about* the ſame time concerning [f] furniture to the Lady *Monteith* [ff].

But this obligement of the *husband* [g] being only for his intereſt *jure mariti*, the debt itſelf doth not properly become his, but only it may take effect againſt his perſon and goods during the marriage. But if that intereſt *be* [gg] diſſolved by his own or his wife's death, before the legal execution be compleat, affecting his goods, there will be no further proceſs againſt him or his heirs. *And* [h] though there was litiſconteſtation before the wife's death, the husband was found free, albeit he was ordained by interlocutor to find caution to pay what ſhould be decerned, *July* 11. 1664, *Dunbar of Hemprigs contra Lady and Lord Fraſer*. So likewiſe a husband [h] decerned with his wife for his intereſt, ſhe dying before execution, he was free of the debt, *December* 23. 1665, *Burnet contra Lepers*. So likewiſe a husband, decerned with his wife for his intereſt, having died before execution, his ſucceſſors were found free of the debt, *Hope*, *Transferring*, *executors of Kinloch contra Dunbar*. But the contrary was found, where the husband was denounced upon the decreet, and had ſold his wife's portion of land, *ibidem*, *Earl of Murray contra Lord St. Colm*. The like, where the decreet againſt the husband, after his wife's deceaſe, was only found effectual, in ſo far as might extend to his wife's third part of *his* [i] moveables, *February* 7. 1629, *Brown contra Dalmahoy*. And a husband was found liable for his wife's debt after her death, in ſo far as might be extended to the benefit of her liferent duties reſting at her death, *February* 1. 1662, *Cuningham contra Dalmahoy*. *And* [k] the husband is always liable for his wife's debt, even after her death, *in quantum eſt lucratus*. *Which he cannot* [l] be underſtood to be by every benefit or tocher, marriage being an onerous contract, where a tocher is given *ad ſuſtinenda onera matrimonii*, *and for the wife's proviſion by law or paction after the man's death* [m]: and therefore he can only be accounted *lucratus*, when the benefit he hath by his wife doth far exceed thoſe

[x] MSS. A, B. & G. [y] MSS. [z] MS. G. [a] MS. D. [b] I. edit. & MSS. [c] F. *theſe were*. [d] MSS. [e] MSS. A. B. & G. [ee] MSS. [ef] dec. [f] I. edit. [ff] *Gosford*, 23. *June* 1675. *Widow Auchinleck contra Earl of Monteith*. [g] MSS. [gg] F. *were*. [h] I. edit. [i] I. edit. & MSS. [k] I. edit. [l] F. *which cannot*. [m] I. edit.

onera, *December* 23. 1665, *Burnet contra Lepers*. And even in caſe he be *lucratus*, the wife's heritage muſt be firſt diſcuſt, *January* 23. 1678, *Wilkie contra Stewart* and *Moriſon*. [m] A husband being ſummarily charged for his intereſt upon a decreet, obtained againſt his wife before the marriage, and *being* [mm] denounced thereupon, yet not undertaken by him, or affecting his goods before *her* [n] death, he was liberate, *March* 20. 1627 *Knows contra Kneeland*. The like, though not only horning was uſed againſt the husband, but *arreſtment* [o], *January* 23. 1678. *Wilkie contra Stewart and Moriſon*. But a husband having given bond of borrowed money for his wife's furniture, was found liable therefore after her death, *July* 7. 1680, *Slowan contra Lord Bargenie*.

But that the husband's lands or heritable rights will be liable for his wife's debt, there is neither deciſion nor ground for it, thoſe not being *in communione bonorum*. It is more dubious, and, for any thing I know, undecided, whether the heritable debt of the wife will affect the husband *quoad mobilia*. But ſeeing it is a communion of goods only moveable, it ſhould be alſo only of moveable debts.

Though *in communi forma*, as tutors and curators, *ſo* [p] husbands will be decerned generally for their intereſt: yet with this difference, that tutors and curators will be *but* [q] liable, in ſo far as they have the pupil's means; but I never heard, that there was a diſtinction made, whether the wife's debt did exceed the third part of the man's moveables, which is her proportion of the ſame. But indefinitely it hath effect againſt the husband's perſon by caption, or his moveables by poinding.

But a wife's heritable *bond became* [r] not her husband's, though uplifted by her, or made moveable by a charge, during the marriage, ſeeing ſhe then re-imployed the money for annualrent, *February* 21. 1679, *Cockburn* contra *Burn*: for the wife's charge is not to make heritable ſums moveable, but to recover them.

And albeit there is no mention in our cuſtom of affecting a wife's goods for a husband's debt, becauſe all her moveable goods and ſums become his by the marriage, except her *paraphernalia*: yet if a husband's heritable rights could be affected for his wife's debt, there were the ſame reaſon that her heritable rights ſhould be affected for his debt. But a husband's heritable debt affects the moveable goods and ſums in the communion, as being the husband's.

XVIII. Theſe are the intereſts of the man and wife during the marriage. But before we come to their intereſts after the diſſolution thereof, it is to be conſidered, that by our cuſtoms donations between man and wife *ſtante matrimonio* are revocable by the giver during life. Which our *cuſtoms have* [s] taken from the civil law, where this reaſon is rendered, *Ne mutuato amore invicem ſpoliarentur* [t]. Thus a donation *by* a man *to* [u] his wife was found annulled by *his* [u] revocation upon death-bed, ſubſcribed by notars becauſe of his infirmity, * *Hope, husband and wife, Earl of Angus contra Counteſs of Angus*. And a husband was allowed to recall a bond granted to his wife, bearing, that he thought it convenient that they ſhould live apart, and therefore obliged him to pay a ſum yearly for her aliment; albeit it bore alſo, *that he ſhould never quarrel or recal the ſame*, importing a renunciation of that privilege, *February* 6. 1666, *Livingſton contra Beg*. Yea, a donation by a husband to his wife was found revoked by a poſterior right to his children, though it was not a pure donation, but in lieu of another right, and *quoad exceſſum* only, ſeeing it was *notabilis exceſſus*, *November* 20. 1662, *children of Wolmet contra Lady Wolmet*. And an infeftment, bearing lands and a mill, was found revocable as to the mill, it not being expreſt in the wife's contract, *February* 5. 1667, *Counteſs of Home contra Hog*. This was extended to a wife's accepting of an infeftment ** in ſatisfaction of her contract, *February* 12. 1663, *relict of Moriſon contra his*

* This revocation, being made by the husband *in articulo mortis* in preſence of three witneſſes, becauſe he could not ſubſcribe, and thereafter in the ſame paper ratified, approved and declared to be his will in preſence of two notars, *en chattelet de Paris*, was ſuſtained as a formal and ſolemn revocation.

** A wadſet, which was afterwards redeemed.

[m] I. edit. [mm] MS. G. [n] MSS. A. B & H. & dec. [o] F. *arreſtment thereupon*. [p] I. edit. & MSS. A. & G. [q] MSS. A. & G. [r] F. *bonds become*. [s] MS. G. [t] *l.* 1. *D. de don. inter vir. & ux.* [u] MSS. A. & H.

his heir. It is alſo revocable indirectly by the husband's poſterior diſpoſition of the lands formerly diſponed to his wife in liferent, *Hadington July* 16. 1622, *Murray of Lochmaben contra Scot of Haining.* So a donation by infeftment, granted by a man to his wife beſide her contract, was found revoked by an annualrent out of thoſe lands granted to his daughter *pro tanto*, without mention of revocation, *December* 15. 1674, *Kinloch contra Rait.* But donations by a man to his wife, who had no former proviſion nor contract of marriage [w], found not revocable, being in ſatisfaction of the terce due by the marriage, *March* 25. (22. *July*) 1635, *Laird of Laurenſton contra Lady Dunipace.* *But* [x] where the husband granted infeftment of all that he then had, there being no contract of marriage, and thereafter a ſecond infeftment, both *ſtante matrimonio*, the firſt was ſuſtained, being in place of a contract of marriage, but the ſecond was found revocable, *November* 23. 1664, *Halyburton contra Porteous.* And a proviſion to a wife, having no contract of marriage, was found revocable, in ſo far as it exceeded a proviſion ſuitable to the parties, *June* 27. 1677, *Short and Birnie contra Murrays.* Yet the want of a contract did not ſuſtain a donation by a wife to her husband, to whom ſhe aſſigned an heritable bond, the husband being naturally obliged to provide for his wife, and not the wife for her husband, *December* 15. 1676, *Inglis of Eaſtſhiels contra Laurie* of *Blackwood.* *And* [x] a donation by a wife, by aſſignation of her former jointure to her husband's behoof, was found revocable, though there was no contract, unleſs the husband had given a remuneratory proviſion, *January* 22. 1673, *Watſon contra Bruce.* And a wife's conſent to a contract of wadſet of her liferent-lands with a back-tack to the husband, was only found valid as to the creditor, but revocable as to the husband, that ſhe might enjoy the ſuperplus of the *mails and duties* [y], more than the annualrent, *by the back-tack* [y], *June* 28. 1673, *Arnold contra Scot and Frier.* But a donation by a husband to his wife's children of a former marriage, though done at his wife's deſire, *January* 15. 1669, *Hamilton contra Bains*; nor by a wife ſubſcribing her husband's teſtament, by which her liferent-lands were provided to her daughter [yy], *July* 12. 1671, *Murray contra Murray*, was not found revocable. As all donations are revocable for ingratitude, ſo donations between husbands and wives *are annulled by divorce* [z] (*or* [a] adultery, though the party injured ſought not divorce,) *Hope de donationibus inter virum & uxorem, Douglas contra Aiton.* A bond conceived to a man and wife, and her heirs, found a donation by the man (whoſe means it was preſumed to be,) and revocable by him after her death, [22. *March* 1634, *Glaſsford contra Dawling.*] *But* [a] a tack taken by him to himſelf and his wife in liferent, *though it* [a] was *once* [a] found *revoked* [a] by a poſterior tack thereof to himſelf and his brother's ſon, *December* 21. 1638, *Laird of Craigmillar contra Chalmers relict of Nisbet*; yet thereafter it was found, *in the ſame caſe, January* 30. 1639, ([a] in reſpect the tack was ſet by a third perſon, and that it did not appear to be by the man's means [a],) not *revocable* [b]. But a donation betwixt man and wife *after* [c] their contract of marriage, being done before the marriage itſelf, was not found revocable, *January* 23. 1680, *Hume contra Humes.* *Yet* [d] where the donation did bear date before the marriage, the husband's heir proving the writ antedated, and that it was truly after the marriage, the donation was therefore found revocable, *July* 24. 1677, *Earl of Dunfermling contra Earl of Callendar.*

XIX. To come *now* [e] to the *intereſts* [f] of the husband and wife after the diſſolution of the marriage, we muſt diſtinguiſh *betwixt* [g] the diſſolution thereof, which falls by death within year and day from the ſolemnizing *of it* [h], and that which is diſſolved thereafter. For by our cuſtom, if marriage diſſolve within year and day after the ſolemnizing thereof, all things done in contemplation of the marriage become void, and return to the condition they were *in* [i] before the ſame. (And in this our cuſtom agrees to the civil law.) And ſo the tocher returns back to the wife, or thoſe from whom it came: and ſhe hath no benefit *of* [i] any intereſt either

[w] I. edit. & MSS. [x] I. edit. [y] dec. [yy] See below, I. 9. 8. [z] I. edit. & MSS. [a] MSS. [b] I. edit. [c] dec. [d] F. *Yea.* [e] MS. G. [f] MSS B. H. & G. [g] MS. G. [h] MSS. H. & G. [i] MS. G.

either in his moveables or *heritage* [k], by law or contract provided to her; nor hath he any intereſt in hers; unleſs there were a living child born, which was heard cry or weep: in which caſe marriage hath the ſame effect as to all intents and purpoſes, as if it *had* [l] endured beyond the year. And this is extended *both to* [l] the *marriages* [m] of maids and *of* [n] widows, *July* 23. 1634, *Maxwell contra Hairſtains*. And extended alſo to an infeftment by a husband to a wife, though it had no relation to the marriage, but was only preſumed to be *hoc intuitu*, *November* 16. 1633, *Grant contra Grant*. And *alſo* [o] extended not only to the wife and husband and their heirs, but to any other *perſon* [o] concerned, reſtitution being made *hinc inde* of all done *intuitu matrimonii*, *Hadington*, *June* 8. 1610, *Laird of Calder contra Roſs* [p]. Yea a diſpoſition by a father to a ſon of his eſtate, in contemplation of his marriage, which was diſſolved within year and day by the wife's death, was found void, ſeeing the father perſiſted not therein, but infeft his ſecond ſon, 16. *July* 1678, *Lord Burleigh contra Laird of Fairnie*. And a tocher, paid within the year, was ordained to be repaid without any deduction for the wife's entertainment during the marriage, but only for her cloaths which were before the marriage, and her funeral charges which were after the marriage was diſſolved, *February* 23. 1681, *Gordon* contra *Inglis*. But gifts, given to the married perſons by the friends of both ſides, were divided equally, the marriage being diſſolved within year and day, *January* 14. 1679, *Wauch contra Jamieſon*. Yet a wife's infeftment was found valid till her tocher was repaid, though the marriage diſſolved within the year, *July* 20. 1664. *Petrie contra Paul*. But where a marriage continued a year, and a part of the next day after the year, the tocher was found not to return, *nam in favorabilibus dies cœptus habetur pro completo*, *February* 25. 1680 *Waddel* contra *Salmond*. *But* [q] if a living child was born, the marriage was found effectual, though both *child and mother* [r] died within the year, *Spotiſwood*, *husband and wife*, *Stewart contra Irvine*. The reaſon, why the child muſt be heard cry, is to make certain its lively ripeneſs, and not to leave it to the conjecture of the witneſſes; and therefore it ſufficeth not though they ſhould declare, that the child was living immediately before the birth, and appeared lively and full ripe when it was born, but that it was ſtifled in the birth [s].

XXII. Marriage *diſſolved* [t] by divorce either upon wilful non-adherence (or wilful deſertion) *or* [u] adultery, [w] the party injurer loſeth all benefit accruing through the marriage, (as is expreſly provided by the foreſaid act of *parl.* 1573. *c.* 55. concerning non-adherence,) but the party injured hath the ſame benefit as by the other's natural death, *March* 21. 1637, *Lady Manderſton contra Laird of Renton*. But if divorce follow upon impotency, all things return *hinc inde*, becauſe in effect there was no marriage, as was found, *Hadington*, 14. *July* 1610, *Earl of Eglinton contra Lady Eglinton*.

XXIII. By the diſſolution of marriage, there ariſe to married perſons, not only thoſe rights which by voluntary contract are conſtitute to either, (and which are not proper here,) but alſo thoſe, which by *the* [w] law and cuſtom are competent without any ſpecial convention or covenant. And theſe are either upon the part of the husband, or more frequently upon the part of the wife. To the husband is competent the liferent of the wife's heritage, which, becauſe it is peculiar unto theſe nations [w], is ſaid to be *the courteſy of Scotland or England*. To the wife ariſeth her ſhare of the moveables, which is the half, where the man hath no children *in familia*, and the third, where there are ſuch, and her terce, which is [x] the third part of his lands during her life. But of reverſions, heritable bonds, diſpoſitions or rights of lands without infeftment, and of teinds, * or tacks or tenements within burgh, the relict hath no terce. Theſe rights of terce and courteſy fall in to be con-

* Here the learned author ſeems to have had in view that of *Craig* (*lib.* II. *d.* 22. § 34.) *Neque aſſedationum triens debetur, cum aſſedatio non ſit feudum, neque decimarum ob eandem rationem.* But below II. 6. 16. he obſerves that the terce is extended to infeftments of tiends, 13. *February* 1628. *Counteſs of Dunfermling contra Earl of Dunfermling*.

[k] I. edit. & MSS. [l] MSS. [m] MSS. B. & G. [n] MS. G. [o] MSS. [p] *Nicolſon, Roſs contra Campbell*. [q] I. edit. & MSS. [r] MSS. [s] See above I. 4. 12. and below II. 6. 19. [t] MSS. [u] F. *or by*. [w] MSS. [x] I. edit. & MSS.

onſidered among the feudal rights; and the relict's third or half of moveables n the ſucceſſion of moveables, wherein it is a concomitant, and regulate according o that which is proper [x] ſucceſſion either of children or others, though as to the wife it be rather *a* [x] diviſion of that communion of moveable goods, that was competent to the married perſons during the marriage: and therefore ſhall be inſiſted on no further here, but left to their proper places [y].

XXII. Law and cuſtom hath favoured and privileged wives in many caſes *propter fragilitatem ſexus* [z]. They are free from obligements for ſums of money, and from perſonal execution by horning or caption, if it be not for criminal cauſes. Their contracts of marriage were commonly thought preferable to other perſonal creditors, *February* 8. 1662, *Crawford contra the Earl of Murray*; *November* 8. 1677, *Sinclair contra Richardſon and her ſpouſe*. But there was a contrary deciſion upon full hearing *in præſentia*, *Keith contra Keith*, *February* 17. 1688. Their ſhare of their husbands moveables is not burdened with the husbands heritable debt, *December* 23. 1668, *Mackenzie contra Robertſons*; *July* 19. 1664 *Scrimgeour contra executors of Murray*. Yea a gratuitous moveable bond granted by a husband, payable at his death, whereby the whole executry would be exhauſted, and the wife have no ſhare, having no other proviſion, *was* [zz] not found to affect the wife's ſhare: but otherwiſe ſuch bonds, granted in *liege pouſtie* without fraud, were found to come off the whole head, and not off the dead's part only, *December* 8. 1675, *Thomſons contra creditors of Alice Thin*. And a a wife was found not excluded from her ſhare of her husband's moveables by a gratuitous diſpoſition, by her husband to his brother, of all ſums that he ſhould have at his death, *January* 10. 1679, *Grant contra Grant*. In like manner the infefments and proviſions of wives are effectual, although the tocher, which is the mutual cauſe thereof, be not paid (ſhe not being obliged therefor herſelf,) though the contract bore, that, the tocher being paid, it ſhould be employed to the wife's uſe, *July* 5. 1665, *Mackie* contra *Stewart*. The like, though the contract bore, that the husband ſhould employ the tocher for the wife in liferent, albeit the tocher was loſt through the father's inſolvency, *June* 11. 1670, *Hunter contra creditors of Peter*. The like, though the contract bore, that the wife ſhould have no benefit, while the tocher ſhould be fully paid, if the tocher could *have been* [a] recovered by the husband's diligence, *November* 21. 1671, *Menzies contra Corbet*. On the ſame ground a contract of marriage, bearing the one half of the tocher to the wife, failing children, albeit conceived *paſſive*, and not that the huſband was to pay the ſame, or do diligence therefor; yet the husband was found liable to pay the half of the tocher, although it was not recovered, unleſs he had done the diligence of a provident man, which was found implied in his duty and truſt as [b] husband, the wife being *in poteſtate viri*, *July* 14. 1676, *Lockhart and Laird Raploch her ſpouſe contra Bonner*. And though *the husband* [c] have no communion in the habiliments and ornaments of the wife, which cannot be affected for his debt: yet ſhe hath her ſhare of the habiliments of the husband, which fall in his executry; and he is obliged to pay all accompts for her habiliments, ſuitable to her quality. But where the wife had an alimentary proviſion for her habiliments, ornaments and her other uſes, the husband having furniſhed them, and received that ſum, was not found liable to repay the ſame to her executors, *February* 2. 1667, *executors of Lady Pilton contra Hay of Balhouſie*. Wives have not only a half or third of their husbands moveables, when they ſurvive, but have their aliment to the next term after the husbands death. Yea a wife was found to have right to the expences of child-bed of a poſthumous child, born after the *next term* [d], againſt the eldeſt ſon, though he was not heir, but [d] having an univerſal diſpoſition to his father's means (which was very conſiderable,) [d] which diſpoſition was granted after the poſthumous child's conception, *November* 10. 1671, *Haſtie and Ker his mother contra Haſtie*. And likewiſe, if the wife predeceaſe, her executors have the half or third of her husband's moveables, the beſt of every

[x] I. edit. & MSS. [y] Below, II. 6. & III. 8. [z] I. edit. [zz] F. *the ſame was*. [a] dec. [b] I. edit. [c] F. *husbands*. [d] I. edit.

kind being ſet aſide as heirſhip *moveable* [e], though there could be no heir for the time, the husband being alive, *December* 8. 1668, *Guidlat contra Nairn.*

We ſhall proceed to the next kind of obediential obligations and natural rights, which *interveeneth* [f] betwixt parents and children.

TITLE V.

Obligations between parents and children.

I. *Obligations betwixt parents and children are divine, and by the law of nature.*
II. *The power of parents over their children.*
III. *In infancy.*
IV. *In minority.*
V. *In majority.*
VI. *Oeconomical government.*
VII. *Proviſion of children.*
VIII. *Obligations of children to their parents*
IX. *Aliment due to parents.*
X. *Obligations of children amongſt themſelves.*
XI. Patria poteſtas *amongſt the* Romans.
XII. *Amongſt other nations. Eſpecially as lawful adminiſtrator.*
XIII. *Foriſfamiliation and emancipation.*

THat there are natural obligations betwixt parents and children, not proceeding from the conſent of either party, or from the conſtitution of any human law, but from the obedience man oweth to his Maker, who hath written this law in the hearts of parents and children, as to their intereſts and duties, with capital letters, is evident by the common conſent of all the nations of the world, how barbarous ſoever. [g] Though evil cuſtom hath put out the eyes of natural light in other things, yet in this the rays of the Sun of righteouſneſs are ſo direct, that their illumination cannot be extinguiſhed. [g] Thoſe obligations are ſo *from God* [h], that in moſt things they cannot be taken off, nor diſcharged by men. Though children would diſcharge their parents of natural affection, education, proviſion, *&c.* or parents would free their children of reverence, obſequiouſneſs, and of entertainment of parents not able to entertain themſelves: yet would theſe obligations ſtill be binding upon either. Thoſe obligations are placed in the common nature that man hath with other animals, and ſo are given as *an* evident *inſtance* [i] of the law of nature, *l.* 1. § 3. *de juſtitia & jure.*

We ſhall then conſider what thoſe are: and *firſt*, What intereſt the parents have in the perſons *and goods* [k] of their children; *ſecondly*, In what they are naturally bound to their children; *thirdly*, What intereſt the children have in the goods of their parents; *fourthly*, What they *do naturally* [l] owe to their parents; *fifthly*, What they are bound *in* [m] to each other.

II. For the *firſt*, ere we can diſtinctly know the power parents have over their children, we muſt diſtinguiſh the *capacities* [n] and ages of the children: whereof there are three, infancy or pupillarity, minority or leſs age, and majority or full age. So doth *Ariſtotle* [o] diſtinguiſh, and after him *Grotius* [p].

III. Infancy is, when the children are without diſcretion. And then *they* [q] are wholly in the power of their parents, who not only may, but muſt carry them whither, and keep them where they will; and muſt alſo breed and order them according to their capacities, means and qualities. And this is rather an act of dominion in the parents, than from any obligation of the children to ſubmit to them.

IV. *During the childrens minority, wherein there is a natural levity for want of fixedneſs and experience, while the light of reaſon is but drawing towards its meridian clearneſs* [r], it will not be *much doubted* [s] but the direction of their *perſons* [t] is naturally ſtated in their parents.

V. But

[e] Dec. [f] MS. G. [g] I. edit. & MSS. [h] MSS. A. B. & H. [i] I. edit. & MSS. [k] MSS. [l] MS. G. [m] I. edit. [n] MSS. A. B. & G. [o] *Pol.* I. *c. ult. Nic.* IV. 3. *Eth.* V. *c.* 10. [p] *De jure bel. ac pac.* II. *c.* 5. [q] MSS. [r] I. edit. & MSS. [s] MSS. A. B. & H. [t] MSS.

V. But the greateſt queſtion will remain of their full age, when the children become able to govern themſelves and their own affairs. [t] As to *this* [u] it is the opinion of ſome [w], that it ſtandeth alone *in pietate & reverentia.* And *Vinnius* [x] ſheweth, that the cuſtom of *Holland* diſſolveth the power of fathers by the childrens age of twenty five years.

VI. Whatſoever may ariſe from the cuſtom of nations, whereby the power of parents over their children in their full age is much diminiſhed: yet by the original and pure law of nature, not only the tutory and protection of childrens infancy, with the [y] *cure* and direction of their minority, is in their parents; but there is alſo an oeconomick authority in the father of the family over all his children and deſcendents, remaining in his family, whom he hath not elocat by marriage (which is alſo a natural bond) *into* [z] other families, whereby the females do naturally change their families, and become under the power of another family.

This is the only natural authority and government, which had in itſelf all authority, publick, private, civil and criminal, till by human conſtitution and divine approbation moſt of that power is now devolved upon *magiſtracy* [a]. This power was not only before magiſtracy, but even remained thereafter with ſubordination thereto in moſt nations. As *Cæſar* [b] writes, that among the *Gauls* and *Belgæ* parents had the power of life and death. The like power had the *Romans* anciently [c]. *Ariſtotle* [d] teſtifieth the like of the *Perſians*. And by the judicial law [e], the rebellious ſon, who obeyed not the voice of his father and mother, was to be brought forth before the elders of his city, and ſtoned to death, without other proof than the parents teſtimony: ſo that the ſentence was the parents, tho' the execution was to be publick. Such authority was that of the patriarchs *Abraham, Iſaac* and *Jacob*, who with divine approbation made war, peace and confederacies, which are now the publick and proper rights of magiſtracy, and governed their own families, without any authority derived from *others* [ee]. And though *Jacob*'s family aroſe to that greatneſs, that in it were many families, yet he remained the father and prince of them all: ſo that the ſeveral ſubordinate families had their ſubordinate authority over their wives and children, (and ſo their children were bound in obedience to them, but with the exception of their ſuperior parents, to whom the firſt obedience *was* [f] due;) *and as* [g] to the differences, ariſing between inſubordinate poſterity, *they* [h] remained under the authority of the common fathers.

This *native* [i] authority reacheth all children, whether procreate of lawful marriage or not, ſo [k] they be truly known to be children; becauſe the ſame foundation and common principles and duties are in both, though they have not the ſame intereſt in the father's goods, in reſpect of that community of goods betwixt man and wife in the conjugal ſociety even naturally, whence the goods are derived to the iſſue of the lawful marriage.

This paternal authority doth not neceſſarily carry the property and diſpoſal of the goods of the children: but that they are capable of ſuch by the gift of their parents *or others* [l] or any otherways, even in infancy; and that they have the full dominion and adminiſtration thereof in their full age. And therefore bonds of proviſion by fathers to children, if delivered, are not revocable directly, nor indirectly by contracting debts thereafter. And the delivery of ſuch bonds of proviſion makes them irrevocable, whether the delivery be to the children, or to any other for their behoof, (which behoof will be preſumed, unleſs the father expreſs his mind at the delivery, that the writ is to be returned to himſelf, or *depoſite it* [m] upon terms.) And therefore a bond taken by a father in the name of his brother, the father obtaining an aſſignation from him to his daughter, the bond was not found revocable by the father, being regiſtrate in the brother's name, *November* 20.

[t] MSS. [u] MSS. A. B. & H. [w] *Stephanus, œcon. juris, lib.* II. *c.* 7. [x] *Partitionum juris, lib.* I. *c.* 7. *in prin.* [y] I. edit. [z] MSS. A. & G. [a] I. edit. & MSS. [b] *De bello Gallico, lib.* VI. [c] *l.* 11. *D. de lib. & poſtum. hered.* 10. *C. de patr. poteſt.* [d] *Nic.* VIII. *c.* 12. [e] *Deut.* xxi. 18.—21. [ee] MSS. A. B. & H. [f] I. edit. & MSS. A. H. & G. [g] F. *due; as.* [h] F. *wherein they.* [i] I. edit. & MSS. [k] MS. G. [l] MSS. [m] F. *depoſitat.*

20. 1667, *executors of Trotter contra Trotter.* Childrens proviſions by bond, granted after *a* [n] teſtament, nominating them executors [n], found not to import that they ſhould have the executry, and [n] the heir *be* [n] obliged to pay the bonds of proviſion, but *that* [n] the bonds being moveable, ſhould *firſt* [n] affect the executry, *Feb.* 22. 1677, *Belſhes of Tofts contra Belſhes.* And a father, granting bond to a bairn in ſatisfaction of her portion-natural, was not found thereby to apply that bairn's portion natural to the heir, executor or univerſal legatar, though they would be liable for payment of the bond; but to apply that bairn's ſhare to the reſt of the bairns, who thereby will have the whole bairns part, *February* 17. 1671, *Macgill againſt the Viſcount of Oxford.* [o] Bonds of proviſion, delivered in *liege pouſtie*, do as other debts affect the whole executry: and where all the bairns had bonds of proviſion, none bearing in ſatisfaction, they had alſo their bairns part of the executry, *July* 16. 1678, *Murrays contra Murrays.* But bairns proviſions payable at ſuch an age, and not bearing the proportion of the deceaſing to accreſce to the ſurviving, the ſhare of thoſe bairns, who died before that age without iſſue, was not found due, *February* 22. 1677, *Belſhes of Tofts contra Belſhes* [p]. [q] The delivery of [q] writs in other caſes is preſumed from the date, if they be in the perſon's hands, in whoſe favours they are granted: but in competition with other creditors, the delivery of bonds of proviſion is not preſumed to have been from the date, but that muſt be inſtructed by ſome evidence, as taking ſaſin, regiſtration, or witneſſes who ſaw the ſame in the hands of the children, or others to their behoof. And in that caſe they are valid, if there be no fraud, or prejudice to creditors by inſolvency. And therefore bonds of proviſion to children were reduced upon the eldeſt ſon's contract of marriage, though poſterior, *January* 10. 1668, *Laird of Glencorſe contra his brothers and ſiſters*; and a poſterior tocher was preferred to a prior aſſignation to a bairn in family, 14. *November* 1676, *major Inglis contra Boſwels*: unleſs the prior delivery [q] were alſo proven, *July* 22. 1668, *Johnſton of Sheins contra Arnold* [r].

From this paternal power it follows, that the parents may *contain* [rr] and keep their children in their families; and that they are obliged to employ their ſervice and work for the common intereſt of the family; and what thence ariſes is the parents, not their own: which doth always endure, till by conſent of the parents they become *foris familiat*, whereby they may employ their work and ſervice for themſelves alone.

Thus the intereſt of parents in the perſons and goods of *their* [s] children, by the law of nature, being cleared: as to the natural obligations of parents toward their children, beſide *thoſe* [s] obligations that ſtand, and are acted in the mind and affections, (which the law reſpecteth not, but thoſe only, *quæ non mente, ſed manu, tenentur,*) the main obligations are education and proviſion. The education of children conſiſteth not only in the care and entertainment of them during infancy, but eſpecially in breeding of them for ſome calling and employment according to their capacity and condition.

VII. The duty of *proviſion* [t] of children, comprehends not only their aliment and entertainment in meat *and* [u] clothes, medicine and burial, *&c.* [w] which may be competent during the parents life, but alſo competent proviſion after the parents death. (For the apoſtle [ww] ſaith, *If any provide not for his own family, he is worſe than an infidel.*) *But* [x] in both, the ability of the parents, and *the* [y] neceſſity of the children is to be conſidered. For if the children be competently provided *aliunde*, the parents are not bound: and though the children be neceſſitous, yet there muſt firſt be reſerved for the parents that which is neceſſary for *their* [z] ſubſiſtence; ſo that, when they are not able to entertain their children, they may lawfully expoſe them to the mercy and charity of others. But a father, though indigent, was decerned to receive his ſon (having no means or calling) into his family,

[n] I. edit. [o] F. *for bonds.* [p] See above. I. 3. 7. [q] I. edit. [r] See below I. 7. 14. I. 8. 2. & III. 8. 45. & 46. [rr] MSS. A. B. & H. [s] MSS. [t] I. edit. & MSS. [u] MSS. A. & H. [w] MSS. A. H. & G. [ww] 1 *Tim.* v. 8. [x] MSS. [y] MS. G. [z] MSS. A. B. G.

family, or to pay him a modification, *January* 13. 1666, *Dick contra Dick*. But a father was not found liable to pay a merchant for furniture given to his ſon, where he gave his ſon an allowance in money for his clothes, *January* 20. 1672, *Wallace contra Crawford of Camber*. Neither was a father found liable for his daughter's bridel-furniture, to a merchant whom he prohibite to give them off, but the daughter and her husband, *July* 10. 1672. *Neilſon contra Guthries and Gairn*. And a mother was found obliged to receive her children into her family, but for no other modification, though they were noble perſons, there being none, repreſenting the father, able to entertain them, *February* 23. 1666. *Children of the Earl of Buchan contra the Counteſs of Buchan*.

As to the intereſt children have in the goods of their parents, it is to be conſidered, as either during the parents life, or after their death. For the intereſt they have after their parents death, it falleth in to be conſidered among the conveyances of rights by ſucceſſion, of which in its proper place. But during the parents life they have no real right of dominion or property in the parents goods: for though the parents be obliged naturally to entertain and educate their children out of their goods, yet that is but a perſonal right, and intitleth not the children to meddle with their parents goods upon that pretence; as *Solomon* [a] ſaith, *Whoſo robbeth his father or his mother, and ſaith, it is no tranſgreſſion; the ſame is the companion of a deſtroyer*.

VIII. The obligation of children toward their parents conſiſts mainly in their obedience to them, and their duty to aliment and ſupply them in all their neceſſities according to the childrens ability. Their obedience to their parents is much cleared from that power and authority their parents have over them, of which we have ſpoken [b]. For unto authority, or power of command, ſubjection or obedience anſwers, as the correlate: ſo that as the *paternal* [c] power was moſt over the children when in *family* [d], and leaſt after their foriſfamiliation, ſo are the duties of obedience proportional. But after emancipation thoſe duties are ſo far diminiſhed, that little remaineth except *that* [e] natural reverence, tenderneſs and obſequiouſneſs that children do ſtill owe to *all* [f] their parents in due order: which, though it hath no civil remeids, yet [g] remains *as* [h] a natural obligation to obſerve the parents commands throughout their poſterity; as in that *notable* [i] example of the *Rechabites*, *Jer.* xxxv. is clear, where they *obſerved* their father's command in a free thing, though inconvenient, *viz.* To drink no wine, to build no houſes, *&c.* and for their obedience the Lord promiſes, there ſhould not be wanting a man of them to ſtand before the Lord for ever. But while they are in the family, they are not only under the occonomical government of their parents, in ſo far as is not devolved upon the magiſtrate, but ſpecially they are bound to abide with their parents, and to employ their ſervice for their parents, and for the uſe of the family, whereunto their parents may compel them by their own proper authority. And parents have action againſt all others who ſhall hinder them to keep their children with them, or lead them whither, and employ them as they pleaſe.

IX. The obligation of aliment and relief to parents in neceſſity is due both by the law of nature, and hath in it alſo that remuneratory obligation, whereby children ought to retribute to, and recompenſe their parents for their education and entertainment. And though it be ſaid, *The children ought not to lay up for the parents, but the parents for the children* [k]: yet it is to be underſtood of that care, foreſight and providence, that parents ought to have, not only to provide things neceſſary for themſelves, but for their children alſo after them; which, being an ordinary duty, ought to be in their *thought* [l] and conſideration, and is not incumbent to the children, it being but rare and unexpected, that parents neceſſities put them to expect relief from their children; or elſe it is to be taken comparatively, that the parents are rather to lay up for the children, than children for the parents. *Solon*'s *laws* [m] made the children infamous who did not aliment their

[a] *Prov.* xxviii. 24. [b] I. edit. & MSS. [c] MSS. [d] F. *their family*. [e] MS. G. [f] MSS. B, H. & G. [g] MSS. B. & G. [h] MSS. A. B. & G. [i] MSS. [k] 2. *Cor.* xii. 14. [l] I. edit. & MSS. [m] MSS.

parents. And *Cicero* [mm] ſaith, *Parentibus nos primum natura conciliat, quos non alere nefarium eſt.*

In theſe natural obligations of aliment betwixt parents and children the order of nature muſt be obſerved, that the neareſt are firſt to be preferred, and the paternal line before the maternal, as being in another family: for even the diſtinction of families, and *the* [n] union thereof in the paternal power, is natural, as before is ſaid. From the ſame ground parents muſt firſt aliment their children in the family: and amongſt thoſe that are emancipate, the males are preferable to the females, who paſs by marriage into other families.

X. As to the *mutual* [o] obligation of children amongſt themſelves, there is no doubt, but that there naturally ly greater obligations upon them each to other, than the common obligations betwixt man and man. Which are not only greater in the meaſure and degree, as to love them, aſſiſt them, ſupport them, and ſupply their neceſſities the more, by how *much* [p] nearer *a* [q] degree of blood they are bound to them than to others (which is commonly acknowledged by all:) but the *Romans* and many other nations have acknowledged the natural *obligation* [r] of brothers and ſiſters to aliment each other; though our cuſtom hath not authorized the ſame, unleſs the brother were heir to the father in a competent eſtate, and the remanent children not at all provided. In which caſe the lords have modified an aliment to them, *January* 24. 1663, *the children of Wedderlie contra the heir*: aliment was alſo found due by a brother to a ſiſter of a ſecond marriage, who had a portion to be paid (*by obligation* [s]) at her age of fourteen *years* [t], and no annualrent or aliment in the mean time [u], *February* 11. 1663 *Frazer contra Frazer.* The like found due by an heir-male to heirs of line till their marriage, [*or payment of their portions* [w]], ſeeing their portions bore no annualrent, *November* 12. 1664, *daughters of Balmanno contra heir-male thereof*; though they had a mother on life, *January* 8. 1663, *Lady Otter contra Laird of Otter.* It is alſo a natural obligation upon children or kinsfolk, deſcending from one common ſtock, to defend, and have the tuition of the pupillarity of that race; which is incumbent ordinarily to the next degree *of* [x] that ſame family: and this is the natural riſe of tutors, of which in the next title.

XI. The *Romans* did no more diminiſh the conjugal intereſts and obligations competent by nature, (as is before ſhown,) than they have exceeded the law of nature in the intereſts betwixt parents and children. For thereby the parents power *is* [y] ſo great, that no nation hath the like [z], it being almoſt dominical, and the children as ſervants, *not capable of goods* [a]. The father had alſo the power of life and death [b]. They had power alſo to ſell their children *into* [c] ſervitude. This was the antient *Roman* law, whereof the auſterity was by little and little corrected by their recent law; ſo that both in ſervants and children *that power was taken off* [d], *and this* [e] retrenched to caſes of extreme neceſſity [f]. Children were permitted alſo to have goods of their own, (which were called *peculium*,) in which they were as free, and had all their rights, and actions competent, as others, but with *this* [g] *diſtinction* [gg] (whereby the right of the father in the goods of the children was much abated.) [h] *Of* [i] the *peculium*, which the ſons acquired by arms or liberal arts, the fathers had no power, which *was* [k] called *peculium caſtrenſe vel quaſi caſtrenſe*, in *which* children were as fathers of families [l]. Of other goods which befel the children, or were acquired, and came not from the father, which were therefore called *adventitious*, the father had the uſufruct and adminiſtration only, but not the property or power of alienation [m]. Yea even the uſufruct ceaſed, 1. in goods given or left to the children, excluding the parents [n]; 2. next, where any thing was given, or left to both jointly [o]; 3. when the goods came by the father's fault, as when he did unjuſtly divorce with the mother [p]. Only

[mm] *De reſp. aruſp.* [n] MSS. B. & G. [o] MSS. A. & B. [p] MS. G. [q] MSS. A. B. & H. [r] MSS. B. & G. [s] MS. A. [t] MSS. A. & G. [u] Dec. [w] Dec. [x] MSS. [y] I. edit. & MSS. [z] § 2. *Inſt. de patr. poteſt.* [a] MSS. *l.* 79. *D. de adq. vel om. her.* [b] *l.* 11. *D. de lib. & poſtum. her. l.* 10. *C. de patr. poteſt.* [c] MSS. B. & G. [d] & 2. *Inſt. de his qui ſui vel al. l.* 1. § 2. *D. eod. tit.* which are cited in the MSS. [e] F. *it was taken off; and this power.* [f] *l.* 2. *C. de patribus qui fil.* [g] MS. D. [gg] F. *reſtrictions.* [h] MSS A. B. & H. [i] MS. G. [k] MSS. *l l.* 2. *D. de SC. Mac.* [m] *l.* 2. *C. de bon. matern.* [n] *Nov.* CXVII. *in prin.* [o] *Nov.* CXVIII. *c.* 2. [p] *Nov.* CXXXIV. *c.* 11.

ly *in profectitio peculio*, which came from the father, he had full right and property, and all permitted to the son was to make use of, and manage it [q], until it was recalled by the father.

XII. The custom of *the* [r] neighbouring nations does follow more closely the natural law, as [s] of *France* and the *Netherlands is* [s] recorded by *Gudelinus* [t]. And *Matthias Stephanus* [u] testifieth the like of the custom of *Germany*. The custom of this nation also keepeth close to what is expressed before of the natural law, as to the interests and obligations of parents and children. And thereby aliments are frequently decerned to children, to be paid by their fathers, if they expel them from their families: and that not only by the act of parliament [w], providing aliment to heirs of lands, to be paid by the liferenters; but a father, though his son had no lands, was found conveenable *super jure naturæ alendi liberos*, *July* 21. 1636, *laird of Ramorney contra Law*.

So also by our custom a father is tutor of law to his sons being pupils. And therefore a father was found liable to the son for annualrent of his mother's third of moveables, remaining in the father's hands, *February* 4. 1665, *Beg contra Beg*. But a father was not found obliged for annualrent of a legacy belonging to his son, uplifted by him, seeing he alimented the son, *December* 15. 1668, *Winram contra Eleis*. But a father, being poor, was not allowed to lift his *bairn's* [a] money, without finding caution to make it forthcoming, *February* 12. 1633. *Govan contra Richardson*. Neither might a father, being *lapsus bonis*, assign a tack, acquired by him to his son *, though he might uplift the duties as administrator, *January* 29. 1629, *Lands contra Douglas and Lands*. A father is also curator to his children, especially when in his family, unless other curators be chosen by his consent. So deeds done by such minors, without their father's consent as lawful administrator, were found null, *Stewart contra Home of Renton* [b]. After pupillarity, a father is no more tutor to his children: and so might not discharge for his daughter, being past pupillarity, but only consent with her as curator, *Hadington*, *June* 26. 1610, *Forester contra Forester*. A father is lawful administrator, both as tutor and curator, *honorarie*, of himself, without any cognition or solemnity; and is not liable for omission; neither is he exclusive of other curators. But deeds, done without a father's consent by a son, were found null, albeit the son resided not in his family, but followed the law, having no calling or patrimony to maintain himself, but living on his father's charges: neither was his father's subscribing with him found a sufficient authorising of him, seeing he subscribed with his father, as cautioner for him, *December* 7. 1666, *Mackenzie contra Fairholm* [bb].

XIII. As to the father's power to keep his children within his family, and to apply their work for his use, (though controversies in that point have seldom been moved, but the matter transacted by consent,) it is not to be doubted but [bc] children may be compelled to remain with their parents, and to employ their service for their use, even after their majority. Unless they be *forisfamiliat* by marriage, or by education in a distinct calling from their parents: *or* [bc] unless their parents deal unnaturally with them, either by atrocity, or unwillingness to provide them with a competent marriage in due time, and with means suitable to their condition; for that obligement to provide for them would be a ground of exception against them, if they would unjustly detain them in these cases: or if the father countenance or allow the children to live by themselves, and to manage their own affairs apart; from whence his tacit consent to their emancipation may be inferred. In which cases also *Zasius* [c] and *Matthias Stephanus* [d] do declare that the consuetude of *Germany* is the same with our customs before expressed. The *English* account children to be emancipate, so soon as they pass their minority [e].

TIT.

* It was a tack of a tenement belonging to the son, set by the father as lawful administrator.

[q] F. *manage it for their own advantage until*, II. edit. *manage it for the father's advantage*, I. edit. & MSS. [r] I. edit. & MSS. [s] MSS. A. B. & H. [t] *De jure novissimo, lib.* 1. *c.* 13. [u] *Oecon. juris, lib.* II. *c.* 7. § 4. [w] 1491. *c.* 25. [a] Dec. [b] I. edit. & MSS. [bb] See below I. 6. 33. [bc] MSS. [c] *ad l.* 107. *D. de verb. oblig.* [d] *Oecon. juris, lib.* II. *c.* 7. [e] *Cowel. Inst. juris Anglic. lib.* 1. *tit.* 12. § 4.

TITLE VI.

Obligations between tutors and curators, and their pupils and minors; between perſons interdicted and their interdictors.

I. *The riſe of tutory in the law of nature.*
II. *Order of tutory by the law of nature.*
III. *The natural obligations of tutors.*
IV. *Pupils obligation to their tutors naturally.*
V. *Kinds of tutors.*
VI. *Tutors teſtamentar.*
VII. *Tutors teſtamentar exclude all others.*
VIII. *Tutors of law, who.*
IX. *How tutors of law are entered.*
X. *The time within which they muſt enter.*
XI. *Tutors dative.*
XII. *Pro-tutors.*
XIII. *Factors for tutors.*
XIV. *Co-tutors.*
XV. *Tutor's cuſtody of the pupil's perſon.*
XVI. *Tutors authorizing their pupils.*
XVII. *Tutors or their factors rights, relating to the pupils, accreſce to them.*
XVIII. *Tutors can only do neceſſary, not free arbitrary deeds; and may not ſell lands* ſine authoritate judicis.
XIX. *Tutors are liable for annualrent of their pupils means.*
XX. *Tutors are conveenable with their pupils, and liable* in quantum intus habent.
XXI. *Tutors accompts.*
XXII. *Tutors are liable for exact diligence, both for intromiſſion and omiſſion.*
XXIII. *Co-tutors are liable* in ſolidum.
XXIV. *Tutory how finiſhed.*
XXV. *Tutors of idiots and furious perſons.*
XXVI. *Removing of ſuſpect tutors.*
XXVII. Geſta tutorum accreſcunt pupillis.
XXVIII. *Duty of pupils to their tutors.*
XXIX. *Riſe of curators.*
XXX. *The way of their conſtitution.*
XXXI. *Curators* ad litem & ad negotia.
XXXII. *Minors may at their option chooſe, or not chooſe curators.*
XXXIII. *Minors deeds, having curators, without their conſent are* ipſo jure *null,* niſi in quantum lucrantur.
XXXIV. *Curators conſent how far requiſite to latter-wills.*
XXXV. *Differences in office between tutors and curators.*
XXXVI. *Duty of curators.*
XXXVII. *Curators or interdictors for prodigals or laviſh perſons.*
XXXVIII. *Interdictors conſtitute* cauſa cognita.
XXXIX. *Interdiction by parties conſent.*
XL. *Publication and regiſtration of interdictions.*
XLI. *Interdictions only extend to heritable rights, and not moveable, nor to perſonal execution.*
XLII. *Interdiction only competent by way of reduction.*
XLIII. *Interdictions cannot be taken off but by the authority of a judge.*
XLIV. *Reſtitution of minors upon enorm leſion.*
XLV. Minor non tenetur placitare ſuper hereditate paterna.

TUtors and curators ſucceed [f] in the place of parents: and their obligations have a near reſemblance; and therefore ſhall be here fitly ſubjoined. Tho' in the conſtitution and duties of tutors and curators the poſitive law predomineth, yet that without any poſitive law or contract there is a duty of tuition and protection of orphans, [f] ſpecially upon thoſe, who by relation of blood are their neareſt kinſmen, and in place of their parents, it will appear by what enſueth: and what is ſuperadded, either by the conſent of parties in curators, or by the law in tutors, with the condition and intereſt of pupils and minors, cannot conveniently be ſeparated. If there were no poſitive law, the natural infirmity of pupilage would not want its natural remedies, provided by him, who is the father of the fatherleſs, and layeth his obediential obligations upon thoſe, whom by the law, written in their hearts, he hath bound to the performance of thoſe duties. As is before [g] ſhown, there is a common obediential, or natural obligation upon all men of

[f] MSS. [g] I. 1. 19.

of love, mercy, and relief of the diſtreſſed, among whom infants and pupils, who have no diſcretion, and cannot at all preſerve or govern themſelves, are the firſt. It hath been alſo ſhown [h] that there is a more ſpecial obligation put upon thoſe of one blood, one family, from one common parent, to help and ſupport each other, *and that* [i] in order, the firſt and neareſt degree *being* [i] firſt and moſt obliged.

II. Hence ariſeth that comely *and* [ii] natural ſubſtitution of tutors for the preſervation of pupils. *Firſt*, The fathers, *of whoſe* [k] tutory and lawful adminiſtration we have ſpoken already. And thoſe failing by death or incapacity, the neareſt degree of agnates are in the place of parents; and are all jointly bound to this natural duty: unleſs the parents by their paternal power have appointed and ordained others, whom they truſt, to undertake that work. But becauſe the privilege of primogeniture with us gives the ſucceſſion to the eldeſt male, and his *repreſentatives* [kk], therefore our law lays the burden of tuition, with the benefit of ſucceſſion, to the male, *the* [l] next of line, if he be paſt twenty five years of age; if not, *the* [l] next agnate of that age: but regardeth not the females, or their ſucceſſion, they not being ſo fit for the office of tutory; unleſs upon particular confidence they be named by the defunct. And *laſtly*, the common obligation, that lieth upon the people, hath devolved upon the magiſtrate, as repreſenting them, the duty of being or appointing tutors for pupils. Hence doth ariſe the diſtinction of tutors [m] teſtamentar, conſtitute by the parent in his teſtament; legitim, appointed by the law, (which is of the neareſt *agnate* [n];) and dative, which are ordained by the king.

III. The natural *obligations* [nn] of theſe tutors to their pupils are *firſt*, to preſerve their perſons, and defend them againſt *injury* [o] and *prejudice* [p]. (And therefore, *are they* [q] named tutors, *quaſi tuitores* [qq].) 2*dly*, To aliment them out of the pupil's own means, according to the condition thereof; and to educate them for a ſtation in the commonwealth according to their quality and capacity. 3*dly*, To manage their affairs with ſuch diligence, as provident men uſe in their own affairs, that nothing may be loſt, but every thing improven to the beſt advantage: in all which they are not to exerce voluntary acts of dominion at their choice, as diſpoſing of what is ſecure; but only neceſſary acts for the preſervation and recovery of what will or may periſh, and for improving the profits of it. 4*thly*, They are bound to give an account, and to reſtore to the pupil what is his own, ſo ſoon as he attains to the age of diſcretion.

IV. On the other part, the pupil is obliged to the tutor, by the obediential bond of remuneration, or recompence of one good deed for another, to make up to the tutors whatſoever is wanting to them through their faithful adminiſtration. This is all the ſubſtance of the intereſts and obligations of tutors and pupils, which the poſitive law doth no more but declare, apply and aſcertain by the *forms* [r] of entering that office; the *ſecurities* [r] for performance of it; the fixed time of endurance thereof. Which naturally is the age of diſcretion, in ſome ſooner, in ſome later, in ſome never: but, for certainty's cauſe, poſitive law determines a particular year, in which for the moſt part diſcretion is attained.

That there are ſuch intereſts and obligations even naturally, the light of nature will ſo eaſily go along, that it will rather need conſideration than confirmation, the grounds thereof being commonly acknowledged and accuſtomed by all men, who are led by reaſon. And it is ſo inſinuate by the ordinary term of law, whereby theſe obligations are called *quaſi ex contractu*, as ariſing from no contract betwixt the tutor and the infant or pupil, (as not capable of contracting,) and yet *not* [rr] ſimply by the conſtitution of the law. And therefore theſe obligations, not being by the will of man, muſt needs be obediential obligations by the will of God.

The *Romans* have in this matter kept clearly and cloſely by the law of nature. And therefore our cuſtoms have kept as near by them: and ſo have the cuſtoms of other nations; ſo ſays *Gudelinus* [s] that the cuſtom of *France* and *the* [t] *Nether-*

[h] I. 5. 10. [i] I. edit. & MSS. [ii] MSS. A. & B. [k] MSS. [kk] See below, § 8. F. *male repreſentatives*. [l] F. *to the*. [m] MSS. A. & H. [n] MS. A. [nn] I. edit. & MSS. B. & H. [o] MSS. A. & H. [p] MSS. [q] I. edit. & MSS. [qq] *l.* 1. § 1. *D. de tutelis*. [r] MSS. [rr] F. *are not*. [s] *de jure noviſſ. l.* 1. *c.* 18. *in fine*. [t] MSS. A. & G.

lands hath very little altered in this from the *Roman* law. We ſhall therefore interweave the civil law and our cuſtoms, that it may appear how far they do agree and differ, and how they do quadrate to the law of nature: following this order; 1*ſt*, What kinds of tutors there *be* [u], and what [u] the order of the ſame; 2*dly*, What the tutors duties are in their entry, adminiſtration and accompt; 3*dly*, How tutories end; 4*thly*, The pupil's obligation to them therefore; and, *laſtly*, The reſemblance that curators and minors have with tutors and pupils.

V. As to the firſt, there be three kinds of tutors by the civil law and our cuſtom, beſide that of the father, who is called, for diſtinction's ſake, lawful adminiſtrator (of which formerly,) and the tutors of idiots or furious perſons. The firſt is *the* [w] tutor teſtamentar or nominate; the ſecond is, the tutor of law; and the third is the tutor dative: all which follow in courſe in the ſame order.

VI. *Tutors* [w] teſtamentar by the civil law behoved to be either named in the teſtament, or codicils confirmed by the teſtament [a]; and could only be given to ſuch as were *in patria poteſtate* [b]. But by our cuſtom a father may nominate tutors to his children in any writ he pleaſes: but it is of a teſtamentary nature, always ambulatory and mutable during his life. A grandfather cannot name tutors to his oyes, becauſe, his ſon being emancipate by marriage, they are not in his paternal power: neither can a mother or grandmother, who have alſo no ſuch power. But any perſon that gives or diſpones any thing to a pupil, may in that diſpoſition name tutors; who are not properly ſuch, but only have the truſt and charge of the thing diſponed, and as to *that* [a] exclude all other tutors: which taketh place, becauſe that nomination is a quality and condition in *the* [c] donation, *January* 31. 1665, *Kirktons contra L. of Hunthill.*

A tutor teſtamentar requires no preparatory ſolemnity to capacitate him to act, but the very nomination itſelf is ſufficient: and, if it be in a teſtament, it is valid, though the teſtament be never confirmed, or be rejected by the executors. And ſo there needs no making of faith, or finding caution, becauſe it is preſumed the father, that *named* [f] him, did ſufficiently know his faithfulneſs and fitneſs. And the confirmation of a teſtament, bearing that a tutor nominate accepted and made faith, was not found to inſtruct his acceptance, without the principal act ſubſcried by him were produced, or acts of adminiſtration proven, though it was thirty ſeven years ſince the confirmation, *January* 31. 1665, *Kirktons contra L. of Hunthill.* Neither was a tutory found inſtructed by a diſcharge as tutor teſtamentar, it being evident by the teſtament that he was only overſeer, *June* 10. 1665, *Swinton contra Notman.* But a writ under the tutor's hand, deſigning him tutor, found to inſtruct, unleſs the contrary were proven by production of the tutory, *December* 2. 1668, *Seton contra Seton.* And a tutor nominate with other two, who accepted not, was only found liable from the time of his acceptance by acting as tutor, and not for what was loſt before; although there was a conſiderable legacy left to him in the teſtament, and that ſhortly after the defunct's death he confirmed himſelf *qua* legatar, and had inſpection of the defunct's writs, and ſubſcribed an inventary thereof, whereof the teſtament was one, yet did not act as tutor for three years after: but he was not found to have right to the legacy, not having followed the defunct's will by accepting the tutory at firſt, *February* 2. 1675, *Scrimgeour contra Wedderburn.*

VII. A tutor teſtamentar is ever preferred to a tutor of law or dative, even though the tutor nominate did forbear to act for ſeven years, and a tutor dative was conſtitute, and in poſſeſſion of the cuſtody of the pupil's perſon, *December* 17. 1631, *Auchterlony contra Oliphant*, (here the pupil had no means to be adminiſtrate,) *Spotiſwood, tutors and curators, inter eoſdem*; or though the tutor nominate had ceaſed ſix years, and was curator to a party, againſt whom the pupil had an action or proceſs, 6. *July* 1627. *Campbell contra Campbell:* ſeeing in both caſes no detriment could be ſhown by his forbearance *.

VIII.

* The nomination of tutors, which was before competent to the father, is regulated, and the nomination of curators is granted to the father by *parl.* 1696, *c.* 8.

[u] I. edit. & MSS. [w] MS. G. [a] *l.* 3. *D. de teſt. tut.* [b] § 3. *Inſt. de tutelis.* [d] MSS. [c] MSS. B. & G. [f] MS. G.

VIII. If there be no tutor nominate, there is place for tutors of law: who ordinarily are thoſe, who have the benefit of ſucceſſion in the pupil's eſtate. And ſo by the *Roman* law, all the agnates of the neareſt degree, as they were heirs, ſo were they alſo tutors by the law of the twelve tables [g]: and ſo, after the ſucceſſion was extended as well to the cognates as to the agnates, with the benefit thereof the burden of the tutory *alſo* [h] was extended [i]. And with us upon the ſame ground, as the prerogative of primogeniture hath given the ſucceſſion, not to the whole next degree of agnates, but to the eldeſt male and his iſſue, ſo the tutor of law is only one, *viz.* the neareſt agnate or kinſman on the father's ſide of twenty five years of age, *parl.* 1474, *c.* 51. where it is expreſly declared, "That though the tutor of law "be ordinarily heir, yet not always: for though the pupil have a younger brother, "who is immediate agnate, yet the neareſt agnate of twenty five years old will be "his tutor, paſſing by all others within that age."

IX. The tutor of law is ſerved, upon a brieve directed out of the chancery [ii], by an inqueſt, as appears by the foreſaid act of parliament. But the brieve may be directed to, and ſerved by any judge-ordinary, though the pupil live not within the juriſdiction, *March* 8. 1636. *Stewart contra Henderſon.* Tutors of law, before they act, muſt find caution *rem pupilli ſalvam fore.* And by the act 1672, *parl. c.* 2. "All tutors and curators muſt make inventary of the pupil's eſtate, he-"ritable or moveable, upon intimations to the friends on the father's ſide and mo-"ther's ſide, or if they appear not, by ſight of the judge-ordinary; with three "copies, one to the father's friends, one to the mother's friends, and one to re-"main with the *tutors or curators* [k]: without which they can neither act nor au-"thorize."

X. The tutor of law muſt ſerve himſelf within year and day from the time that he is in a capacity to be tutor, either counting from the defunct's death, or from the birth of the pupil if poſtumous, or the ceaſing of a juſt impediment. So that after the marriage of a tutrix teſtamentar, place was found for a year for the tutor of law to ſerve himſelf, before a dative had acceſs, *July* 15. 1631, *Grant contra Grant.*

XI. Where there is no tutor nominate, nor the tutor of law claimeth right within the year, there is place for a tutor dative: which though by divers municipal cuſtoms may be conſtitute by the ordinary magiſtrate of the place, yet is moſt fitly conſtitute by the ſupreme magiſtate; and ſo with us is given by the king in exchequer. And by the late act of *parl.* 1672, it is appointed, "That be-"fore conſtituting of any tutor dative, the pupil's neareſt friends on both ſides "ſhall be cited, that they may offer and inform concerning the fitteſt perſons to be "tutors." Tutors may be given to ſtrangers pupils in ſo far as concerns their lands in *Scotland*, *December* 17. 1627, *Donaldſon contra Brown.* In the giving tutors dative, though it be in the arbitrement of the king to chooſe whom he thinks fit, yet he will have regard to the intereſt of the pupil, to give a tutor, either who was nominate by the father, but not legally, or who was nominate by the mother or grandmother, though having no legal power, or the neareſt of kin, though they have neglected to ſerve within the year. But of all theſe he may take the beſt of ſuch as offer or are willing: ſeeing with us all tutors are free to accept or refuſe. But tutory being a publick office, it could not be refuſed among the *Romans*, unleſs the tutor had excuſes allowed of the law [l]. Tutors dative muſt both make faith *de fideli adminiſtratione*, and find caution, the ſufficiency whereof is in the magiſtrates truſt. And amongſt the *Romans* an ordinary or inferior magiſtrate *and* [m] his heirs were liable *pro dolo &* [n] *lata culpa*, if the caution taken by them were not found ſufficient; but not the greater magiſtrates, as the Pretor or *Preſidents* [o], who, through the eminency of their office, could not ſo particularly know, but were neceſſitate to truſt to the relation of others [p].

XII. Thoſe that act as tutors, not knowing but that they are ſuch, or otherways

[g] *l.* 5. *pr. l.* 6. *D. de leg. tut.* [h] MS. H. [i] *Nov.* CXVIII. *c.* 5. [ii] See below, IV. 3. 6. [k] Act of parl. *toto tit. D. de excuſ..* [m] MSS. A. H. & G. [n] MSS. B. H. & G. [o] MSS. [p] *tit. D. de magiſtr. conv.*

ways fraudulently, knowing they are not ſuch, are therefore called protutors; and are liable for all the duties of real tutors during the time of their acting. And by the civil law they were liable to make up his intereſt, whom by fraud they had deceived by acting as tutors [q]. Whence it follows, that ſuch actings *were void* [r]. But if the perſon had been long holden and repute tutor, the deed *would likely be* [s] ſuſtained, unleſs annulled becauſe of the pupil's leſion. There had no deciſion occurred with us to ſhew, whether protutors are obliged for their intromiſſion only, or alſo for their omiſſion. But a caſe occurring *June* 10. 1665, *Swinton contra Notman*, (who, being nominate an overſeer, intromitted,) after long debate the lords found, that an overſeer acting under the name of tutor, but by a falſe deſignation, contrary to the teſtament, ſhould be liable only for ſuch kinds of things, and for the annualrents thereof, as he intromitted with; for ſeeing *we* [t] had no law or cuſtom regulating the caſe, the defender could be only condemned according to equity: but they declared by an act of ſederunt, that whoſoever in time coming meddled with pupils or minors means as protutors or pro-curators, ſhould be liable from *thenceforth* [t] as tutors or curarors for intromiſſion and omiſſion, *June* 10. 1665.

XIII. Tutors do uſe ordinarily to name factors, who do not exoner the tutors of any of their obligations: but both the tutors, and they in the ſame terms as the tutors, are liable to the pupils, if they be factors generally conſtitute, *March* 28. 1632, *L. of Ludquhairn contra L. of Haddo*; *July* 18. 1635, *Edmonſton contra Edmonſton*.

XIV. If there be more tutors *either* [u] nominate or dative, and no *quorum* expreſt; if ſome of them dy, the office is not void, but the reſt of them may act. And ſo it was found in tutors nominate, *Hope, tutors and curators, Ruthven contra* ; *ibid. Falſide contra Adamſon* *: the like though ſome of the tutors accepted not, *February* 14. 1672, *Eleis contra Scot* **. But a tutory to two, bearing to them jointly, was found void by the death of either, *January* 17. 1671, *Drummond of Ricarton contra feuars of Bothkennel*. And where there are many tutors nominate, they may be either with, or without a *quorum*; and either *indefinitely* [u], or by a diſtinct diviſion: in which caſe each are but liable for their own diviſion, *l.* 2. *C. de div. tut.* ***.

XV. As to the duties of tutors, they are alike in them all. And the firſt is the cuſtody of the pupil's perſon. Wherein a tutor was preferred to the pupil's mother, offering to entertain him *gratis*, though the perſon neareſt to ſucceed was married upon the tutor's ſiſter, (here the tutor was nominate, and the mother married,) *July* 4. 1629. *L. of Langſhaw contra Muir*. The like, where both the tutor and the mother offered to aliment the pupil *gratis*, but the mother's ſecond husband had appriſed the pupil's lands, and the pupil was a laſs, only of five years old, *February ult.* 1632, *Gordon contra Corſan*. A tutor was found to have the cuſtody of his pupil, (who was an heritrix,) and not her mother, though ſhe offered to entertain her *gratis*, being married to a ſecond husband, *February* 5. 1675, *Fullarton contra Lady Boyn*. Yea a tutor obtained his pupil's perſon to be removed from her mother, though unmarried, at the pupil's age of eleven years, albeit the pupil was valetudinary: and ſhe was appointed to remain with one of her father's friends, to the effect that ſhe might not be influenced as to her marriage by her mother, or her friends, *February* 6. 1666, *L. of Dury contra Lady Dury*. *For* [w] if the tutor be immediately to ſucceed to the pupil, he hath not the cuſtody of his perſon: which is to be with his mother or ſome other perſon at the arbitrement of the lords; and a modification *to be* [x] for the pupil's aliment according to his means, *Nicolſon ubi pupilli, &c. Foulis contra Macmath* [y]. But if there be any other

* In this caſe, three perſons having been nominated tutors equally, one was dead, another had renounced, and the third had accepted the office, *Hadington*, 12. *December* 1609.

** Here out of five, that were named, three did not accept.

*** Factors appointed by the lords of ſeſſion on the eſtates of pupils not having tutors, are governed by the rules preſcribed to them in the act of ſederunt 13. *February* 1730.

[q] *l.* 7. *D. quod falſo tutore.* [r] I. edit. & MSS. (F. *were not void.*) [s] MSS. (F. *would be.*) [t] MS G. [u] MSS. [w] F. *but.* [x] MS. B. [y] I. edit. & MSS.

other immediate ſucceſſor, though the tutor *be next to him* [z], he *hath* [z] the cuſtody of the pupil's perſon, *ibidem*, *Smith contra Foreſter*.

Of old tutors were excluded by the donatars of ward from cuſtody of the ward-pupil's perſon, *June* 18. 1543, *Laird of Achans contra Lord Livingſton*; *March* 27. 1566, *Weir contra Lockhart of Lee*, *Spotiſwood*, *minors and pupils*. Since that time tutors are preferred in the cuſtody of their pupil's perſon to the donatar of his ward.

XVI. The next duty of *the tutor* [a] is to authorize the pupil in actions of law. Which though it be done ordinarily by all the tutors, when they are more; yet one of three was admitted to authorize a pupil in a purſuit againſt the other two to accept or renounce, though they were all named jointly, *March* 8. 1628, *Muir and Thomſon contra Kincaid*.

XVII. Tutors *and* [b] their factors are preſumed to do that to the behoof of the pupil, which they ought to do. And though it be done *proprio nomine*, it accreſceth to the pupil, *July* 18. 1635, *Edmonſton contra Edmonſton*. And ſo a tack *of the teinds* [c] of the pupil's *lands*, taken by the tutor's factor to [c] his wife in liferent, was found to accreſce to the pupil, except as to the wife's liferent-lands, *March* 28. 1632, *L. of Ludquhairn contra L. of Haddo*. This is preſumed *præſumptione juris & de jure* [d]: ſo that the narrative, bearing another *cauſe* [e], is not reſpected. And therefore a tutor acquiring a diſcharge or aſſignation of an annualrent due by the pupil to his mother, the ſame was found to accreſce to the pupil, though it bore *for* [e] love and favour, and for the tutor's pains *in* [f] diſcharging the office, *March* 5. 1629, *White contra Douglas* *; *Hope*, *tutors and curators*, *Dewar contra Dewar*. Neither hath the tutor ordinarily action againſt the pupil, till his office end; and then he may purſue as a ſtranger, *Hope*, *ibidem*, *Naſmith contra Naſmith*. Likewiſe he may appriſe the pupil's lands for his own debt, the pupil having other tutors, *Hope de heredibus*, &c. *Whiteford contra Calderwood*. So a tutrix, nominate *ſine qua non*, was admitted to purſue a regiſtration of her contract of marriage againſt her pupil, there being more tutors nominate, and ſhe having renounced her office, though ſhe had acted by ſubſcribing deeds, not hurtful to the pupil, *July* 30. 1625, *Lady Stonyhill contra her ſon*.

XVIII. Tutors may only do neceſſary deeds for their pupils: either ſuch as the pupil is obliged to do, as payment of his debts, which the tutor may do willingly without compulſion of law; or otherwiſe deeds neceſſary for management of his eſtate, *as* [g] ſetting of his lands, or labouring the ſame, uplifting his rents and annualrents, uplifting the ſums that are not ſecured, carrying on any work which was left to the pupil, which cannot otherwiſe be diſpoſed of.

But tutors cannot ſell the lands or heritable rights of their minors, without an interveening decreet of a judge, *tit. D. de reb. eor. qui ſub tut.* and any ſuch alienation is null, without the cognition aforeſaid. *This* [h] reſtriction of the tutors power hath been introduced from the example of the *Roman* law, which at firſt did only extend *ad prædia ruſtica & ſuburbana*. The ſame was afterwards extended *ad prædia urbana*: and is ſo extended by our cuſtom. And therefore a houſe in *Edinburgh* being ſold by a tutor without antecedent authority of the lords, the ſame was declared to belong to the pupil, albeit the houſe was raiſed ſeveral ſtories high; and the acquirers were only found to have right to the meliorations, in ſo far as profitable to the pupil: who was put not to prove leſion by the ſale, *February* 5. 1692, *Sandilands contra L. of Niddery*. And the authority of the lords is interponed upon a proceſs, which muſt be by calling the creditors of the pupil and his neareſt friends to hear and ſee it found that there is a neceſſity to ſell the whole, or a part of his heritable rights, and that the rate thereof may be determined. In which it muſt appear, that the pupil's debt cannot otherwiſe be

* Here the liferenter of the ſum in a bond, granted by the tutor to the pupil's predeceſſor, having for the cauſe expreſſed by the author, diſcharged the tutor of the annualrent during her life, the benefit of the diſcharge was found to accreſce to the pupil. But this deciſion was thereafter altered. See dec.

[z] MSS. [a] MSS. [b] MS. H. [c] dec. [d] MSS. A, B, & H. [e] MSS. [f] MSS. A. & H. [g] MSS. [h] F. *and albeit this.*

ſatisfied. The law allows the like in the caſe of the pupil's aliment, *which* [i] cannot be afforded otherwiſe. [i] Alienations ſo made are not eaſily reducible, or the the pupil or minor reſtored againſt the ſame, if the true cauſe hath been known to the judge: but not ſo, if that hath been latent either *dolo* or *lata culpa*, *l.* 11. *C. de prædiis & al.* And therefore a tutor's aſſignation of his ſon's and pupil's mails and duties for the tutor's own debts was found null by exception, even at the pupil's tenant's inſtance, *Spotiſwood, aſſignation, Lands contra Douglas and Lands* [k]. Yet a tutor's ratification of a reducible decreet, given againſt his minor, was found valid, though voluntary, being *in re antiqua*, *Spotiſwood, tutors and curators, Earl of Kinghorn contra Strang.*

XIX. Tutors and protutors are liable for *annualrent* [l] of their pupils monies, which they are obliged to make profitable, in ſo far as they are either liquid ſums, that they had in ſpecie, or which the *tutor* [l] took up, *or* [l] which was made [l] of their pupils moveables, *or the rents* [m] of lands after a term in money-rent, and a year in victual, from the term of payment, in ſo far as it is not employed for their own uſe [l] profitably for paying of their debts or annualrents, alimenting *themſelves* [l], or other uſes neceſſary; according to the ancient law of the *Romans*, which obliged the tutor, after he had the money two months in his hands. But by the novel conſtitutions [n], it is left to the arbitrement of the tutor, either to keep the pupil's money by him, or to employ it for profit; but it is not ſo by our cuſtom [o]. It was [o] found, that a tutor by his office and diligence was obliged to lift and employ the pupil's annualrents of ſums in ſecure hands once in his tutory, and ſo pay annual for the annualrents of his pupil's ſums, omitted to be uplifted by him, yet only from the expiring of the tutory, *January* 27. 1665, *Kintore contra Boyd.* So a tutor was found liable for the annualrent of his pupil's annualrent, [*due before the tutory* [p],] within a year after his acceptance, but not for the current annualrent during the tutory, he leaving the ſame employed for annualrent at the iſh thereof, *February* 27. 1673, *Douglas contra Gray.* A tutor's heir, being minor, was found liable only for annual [q] after the intenting of the cauſe, the purſuer being ſilent twenty five years, *February* 22. 1634, *Davidſon contra Jack.* Neither was the heir found liable for annualrent *of the pupil's annualrents* [r], where the father died during his tutory, *Hope, de heredibus, &c. Graham contra Crichton; July* 4. 1665 *Boyd contra Kintore* But pupils annualrents bear not annualrent from a year after they are due, as their ſilver-rents of lands do bear, but only from the end of the tutory, *July* 18. 1629. *Naſmith contra Naſmith.*

XX. Tutors are liable for their minors, and muſt be conveened with them by their creditors, for their intereſt; and are alſo decerned with them for their intereſt. Upon which decreets perſonal execution is competent againſt tutors for any deed, preſtable by them by their office. For example, they may be compelled to receive vaſſals, whom the pupil's predeceſſor was obliged to receive; or grant *a tack* of lands, or *a charter* or *ſaſin* [s], where there hath been a diſpoſition before. But in decreets for payment of liquid ſums execution cannot be made againſt the means of tutors, unleſs they be ſpecially decerned to make forthcoming ſo much of the pupil's means as they have in their hands, for ſatisfying of the debt in whole or in part: which, though it be oft done by a ſecond proceſs, yet may be a diſtinct member of the firſt, or by way of ſpecial charge in the diſcuſſing of a ſuſpenſion, raiſed by the tutor againſt creditors on that or other grounds. But the tutor's oath was not ſuſtained to prove againſt the pupil an agreement made by the defunct, though there were concurrent probabilities and teſtificates, *December* 7. 1664, *Eccles contra Eccles.* Yet the tutor's oath was ſuſtained againſt the pupil, as to the tutor's intromiſſion in name of the pupil, that being *factum proprium*, obliging alſo himſelf: and yet he was not holden as confeſt, as being a party; but was compelled to depone by caption, *June* 27. 1665, *Cant contra Loch.*

XXI. The laſt duty of tutors is to make an accompt, and to reſtore and refound.

[i] I. edit. & MSS. [k] See above I. 5. 12. [l] MSS. [m] F. *or rents.* [n] *Nov.* LXXII. *c.* 6. *auth. noviſſime. C. de adminiſtr. tut.* [o] MSS. A. & G. [p] dec. [q] I. edit. & MSS. [r] dec. 1665. [s] I. edit. & MSS.

found. Wherein they will be liable to account and satisfy for the pupils whole means and estate, not only for their intromission, but for their omission; and for such diligence as they use in their own affairs, which seems sufficient in tutors testamentar, seeing the office is gratuitous and free, and not sought by them. But in tutors of law and dative, who ordinarily seek the office, and offer themselves, both the diligence accustomed by provident men, and such as they use in their own affairs, may be justly required. [t] By the civil law all tutors were liable *pro dolo, culpa & negligentia* [u].

XXII. That tutors are liable, not only for what they did intromit *with* [w], but what they might have intromitted with by diligence, and particularly *of* [x] the rents of the pupils lands, wherein his *predecessor* [y] died infeft, and in possession, though the pupil himself was not infeft, was found *January* 26. 1628, *commissary of Dunkeld contra Abercromby*. In a tutor's accompts it was a sufficient instruction of an article of the charge, a bond due to the defunct, produced by the pupil: nor was the tutor liberate upon alledging he knew not of it; but it was presumed to have been in the charter chest, unless the tutor could instruct that he had made search in the charter chest, and neither found this bond, nor any inventary relating thereto: so the tutor was found liable, tho' the sum was lost by the debitor's becoming insolvent during the tutory, *June* 24. 1680, *Cleland contra L. of Lamington*. Yet a tutrix was found only liable for her intromission, in respect she continued but some months, and the place where the minor's goods were, was infected with the plague, *Hope, tutors, &c. Rosyd contra Cathcart*. Neither was a tutor found liable for a sum due to the pupil, as not doing diligence by horning and caption for uplifting thereof, unless it were alledged, that by diligence he might have recovered [z], and that the debitor was become worse, *July* 2. 1628, *Hamilton contra Hamilton*. The like, where the tutor offered to prove by the neighbourhood, that the debitor during his tutory was repute and holden insolvent, *February* 6. 1623, *Watson contra Watson*. A tutor was not found liable for the services he got of the pupil's tenants in kind, *January* 11. 1668, *Grant contra Grant*.

XXIII. Co-tutors, both by the civil law and our custom, are liable *in solidum*. And so *one was* [a] decerned for the whole, though the rest were not conveened, *February* 22. 1634, *Davidson contra Jack*. They were also found liable *in solidum*, though they had divided the tutory among themselves. (But if the same were divided by the testator or a judge, the tutors *are* [b] only liable for their share, and not for the rest, unless they have by fraud and supine negligence omitted to pursue the other suspect tutors to be removed, *l.* 2. *C. de div. tut.*) *So that* [c] the benefit of the order of discussing, competent of the law, *whereby, when* [c] the tutors did administrate *severally, they* [c] were only liable for their parts *primo loco, they all being* [c] *solvendo, l.* 3. *C. de div. tut.*, and that they should be first discust, who had administrate and intromitted, before them who had neglected or forborn, *ibid. take no place in our custom* [c]. Yet a tutor was not found to have interest to cause the co-tutors find caution to warrant him for their acting without him, or against his mind, where they did out-vote him, or else to quit the tutory; but was left to his ordinary course, to remove them if they malversed, *June* 27. 1672, *Stirling contra his co-tutors*.

XXIV. Tutory is finished: *first*, by the death either of tutor or pupil: *secondly*, by the marriage of a tutrix testamentar, which no provision even of the testator can dispense with: *thirdly*, by the tutor's renouncing the office; after which, though he were tutor testamentar, he cannot resume the office, *July* 6. 1627, *Campbell contra Campbell*: (But forbearance for six or seven years doth not extinguish the office of a tutor testamentar, by the former *decision* [d]. The like, *December* 17. 1631, *Auchterlony contra Oliphant*:) *fourthly*, by *the* [e] fury, lethargy, or any natural defect of the tutor, rendring him unable to exercise his office: *fifthly*, and most ordinarily, by the pupil's running [f] his pupillarity, which in

[t] I. edit. & MSS. [u] *l.* 1 *pr. D. de tut. & rat. distr. l.* 33. *pr. D. de adm. & per. tut.* [w] MSS. [x] I. edit. & MSS. B. G. & H. [y] MS. B. [z] MSS. [a] MSS. [b] I. edit. [c] MSS. [d] MS. G. [e] MSS. [f] I. edit. & MSS.

in men is fourteen years, [g] in women twelve. But if the tutors continue to act till majority, they are liable as curators. Yet the expreſs appointment of the defunct, that the tutors continue curators, cannot extend the tutory after pupillarity, or hinder election of curators, if the minors think fit to chuſe others, *February* 6. 1633, *Harper contra Hamilton.*

XXV. The tutory, appointed to idiots and furious perſons, is preſcribed by act of *parl.* 1585, *c.* 18. whereby the neareſt agnates or kinſmen of natural fools, idiots or furious perſons, ſhould be ſerved, received and preferred to their tutory and curatory, according to the common law. Where by the *common law* the *civil law* is underſtood. And though the act ſeems to hold out *only* tutors of law [h] ſerved; yet, ſeeing it is according to the diſpoſition of the civil law, it excludes not tutors teſtamentar during ſuch perſons pupillarity, nor tutors dative, if the neareſt agnate ſerve not: but ordinarily the tutors of idiots are the tutors of law. This act by cuſtom is extended to deaf and dumb perſons, though they be not expreſſed: who have tutors in the ſame manner, albeit they have ſufficient judgment, ſince they cannot act by it. Theſe tutors have greater privilege than other tutors, becauſe they are ordinarily the heirs of ſuch perſons. And therefore *not* [i] ſerving within the year and day from the idiotry or furioſity after pupillarity, albeit datives be conſtitute, the tutors of law recal them, and call them to an account. Which was ſo found, though the tutor was not ſerved till five years after the idiot's majority *, *February* 22. 1628, *Colquhoun contra Wardrope. It was alſo found, that a tutory dative did not hinder the ſervice of a tutor of law to an idiot* quandocunque [k], *January* 21, 1663, *Stewarts contra Spreul.* Theſe tutors muſt be ſerved by a brief of idiotry, and by inqueſt, *parl.* 1475. *c.* 66. by which the time of the idiotry or furioſity muſt be determined: and all acts during that time are declared null. They are liable in all other things as other tutors, for finding caution, inventary, and being comptable for intromiſſion and omiſſion. Their tutory ends not by lucid intervalls, but by full recovery of the furious perſons their judgment.

XXVI. Laſtly, tutory ceaſeth by the action of removing ſuſpect tutors, which was a popular action competent to any, *l.* 1. § 6. *D. &* § 3. *Inſt. de ſuſp. tut.* But ordinarily it is done by the overſeers, *mother* [l] or friends of the pupil, or by the other tutors. The *grounds of it* [l] are not only his malverſation, (*and* [m] it was found a malverſation, that the tutor had not made inventary conform to the late act of parliament, *July* 7. 1680, *Gibſon contra Lord Dunkeld and Thomſon*) but any thing incident, or appearing to weaken his truſt, *or* [n] if he *be* [n] inſolvent, or his cautioner become ſuch.

XXVII. When tutory is ended, whatſoever the tutor acted in name of the pupil, the pupil hath thereupon action, as if it had been done by himſelf, *l.* 2. *D. quando ex facto tut.* So whatever was decerned againſt the tutor *hoc nomine*, ceaſeth when the tutory is ended: and *there is action* [o] competent againſt the pupil *therefor* [p] *l.* 1. *C. eod. tit.* As likewiſe, if the pupil be advantaged by the fraud of the tutor, he may be therefore conveened, *l.* 3. *D. eod. tit.*

XXVIII. The reciprocal duty of pupils to tutors after *the* [q] tutory is ended, is to reſtore and make up to them whatſoever they wared out profitably, or is ſo wanting to them by *their* [r] office, wherein the *expence* [s] of obtaining the tutory itſelf *is* [t] a part. But tutory being a free gratuitous office, the pupils are not liable to their tutors for any allowance, ſalary, or ſatisfaction for their pains, but only for their expences, *Nicolſon, de tutelis, &c. tutors of Earl of Buccleugh contra Earl of Buccleugh* [u]. And if a tutor hath not made inventary conform to the late act of parliament, he loſeth his expences **, (as a penalty for not making inventary,) even though the pupil was *lucratus* thereby.

After

* It was a ceſſation of five years after the agnate's majority that was here objected. See dec.

** The clauſe of the act of *parl.* 1672. *c.* 2. whereby this was ſtatuted, is explained by an act of ſederunt, 25. *February* 1693.

[g] MSS. A. B. & H. [h] MS. A. [i] F. *their not.* [k] I. edit. [l] MSS. [m] I. edit. [n] MSS. [o] MS. A. [p] MSS. [q] MSS. A. B. & H. [r] MSS. B. G. & H. [s] MSS. A. & B. [t] MSS. [u] I. edit. & MSS.

After tutory is ended, the tutor hath no action againſt his pupil *ante redditas rationes*, till he make his accompts. Neither hath the tutor's aſſigny action againſt the pupil before the tutor's accompts be made, albeit aſſigned to a liquid ſum, unleſs the aſſigny find caution for the tutor, *January* 24. 1662, *Ramſay contra Earl of Winton*. Neither for the ſame reaſon *had* [w] the tutor's aſſigny action againſt the pupil, as heir to his father, though it was ten years ſince *the* [w] pupillarity was paſt, *July* 7. 1676, *Spence contra Scot*. Yea a tutor having compted, and *got a* [a] bond for the balance, being charged with other articles, though theſe were not inſtantly liquidate, yet the extract of a decreet upon the bond was ſtopped for a time, till the additional articles ſhould be cloſed; but the bond was not reduced, as being *in confinio minoris ætatis, & ante redditas rationes*, *December* 5. 1671, *Scot contra Eleis* [b]. Neither did a tutor get any further allowance for his pupil's maintenance, than the annualrent of his ſtock, though he expended more, *November* 17. 1680, *Sandilands contra Tailzefer*.

XXIX. Curatory hath ſuch a reſemblance with tutory, that, tho' the conſtitution of curators be not of the law of nature, which leaveth all perſons of diſcretion free, but of poſitive law, whereby a way is provided for the levity and facility of minors, yet to ſhun repetition it will be moſt proper here to annex that office, and the obligations therefrom ariſing betwixt *the* [c] curators and the minors. And in theſe we ſhall *only* [d] touch the difference betwixt tutors and curators (ſuppoſing the reſt as common to both,) which is chiefly in theſe points.

XXX. *Firſt*, In the election and conſtitution of curators. Which is done by way of proceſs at the inſtance of the minor before any judge-ordinary whatſoever *, whereby he citeth two or three of his neareſt kinſmen on both ſides, and all others having intereſt generally at the market-croſs, upon nine days warning, to hear and ſee curators decerned to him [e]. And it is in his option whom to chuſe: as it is in their option alſo to accept or refuſe. He may alſo make any number a quorum, or adject any condition he thinks fit in their election. And the parties compearing muſt accept and make faith *de fideli adminiſtratione*, and find caution. Their acceptation muſt be by ſubſcribing the act of curatory, eſpecially if the election be in an inferior court, for want whereof an act of curatory before the baillie [ee] was found null, *Hope, tutors and curators*, *Sibbald contra Hay and Lindſay*. Curators alſo may be choſen by *procuratory* [f] without the minor's preſence, *Hope, ibid. Marquis of Hamilton and his curators*: ſo that the procuratory expreſs the curators names. Yea being done in *England*, according to the cuſtom there, it is ſufficient to authorize the minors here, *Hope. ibid. L. Poſſaw contra Naſmith*. Though the minor may chuſe curators whom he pleaſeth, yet he may not chuſe rebels unrelaxed, if it be objected and verified at the election by his friends, *July* 4. 1629, *Corbet of Ardill contra his neareſt of kin*.

XXXI. Curators are of two kinds, *ad* litem [ff] and *ad negotia*. The former are appointed for authoriſing judicially in proceſs: the other are mainly for extrajudicial affairs. Curators *ad* litem [ff] are ſo far neceſſary, that they muſt be given by the judge ordinary, before whom any action is purſued, for authorizing of the minors either *paſſive* or *active*, § 2. *Inſt. de curat.* and they will be given upon the deſire of either party. Their office ſeems to reach no further than to faithfulneſs and diligence in *proceſſes* [g], whereunto they are elected. There are ſometimes curators named to pupils to ſupply the defect of their tutors, as if their tutor be concerned, or be abſent, or uncapable to act for a time. Theſe, though for a diſtinction from tutors they be called curators, yet their office *pro tempore* is of the ſame nature with tutors.

XXXII. Curators *ad negotia* are in the minor's option, and muſt be freely choſen: ſo that, though a minor's father named his *tutors* [gg] expreſly to continue their of-

* *Before his judge ordinary*, act of parl. An act of curatory was found null, becauſe the minor's kinſmen, that were cited to ſee the curators decerned, did not dwell within the juriſdiction of the judge, *Home*, *January* 1685, *Burnet contra Burnet*.

[w] I. edit. [a] dec. [b] Gosford. [c] MSS. A. B. & G. [d] MSS. [e] *parl.* 1555, *c.* 35. [ee] MS. H. [f] MSS. [ff] MS. D. [g] MSS. [gg] MSS. B. G. & H.

fice till the pupil's majority, yet it was found not to hinder the minor to chuse curators, or to disown his tutors after his pupillarity, *February* 6. 1633, *Harpers contra Hamilton.* Minors having chosen no curators are in the same condition, for extrajudicial acts, alone as if they had curators: in either case the deeds are revocable, and reducible upon enorm lesion.

XXXIII. But if once they chuse curators, all deeds, done by them without consent of their curators, are *eo ipso* null by exception, without necessity to alledge lesion, *December* 19. 1632, *Maxwell contra the E. of Nithisdale.* And that so exactly, that the minority was counted *de momento in momentum*, though the minor wanted only twelve hours of twenty one years, *June* 26. 1624, *Drummond contra L. of Cuninghamhead.* This [h] extended to a judicial act, whereby the minor enacted himself cautioner, *Hope, tutors and curators, Paterson and Wishart pursuers*: and extended also to a minor's service without consent of *his* [i] curators, and that by exception, without instructing lesion, 16. *February* 1627, *Simson contra laird of Balgony*; and to a tack taken by the minor without consent of his curators, *Hope, de minoribus*, and *Hadington* [i], 21. *March* 1622, *Seton contra L. of Caskiben.* And *this* [i] extended to deeds done by minors in their fathers family, without their fathers consent, *Stewart contra Home of Renton* [i]. And so it was found, that a minor's bond, subscribing cautioner with, and for his father, was null; and that his father, as lawful administrator, could not authorize him to be cautioner for himself: here the minor was a student at law, but entertained by his father, and not *foris familiat* [ii], *December* 7. 1666, *Mackenzie contra Fairholm*; *July* 25. 1667 *inter eosdem.*

Yet the deed *will be* [k] sustained, being a bond of borrowed money, the creditor proving by witnesses, that the sum was converted *to* [l] the minor's use profitably, *December* 11. 1629, *Gordon contra Earl of Galloway.* (This is according to that common ground of equity, *nemo debet ex alieno damno lucrari*: hence flows [m], *minor tenetur in quantum locupletior factus.* But though there was some onerous cause of minors deeds, yet unless it were liquid *by delivery* [n] of money, it *is* [o] not receivable by way of exception or reply, but only is reserved to the creditor to pursue as accords, and the minor's *deed* [p] found void notwithstanding, *December* 19. 1632, *Maxwell contra Earl of Nithisdale.*) And this was [q] extended to necessary furnishing of cloaths, taken on without consent of curators [r], *February* 5. 1631. *Inglis contra executors of Sharp.*

XXXIV. *But* [s] the civil law seems not to require the consent of curators, as necessary to concur with the minor in the making his latter will, but only to deeds among the living; because law hath rejected all ties and hinderances of full liberty in testaments of defuncts [s] disposal of their goods. And therefore, if a minor, having curators, do in his testament say, *quæstionem curatoribus meis nemo faciat, rem enim ipse tractavi*, in that case curators are liable *but* [t] for restitution of what they have of the minor's goods, *and* [t] fraud, but not for a compleat diligence [u]. I have not observed it directly controverted and determined, whether by our custom minors, having curators, may test without their consent. But indirectly a minor, making his curator his executor and universal legatar, though the minor was with the curator when he tested, and died shortly after, and his neareſt relations were not acquainted, whom he had named in a former testament, it was sustained, no threats nor importunity being alledged, *November* 30. 1680, *Stevenson contra Allans.*

XXXV. *Secondly*, Curators in their office *differ* [w] from tutors. *Namely* [a] in this, that tutors are given chiefly for the pupil's person, but curators are given for the right managing of *the* [b] goods and affairs: and tutors act for, and in *the* [b] name of their pupils, who in their pupillarity have no discretion, but curators cannot, and are only obliged by their office, to authorise their minors, and act with them by con-

[h] I. edit. & MSS. [i] MSS. [ii] See above I. 5. 12. [k] MSS A.B. & H. [l] MSS. A. G. & H. [m] MSS. A. B. & H. [n] MS. A. (*and delivery*, MSS. B. D. & H.) [o] MSS. [p] MSS. A. G. & H. [q] MSS. A. B. D. & H. [r] MSS. [s] MSS. [t] MSS. A. B. & H. [u] *l.* 20. § 1. *de liberat. leg.* [w] MSS. [a] MSS. B. & H. [b] MS. H.

conſenting to their deeds; for inſtance, curators cannot diſcharge for their minors, but only conſent to their minors diſcharge. And ſo fathers, after childrens pupillarity, can only conſent with their children, as their lawful adminiſtrators, (whereby they are tutors in the childrens pupillarity, and curators in their minority, without election or formality,) *Hadington, June* 26, 1610, *Foreſter contra Foreſter*; *January* 9. 1675, *Macintoſh contra Fraſer of Strichen.*

XXXVI. Their duty is to ſee to the minors affairs, that they get no detriment: and *ſo* [c] they muſt anſwer, not only for the deeds whereunto they conſent, but for their omiſſion, and for any detriment the minor ſuffereth by their negligence. (And therefore a curator was found liable for intromiſſion and omiſſion, albeit the act of curatory did not bear that he compeared and did find caution, ſeeing he accepted thereafter, by ſubſcribing a writ with the minor as his curator, which was found to oblige him from the time of the acceptance, *November* 18. 1671, *Caſs contra Eleis.* But curators, continuing to uplift their minors rent after majority, were found not liable for omiſſions theſe years, unleſs they had a diſtinct factory continued *per tacitam reconventionem, ibidem.*) And therefore they muſt not only be counſellors to the minors, ſhowing them what they ought to do, and requiring them to do the ſame; but eſpecially they muſt cauſe them conſtitute factors, and grant procuratories [d] for purſuing their actions, and putting them to execution, and for uplifting their money, whether it be the ſtock (of that which may be in hazard,) or *annualrents* [e] or rents [f]. For, ſeeing they muſt be accountable, they muſt not ſuffer the minor to have his own goods and [g] money in his own hand, leſt he loſe *or* [h] miſpend *the ſame* [i]. [k] Theſe procuratories may be given to ſome of themſelves: and in many things their very office includes a procuratory, *procuratory* [l] being leſs than curatory. But though they may intromit with the pupil's means themſelves, yet they are not obliged to be ſervants or factors; but may authorize ſuch, being liable always that they *have* [m] acted therein profitably. But if the minor will not authorize ſuch, nor do thoſe deeds needful and profitable for his affairs, the curators may crave to be exonered. So they may alſo do, if he meddle with his own means, and will not be reſtrained. Or if any of the other curators act unprofitably, or without conſent of the reſt, the curators muſt do diligence to remove them, as ſuſpect and malverſant *curators. And are* [mm] to recover that which was unwarrantably meddled with: otherwiſe they are liable, not only for their own *omiſſion and* [n] *intromiſſion* [o], but for the other curators. And ſo are all liable *in ſolidum* (as hath been ſaid of tutors,) *February* 11. 1630, *Guthry contra Guthry.* And they are liable for annualrent of minors means, as tutors are, *February* 24. 1627, *Guthry contra Guthry*; yea their heirs, (though minors for the time,) after expiring of the *curatory* [p], *ibid.* where the curator's heirs are found liable for the annualrent of a ſum conſigned to the *minor* [q]. *But* curators, expreſly choſen with a *quorum*, and with this condition, that they ſhould be only obliged for deeds, whereunto they conſented, and be free of *omiſſion* [r], were ſo approven by the lords during their office, *Nicolſon, de tutelis, &c. curators of the Earl of Buccleugh contra the Earl and other curators* [s]. *And* [ss] where the act of curatory bore, that the curators were named *jointly, or* [t] *at leaſt* [u] three of them to be a *quorum*; two only accepting, the curatory was found null, *January* 25. 1672, *Ramſay contra Maxwell.* But where they were not named jointly, the death of one did not annul the curatory, *January* 4. 1666, *Fairfouls contra Binning* *; or the not acceptance, *February* 11. 1676, *Turnbul contra Rutherford* **.) *Yet* [w] though there be a *quorum* conſtitute, all the curators are liable for diligence: and if any *quorum* act hurtfully, they muſt crave them to be removed, and what they have ſo done, to be reſtored

* In this caſe it being objected, that after the death of a *ſine qua non* the remaining curators were not ſufficient to authorize, it was found ſufficient that the minors ſhould compear and acknowledge the curators.

** Here it was found that one tutor accepting was ſufficient, albeit there were more nominate with a *quorum*, ſeeing the reſt refuſed.

[c] I. edit. & MSS. [d] MS. B. [e] MSS. [f] MS. B. [g] MS. G. [h] MSS. G. & H. [i] MS. A. [k] I. edit. & MSS. [l] MS. G. [m] MSS. [mm] F. *curators are.* [n] MS. G. [o] MS. H. [p] MSS. [q] I. edit. & MSS. (F. *minor. Yet if curators die, before their minor become major, they are not liable for annualrent. But).* [r] MS. H. [s] I. edit. & MSS. [ss] F. *But.* I. edit. [u] *dec.* [w] MSS. A. B. & H.

reſtored. Curators are not ſimply liable for all *the minor's* [a] means, which may be loſt without their fault; neither to do diligence in all caſes, but where diligence might be profitable, as hath been ſaid of tutors [b]. Curators may not authorize their minors, where hazard predomines; nor may they buy lands with their minor's money: but they may give it out on land-ſecurity, and may relieve the minor's eſtate of burden, though there might be latent hazard of ſecurity. So the curators of *Fletcher of Aberlady*, having liberate his eſtate of a liferent, and cauſed the minor to ſwear not to quarrel the bargain, and *given* [c] their own warrandice to the liferenter, were not found liable to their minor's heir; albeit the liferenter had a cancer in her breaſt, and died ſhortly after the bargain, ſeeing they knew it not, and acted prudently: and the minor's heir was excluded by his predeceſſor's oath, (given before the late act of parliament [d]) becauſe he purſued on his predeceſſor's leſion, who was minor and ſwore, *January* 1691, *Fletcher of Aberlady contra Murray of Blackbarony and others* *.

Curators, being elected by authority of a judge, cannot be liberate by the minor's conſent. Neither did a decreet againſt a minor, on his conſent, liberate curators from their office, *July* 21. 1664, *Scot of Braidmeadow contra Scot of Thirlſtane* **.

XXXVII. Curators *were* [ee] appointed in the law, not only for that ordinary levity and weakneſs incident to minority, (which therefore runs only to twenty one years compleat, at which time by our cuſtom minority endeth;) but alſo in caſe of known *and* [f] conſpicuous levity, though after majority. Such were the curators of prodigals: to whom, as to furious perſons, curators were conſtitute their neareſt agnates. Inſtead of this our cuſtom hath interdictions, whereby perſons, acknowledging their own weakneſs, [f] levity, and readineſs to hurt themſelves, do therefore bind themſelves, that they ſhall not act without the conſent of thoſe perſons interdictors therein mentioned: who thereby become as curators, though they be not obliged for *omiſſion* or *intromiſſion* [g], but only to conſent with the perſons interdicted, and for their fraud and fault in conſenting.

XXXVIII. Interdictions [gg] are moſt fitly made *judicially*, upon cognition of the cauſe. By which after trial *that* [h] the perſon *craved* [i] to be interdicted, *is truly laviſh and prodigal* [k], interdictors are appointed by the judge competent, and that either at the inſtance of the party himſelf, or of his friends. Yea the lords *ex proprio motu* did interdict a perſon, who was evidently laviſh, and had thrice made oppoſite rights of the ſame ſubject; and that *incidenter* in another proceſs where his levity did ſo appear, *February* 17. 1681, *Robertſon contra Gray*. That this is the genuine way of interdictions, is clear by the narrative of the act of *parl.* 1581. *c.* 119. And therefore an interdiction was reduced, only becauſe it was done *ſine cauſæ cognitione* [l], *Hope, interdiction, Roberton contra* : but there has not been a juſt ground for the interdiction alledged and inſtructed.

XXXIX. The more ordinary way of interdictions is *of conſent*. Whereby the perſon interdicted, acknowledging his own laviſhneſs, doth, by a writ under his hand, interdict himſelf. And this is reducible, if the narrative was not true, but the perſon interdicted [m] prudent and provident, *December* 20. 1622, *Campbel contra L. of Glenurchy*; and *December* 4. 1623, *Gechan contra Hay and Davidſon*. Interdictions uſe alſo to be in the way of obligation not to contract debts or diſpone lands without conſent of ſuch perſons, and inhibition regiſtrate thereupon: which was ſuſtained, though not in the ordinary ſtile of interdiction, the perſon obliged being known inſufficient to manage his own affairs through levity or prodigality, *November* 10. 1676, *Stewart contra Hay of Gourdy*. But a bond bearing, that a man ſhould not ſell or diſpone without conſent of his wife, on the narrative of his facility, whereon inhibition was uſed, was found not to be valid as an interdiction,

* See the opinion of the faculty of law at *Leyden* on this caſe, *J. Voet ad D. de adm. & per. tut.* § 13.

** Here a minor having obtained decreet, *parte concedente*, againſt his curator to renounce his office, it was found that this decreet did not liberate the curator, even for his omiſſions thereafter.

[a] MS. H. [b] I. 6. 22. [c] F. *gave*. [d] 1681. *c.* 19. [e] See below, I. 17. 14. [ee] MSS. B. & H. [f] MSS. B. G. & H. [g] MS. A. [gg] See below, IV. 20. 30. *& ſeqq*. [h] I. edit. & MSS. [i] MSS. B. & G. [k] MSS. [l] dec. [m] MSS.

diction, as inconsistent, binding a man to the direction of his wife; but that it was only valid to secure the wife's own interest *of* [n] an aliment according to her quality, as an inhibition, *February* 27. 1663, *Lady Milton contra L. Milton.*

XL. Interdictions must be published at the market-cross of the head-burgh of the shire where the party dwells: and within forty days after *the* [o] publication, [p] the same, with the executions thereof, must be registrate by the sheriff-clerk of that shire, in the register of *inhibitions and interdictions* [q], *and* within the *said forty days* [q] must be also registrate in the register of inhibitions of any other shire where the lands of the interdicted person ly. (*If registrate in the general register, it is sufficient, parl.* 1600 *c.* 13. [r]) Otherwise, if it be not published, *and registrate in the shire where it is published* [s], it is absolutely null; and hath no effect as to lands or heritable rights in any other shire, unless it be also registrate there, *parl.* 1581. *c.* 119. *February* 11. 1662, *Ramsay contra Maclellan.* Yet it needs not be intimate to the party interdicted, *December* 11. 1622, *Seton and Eleis contra creditor of Achesón.*

XLI. The effect of interdictions by custom is retrenched to the preservation of heritable rights only; and doth not extend to moveables, or personal execution against the person interdicted. So that he may dispone his moveables, or upon any personal bond, granted by him, his moveables may be poinded, arrested and made forthcoming, and his person incarcerate, though the stile of interdiction doth expresly prohibite alienation of moveables, *July* 11. 1634, *Bruce contra Forbes*; *June* 20. 1671, *Crawford contra Haliburton.* Also he may thereupon be denounced, though thereby his liferent fall in prejudice of the heritage, *Hadington, February* 8. 1610. *Hay of Brunthills contra his father and sister*; and *December* 21. 1610. *L. Broxmouth younger contra relict of Wauchop.* But interdiction hath effect in favours of the heir of the interdicted person, that neither his heritage can be affected upon any obligation granted by his *predecessor* [t] after interdiction, neither can any personal execution by *horning and caption* [t] be against him, as would have been against his predecessor. But such bonds will take effect against the heir, as meddling with the heirship *moveable* [u], or *against any intromitter with the* [w] moveables of the defunct, 11. *February* 1662, *Ramsay contra Maclellan* [a]. The reason *why* [b] moveables are *exempted* [b] both from inhibitions and interdictions is, because they are of less moment, and the traffick of them must be current and free. And therefore these remeids being but by positive law, and not by natural equity, by which the engagement or disposition of any person, having the use of reason, is effectual, though lavish, positive law prohibiteth and voideth such only as to [b] heritage [b], as being of the greatest imporance: in which a tack *even* [c] to a kindly tenant, set without consent of the *interdictor* [c] was found null, *Hope, interdict. Douglas contra Cranston. Interdictions* [d] do not make void all posterior obligations, but only such where there is a lesion: and therefore, where there is a just and onerous cause, the obligation or deed is good, though without consent of the interdictors, *July* 29. 1624. *L. of Collington contra Faw*; *November* 10. 1676, *Stewart contra Hay of Gourdie.*

XLII. The remeid by *interdiction* [e] is only by reduction, and not by exception or suspension, *March* 17. 1630, *Sempil contra Dobie* *; *January* 22. 1631, *Hardie contra Macaula.* Yet interdiction is sustained by way of reply, seeing the pursuer thereby doth only delay himself, *February* 13. 1662, *Lockhart contra Kennedy.* It is a competent ground of reduction at the instance of the interdicted person, his *assigney* [f] or *heir* [f], *Hadington, Douglas contra Cranston* [g]. And it is also competent at the instance of *the* [g] interdictors without consent of the person interdicted, *Hadington, December* 21. 1610. *L. Broxmouth younger contra the relict of Wauchop.*

XLIII. Interdictions cannot be taken off by consent of the interdictors or interdicted persons, though they should renounce or discharge them, but only by the

* Here interdiction was not received by way of answer to the reasons in a suspension.

[n] F. *by.* [o] MSS. B. & G. [p] I. edit. & MSS. [q] MSS. [r] MS. B. [s] MSS. [t] MSS. [u] dec. [w] MSS. A. B. & H. [a] MS. G. [b] MSS. [c] MS. G. [d] MSS. [e] MS. G. [f] MSS. [g] MSS. *Hope, interdiction,* 25. *February* 1613.

act of a judge competent, finding the grounds thereof either not true, or otherwiſe that the perſon interdicted is come to a more ſtable deportment, *Hope, interdiction, Sanderſon contra interdictors of Craig; December* 4. 1623, *Gechan contra Hay and Davidſon.* Which is to be underſtood of interdictions laid on by authority of a judge *cauſa cognita.*

XLIV. There are *two* [h] privileges of minors *, which can no where be ſo conveniently ſpoken to, as in this place. The one is, that minors are reſtored againſt deeds done by them in their minority to their enorm leſion. The other is, *Minor non tenetur placitare ſuper hereditate paterna* [i].

As to the firſt, Minority and leſion are the ordinary ground of reduction. But becauſe they are *facti*, and abide probation, they are not receivable by exception, *if* [k] he who purſues the minor can *inſtantly* [k] inſtruct his purſuit: but if he take a term to prove, the minor may take the ſame term to prove his minority, (which doth not acknowledge the libel, or free the purſuer from probation thereof;) [*or if the minority be inſtantly verified, as ſometimes it is by ſight of the minor's perſon* [k].]

There is no difference as to the reſtitution of minors, though the deed be done with conſent of curators. Nor did it exclude a minor reducing, becauſe his curators had received the money in queſtion, and ſo were liable to the minor for miſimploying it, upon pretence that his leſion could not be known till they were diſcuſt, *July* 2. 1667, *Lord Blantyre contra Wakinſhaw.* The reaſon is, becauſe the minor leſed may purſue both.

But this remeid is not competent for every ſmall leſion, but it muſt be enorm; which is in *arbitrio judicis.* Neither is a minor reſtored againſt leſion, which falls not by levity, but by accident, as by ſhip-wreck, [k] the minor being a trading merchant, *Hope de minoribus, Edgar contra executors of Edgar.* Neither becauſe he was bound conjunctly and ſeverally for ware with another merchant, who was in ſociety with him in trading, *June* 20. 1676, *Galbraith contra Leſly.* Becauſe trading merchants and others exerciſing trade, requiring peculiar skill, capacity and underſtanding, are held rather to deſign to deceive, than to be deceived: as was found in the caſe of a notar-publick, *July* 19. 1636, *Gardner contra Chalmers* **.

Neither was a minor reſtored againſt his judicial confeſſion upon oath, upon point of fact, and ſwearing never to come in the contrary, *November* 28. 1626, *Hope and Nicolſon contra Nicolſon* ***. Neither was a minor reſtored againſt his promiſe upon Oath, to quit *two out of* [l] twenty chalders of victual, provided to him by his contract of marriage, as not leſed by keeping his Oath, which is conform to the authentick *Sacramenta puberum* [m], *January* 15. 1634, *Hepburn contra Hepburn and Seton.* And it was found relevant againſt reſtitution of a minor of a bond granted for a debt of his father's, whom he repreſented not, that he ſwore to perform the ſame, *February* 10. 1672. *Wauch contra Baillie.* But the oaths of minors being elicit with the ſame facility as their bonds and obligations are, therefore they are lately altogether diſcharged by act of parliament with great ſeverity, and declared void and null, *parl.* 1681. *c.* 19 [n].

A minor hath not the privilege to reduce a diſpoſition of land without the authority of a judge, as in the caſe of pupils; unleſs he alſo alledge leſion, *February* 2. 1630, *Hamilton contra Sharp, &c.* The like, though the minor had no curators, *December* 13. 1666, *Thomſon contra Stevenſon.* Neither is reſtitution competent, unleſs reduction be intented within the age of twenty five years compleat. For with us majority *comes* [o] at the age of twenty one years compleat: and

* Minors during their pupillarity are exempted from caption and warding for any debt or civil cauſe, *parl.* 1696. *c.* 41.

** In this caſe theſe two exceptions, *viz.* that the minor was a notar when he ſubſcribed the bond (ſought to be reduced,) and that he had paid annualrent of the ſum after he became major, were ſuſtained *conjunctim*, the latter part of the defence being found probable by witneſſes.

*** The deciſion here cited imports no more than that a decreet was pronounced againſt a minor, who judicially acknowledged upon oath his having ignorantly cancelled the ſubſcription of a bond, that the bond ſhould make as great faith againſt him, as if it were entire; and that the decreet was ratified upon oath by the minor in preſence of the lords.

[h] F. *other two.* [i] *Reg. majeſt.* III. 32. 15. *& ſeqq. Statut. Willelmi regis, c.* 39. [k] I. edit. [l] dec. [m] *C. ſi adv. vend.* [n] See below, I. 17. 14. [o] I. edit.

and there are four years allowed to minors to intent reductions, which therefore are called *anni utiles*, *Nicolſon, de minoribus*, *Guidlat contra Auſtin and others*, *L. of Craigie contra Dunbar* [o].

A minor was reſtored againſt his contract of marriage, wherein he was obliged to infeft his firſt-born ſon in fee of his whole eſtate, (which was very conſiderable,) having gotten but ten thouſand merks of tocher, *March* 7. 1623. *Lord Bargeny contra his ſons*. The like where a minor, getting but a thouſand merks of tocher, provided five thouſand merks to his wife's father in caſe of no ſucceſſion; but not [o] reſtored againſt that part of his contract, providing all his means acquired and to be acquired in liferent to his wife, *July* 4. 1632, *Davidſon contra Hamilton*. *And* [o] a woman minor was reſtored againſt the *exorbitancy* [p] of her contract of marriage, *November* 22. 1664, *Macgill contra Ruthven of Gairn*: but here ſhe was only reſtored to a ſuitable liferent, but not againſt that proviſion in her contract, providing her lands and ſums to the heirs of the marriage; which failing, to the man's *heirs* [q]. The like, where the wife diſponed her lands to her husband, whoſe means were altogether unanſwerable, *Spotiſwood, husband and wife*, *Fleming contra Hog*.

Minors are alſo reſtored againſt judicial acts to their leſion; as againſt a decreet of exoneration of a tutor, with concourſe of curators, before the lords *in foro contradictorio*, *December* 1. 1638, *Stewart contra Stewart*; *Hope, univerſal and lucrative ſucceſſor*, *Knolls contra Knolls and Watſon*; and againſt a defence proponed by an advocate without ſpecial mandate, which did homologate a deed in minority, *February* 14. 1677, *Duke and Dutcheſs of Buccleugh contra Earl of Tweedale*, (in which caſe it was found, that accepting an illiquid right for a liquid was no enorm leſion, inferring reſtitution.)

But reſtitution is excluded, *ſi minor ſe majorem dixerit*, (*nam deceptis, non decipientibus, jura ſubveniunt* [r];) as where the minor's bond bore expreſly that he was major, and *the* [s] creditor knew not he was minor by his aſpect or otherwiſe, nor did fraudfully induce him to inſert his majority, *February* 23. 1665, *Kennedy contra Weir*. It is alſo elided, if it be proven that the deed in queſtion was profitable, as that the ſum in queſtion was wared upon the minor for meat and clothes, tho' his father gave him a ſufficient allowance, ſeeing he was then abroad from his father, *Spotiſwood, minors, &c. Creich contra Walker*. It is alſo elided by deeds of homologation after majority, *July* 19. 1636. *Gardner contra Chalmers* [t].

Where [u] majority was alledged againſt a minor's reſtitution, neither party was preferred in [w] probation, but witneſſes allowed *hinc inde*, *February* 20. 1668, *Farquhar of Tonley contra Gordon*. And leſion needs not be proven by the minor, granting bonds of borrowed money: for the miſapplication is preſumed unleſs the contrary be proven.

This privilege is not only competent to the minor himſelf, but to his heir: who *may* [a] reduce the deed done in his predeceſſor's minority. The rule whereof in the ſeveral caſes, which may occur, is well deduced from the redemptionsof appriſings led againſt minors. For the *act*, *parl.* 1621 [aa], *anent compriſings*, orders the intereſt of minors in redeeming appriſings thus: that if a minor, having right to redeem compriſed lands, deceaſe before his age of twenty five years compleat, and *another* [b] minor be heir, or ſucceed to him in his right of reverſion, that minor ſhall have the ſame time to redeem, as if the appriſing had been led againſt himſelf; but a major ſucceeding to a minor in the right of reverſion, if that minor died within ſeven years after the appriſing, the major hath as much time to redeem as reſted of the ſeven years, but no *anni utiles* after; and if the minor, who had right of reverſion, outlive the ſeven years, but dy *intra annos utiles*, the major ſucceeding hath a year to redeem, though there be not ſo much reſting of his predeceſſor's *anni utiles*; but tho' more be reſting, he hath only a year. There being no ſpecialty as to minority in appriſings and other rights, *this* [bb] rule is to be followed in all caſes of minority.

Mi-

[o] I. edit. [p] dec. [q] I. edit. [r] *l.* 2. *C. ſi min. ſe maj.* [s] F. *that the.* [t] above in this § where ſee the note. [u] F. *but where.* [w] I. edit. [a] F. *if he were minor may.* [aa] *c.* 6. [b] F. *that another.* [bb] F. *and this.*

Minority and leſion *was* [c] alſo *found* [c] relevant at the inſtance of a minor's creditors *, ſeeing the minor *intra annos utiles* had intented reduction, *Nicolſon, de temporibus in integrum reſt. Hamilton contra Sharp, &c.* [c]. But the privilege of reſtitution is not competent to minors upon revocation, unleſs they intent reduction and declarator *intra annos utiles:* which was found to hold in the king's *revocations* [c] as to lands not annexed, *Spotiſwood, revocation, Hoppringle contra Ker* **.

XLV. The other privilege of a minor is, *quod non tenetur placitare ſuper hereditate paterna.* Which though it be not *peremptorium cauſæ*, delaying only purſuit till majority, yet there is no neceſſity to verify it inſtantly, but a term will be granted to prove the ſame, *February* 24. 1676, *Kello contra Kinnier.*

[c] This privilege is introduced in favours of minors, that they be not put out of their father's heritage, whereof he died in peaceable poſſeſſion. For though their privilege of reſtitution might recover ſuch rights by reduction, yet the *minors* [d] would loſe the fruits and profits *medio tempore*, and until their rights were produced and made clear in reduction. Which might be of great importance to them: for if a minor of a year old were diſpoſſeſt of his father's inheritance, he would loſe at leaſt twenty years fruits of it. And therefore the law hath introduced this privilege in favours of minors (beſide the privilege of reſtitution:) wherein minors are not in contradiſtinction to pupils, but the privilege is chiefly competent to pupils.

Though [e] it bear only *de hereditate paterna*, yet *minors* [f] ſucceeding immediately to their grandfather or other predeceſſor, who died in poſſeſſion, it is not like the privilege would be denied to them (though I have not found it controverted or determined,) ſeeing the law under the name of father doth ordinarily comprehend grandfather, great-grandfather and all predeceſſors in a direct line: who come all under the deſignation of forefathers; as all ſucceſſors in the right line come under the name of children. And it holds alike *in* [g] the heirs of mothers, grandmothers *&c.* But the law indulgeth this favour only as to *the heritage of fathers.* And therefore neither the ſtile nor cuſtom hath extended it to collateral ſucceſſion, as to brothers or uncles: wherein minors, if they be excluded, can only be reſtored by minority and leſion, ſo ſoon as their predeceſſors or authors rights can be found.

Neither was ever this privilege extended further than to minors in poſſeſſion of the heritage of their forefathers, who died in peaceable and lawful poſſeſſion, and to whom the minor immediately ſucceeded. For there is no privilege to poſſeſſion *vi, clam aut precario:* though law or cuſtom hath not determined how long poſſeſſion of the defunct is required to exclude clandeſtine or momentany poſſeſſion. But the continued poſſeſſion of the defunct with his author may be accounted ſufficient: or the defunct's poſſeſſion *by a liferenter, whoſe right is granted by his father* [g], or reſerved in his right, but not *the* [h] poſſeſſion of ſingular ſucceſſors by redeemable rights, as wadſetters or *appriſers, nor any other liferenter than the father's relict. Neither* [i] hath there been any exception made of the purſuits at the inſtance of minors againſt minors, as being both privileged, there being no parity in recovering and retaining poſſeſſion. But where a minor was put from poſſeſſion by a decreet of removing, obtained by a minor, from lands wherein her father and herſelf were infeft, and in poſſeſſion, ſhe was not excluded to reduce that decreet of removing upon the minority of the other minor, whoſe father died not in poſſeſſion, *June* 18. 1680, *Lyle contra Dons.*

This privilege will not only exclude poſſeſſory judgments, ſuch as removings or mails and duties, but alſo declarators or reductions. As to which it hath been variouſly decided, whether it ſhould ſtop certification *contra non producta*, eſpecially

* Even *poſt annos utiles.* See dec.

** The authority here cited informs us only, that the diſponee in an alienation of lands not annexed, made by the king in his minority, could not be put from his poſſeſſion, upon the king's revocation in parliament, without a ſpecial declarator of a judge conform thereto.

[c] I. edit. [d] F. *minor.* [e] F. *and though.* [f] F. *thereby minors.* [g] F. *on.* [g] F. *by his father's liferenter, whoſe right is granted by him,* II. edit. *by a liferenter, whoſe right is granted by him.* I. edit. [h] F. *to the.* [i] *Appriſers. Neither,* I. edit.

cially in the caſe of improbation. And though it cannot exclude improbation, where the writs are produced, or where they are in the hands of the *minor* [k] and his tutors *or* [l] curators, if that ſhall appear by their writ or oath; yet where the minor produced his father's infeftment, and proved his father's poſſeſſion, he was found obliged to produce no further, *January* 31. 1665, *Kello contra Pringle and the L. of Wedderburn*; ſo that it cannot defend ſimply againſt production. But if it could not defend againſt production of any further but the father's infeftment, and that certification in improbations would be granted in all other rights: if theſe certifications could take effect, the privilege might be wholly evacuate; and if they ſhould take no effect till majority, certifications in improbations ſhould not be granted, being hardly reducible, even though in abſence. And though it was not ſuſtained againſt production in a reduction [*and improbation* [m],] *November* 27. 1678. *Guthry contra L. of Guthry*; yet in that caſe the minor's right was only an appriſing at his father's inſtance, upon which his father was never infeft.

This being a feudal privilege, whereof there is no mention or foundation in the civil law, it is only competent to minors, whoſe fathers were in poſſeſſion by virtue of infeftment: *as in the former caſe of appriſing*; *and January* 31. 1665, *Kello contra Pringle and L. of Wedderburn*, (where the father had a diſpoſition without infeftment.) [n] But the want of infeftment of the father's author was not found relevant, *January* 18. 1667, *Chapman contra White*.

Where the reaſons of reduction *are* [n] probable by witneſſes, *ſo that the probation may periſh by delay* [n], their oaths *are* [n] taken to ly *in retentis*, *January* 31. 1665. *Kello contra Pringle and L. of Wedderburn* [n]; *February* 15. 1678, *Gordon and her ſpouſe contra Maxwell*.

This privilege will not [o] exclude the father's obligement to denude himſelf of the infeftment in queſtion, *Spotiſwood, Minors, &c. John Hamilton contra* : For there *there* [p] is no competition of rights, but implement of an obligement. And ſo it was not ſuſtained, in a reduction upon a clauſe irritant in a feu, *Hope, de minoribus, Lord Inchaffrey contra Mitchel:* neither to exclude reductions *ob non ſolutum canonem* by the father, though the feu contained no conventional clauſe irritant, *February* 20. 1633, *Lenox contra Macmoran*. Neither did it exclude the probation of the tenor of a charter, which might exclude the minor's right, *February* 15. 1628. the *maſter of Jedburgh contra the Earl of Home*; albeit it would exclude proceſs upon that charter.

Neither doth it exclude proceſſes in relation to marches, perambulation, or diviſion of lands, *July* 27. 1675, *Robertſon contra Stewart*. Neither did it exclude the nullity of a diſpoſition by a wife to her husband, dying within the year, *February* 15. 1678, *Gordon and her ſpouſe contra Maxwell* *.

But this privilege was found not only competent to defend minors in their property, but in their commonty, *Hope, de minoribus*. [p] Where the intereſt of a minor is not the chief right, but a major's right, whereby the minor's would fall in conſequence, *the proceſs doth not proceed but againſt the major, having a partial intereſt by the ſame evidents* [q], *November* 25. 1624, *Hamilton contra Matthiſon, &c. Spotiſwood, minors, &c. inter eoſdem*. Or where a major liferenter is called with a minor fiar, the proceſs proceeds againſt the liferenter, but the minor is as not called, *March* 21. 1628, *Bamanno contra Yule*; *July* 15. 1665, *Borthwick contra Skene*. This privilege is not relevant againſt the faults of the father (or his authors,) as to his poſſeſſion or right. And therefore it will not defend againſt forfeiture of the father's author, whereby the father's right fell in conſequence, *Spotiſwood, minors, &c. Hamilton contra L. of Gaſton* **. Neither againſt recognition, *February* 19. 1662,

* It was not a purſuit of the nullity mentioned by the author, but of another, namely, revocation of a donation between man and wife, which was here found not excluded by the privilege, (the defender being heir to the donatar.)

** The true purport of the deciſion is this: the privilege was not ſuſtained to exclude reduction of an infeftment of forfeited lands granted by the king to the minor's father, purſued by the heir of the forfeiting perſon, for that the forfeiture had been reduced in parliament.

[k] F. *minors.* [l] F. *and.* [m] dec. [n] I. edit. [o] F. *neither will this privilege.* [p] I. edit. [q] F. *the proceſs doth proceed, but the minor is held as not called,* I. edit.

Lord Carnegie contra Lord Cranburn. Neither will it defend againſt the ſuperior, or his donatar, purſuing for any caſualty of his ſuperiority.

TITLE VII.

Reſtitution.

I. *Reſtitution of other mens goods a natural obligation.*
II. *Reſtitution is not ſolely an effect of property.*
III. *Reſtitution of things ſtraying or waith, and loſt.*
IV. *Reſtitution of things* bona fide *acquired, not from the right owner.*
V. *Reſtitution of things recovered from thieves, pirates and robbers.*
VI. *Reſtitution of things recovered from publick enemies.*
VII. *Reſtitution of things*, quæ cadunt in non cauſam, & ob cauſam data cauſa non ſecuta.
VIII. *No reſtitution of things given* ob turpem cauſam.
IX. *Reſtitution of* indebitum ſolutum, *except by tranſaction or litiſconteſtation.*
X. *Reſtitution reacheth alſo the fruits not conſumed.*
XI. *Reſtitution is grounded on having; which ceaſing without fault, the obligation of reſtitution ceaſeth.*
XII. Bonæ fidei poſſeſſor facit fructus conſumptos ſuos.
XIII. *The obligations of heirs and executors.* Pro poſſeſſione dolus eſt.
XIV. *From reſtitution ariſes the action of exhibition and delivery:*
XV. *Alſo the diviſion of things common without ſociety.*

THE obligations, whereby men are holden to reſtore the proper goods of others, are placed here among natural or obediential obligations, becauſe they are not by contract or conſent, neither have they their original from poſitive law. For though there were no poſitive law, thoſe obligations would be binding: and they are obligatory among perſons, who are not ſubject to one poſitive law. And therefore, ſeeing they are not obligatory by the will or law of man, of neceſſity they muſt have their original from the authority and command of God, and that obedience we owe thereto by the law written in our hearts.

We are not here to ſpeak of the obligations of reſtitution, which are by any voluntary engagement, or which are by delinquence, but of thoſe only, whereby that which is another's coming in our power, without his purpoſe to gift it to us, and yet without our fault, ought to be reſtored, as things ſtraying, or found, or recovered from pirates, thieves, *&c.* or bought *bona fide*, or the like.

II. Reſtitution of things, belonging to others, may ſeem to be an effect of property, whence cometh the right of vindication or repetition of any thing: but beſide the real action the proprietar hath to take or recover what is his own, which doth not directly concern any other perſon, and ſo, being no perſonal right, hath no correſpondent obligation; *there is an obligation* [r] upon the haver of that, which is another's, to reſtore it, *and thence* [r] a perſonal right. Which is a power in the owner to demand it, not only when it is in the poſſeſſion of the haver, but if he *have* [s] fraudfully put it away. And yet it is his once having it, that obliges him: and his fraudulent away-putting, though it be a delinquency, yet it *gives* [t] not the riſe to the obligation, but only continues it in the ſame condition as if he yet had it. So in that caſe his obligation is more palpable, *where* [u] vindication of the thing, where *now* [w] it is not, cannot take place *properly* [w]: *for though* [a] *pro poſſeſſore habetur qui dolo deſiit poſſidere*, that is only *fictione juris*; but the obligation to reſtore is direct and proper.

The learned *Grotius* [b] maketh ſuch obligations, as ariſe from dominion and property, to be by tacit conſent or contract, whereby the nations, who have agreed to

[r] MSS. A, B, & H. [s] MSS. [t] MS. B. [u] MSS A. G. & H. [w] MSS. [a] F *place, though.* [b] *De jure bel. ac pac. lib.* II. *c.* 10.

to appropriate things common to men, have [c] alſo tacitely agreed, that each man ſhould reſtore what is *in* [c] the property of another. Yet this will not hold, if we conſider that, though for the moſt part property be by conſent, yet in many things it is without conſent, as things which have their ſpecification from their owner *by* [c] his skill *or* [c] induſtry, or others (as will appear in its own place.) And therefore it is *more* [d] juſt and ſure to attribute ſuch obligations to the law of God written in our hearts [d] than unto any other conjecture *or* [c] ſuppoſed conſent. To this agreeth the *Roman* law, which holdeth theſe obligations not to be *ex contractu, ſed quaſi ex contractu*, neither doth account them obligations *ex lege*. And if they were of tacit conſent, theſe obligations were *ex contractu* [e], for that tacit conſents produce true, and not *quaſi* contracts [ee].

III. There *be* [f] many ways, by which the things of others may come to our hands, without our fault or delinquence. As *firſt*, Things ſtraying. Concerning which the Lord hath ordained, *commanding* [f], "To bring again unto their bro-"ther that which went aſtray, and if he were not near, to keep it till he ſought "after it, and then reſtore it; and to do ſo with all things loſt by him [g]." Wherein there ſeemeth ſomething to be *admixed* [h] of poſitive law, as the taking of it home to him, or keeping of it for his brother: whereas the ſimple natural obligation of reſtitution obliges to no duty of cuſtody or pains, but only not to conceal that which is another's, and to reſtore it when demanded. And ſuch is the cuſtom of *Scotland*, that waith * or ſtraying goods muſt be proclaimed, and intimate to be waith; and if the owner make them appear to be his, he may have them, ſatisfying for what was wared upon them for their preſervation, as graſs, *&c.* and if none appear within ſuch a time, cuſtom hath added that waith or *ſtraying* [i] goods become publick, and eſcheat to the king, or others, to whom he hath diſponed or committed that power. And this intimation is ſo far requiſite, that if the goods be meddled with, or diſpoſed of otherwiſe, it is theft. But though the publication maketh the goods publick, and the meddling therewith to be without fault: yet ſo that, if there do never any owner appear, the things do become really and abſolutely publick. And they do not become the poſſeſſor's by that ancient law, *quod nullius eſt, ſit* [m] *occupantis*. Which takes place amongſt us only in things which were never known to have an owner, as pearls or ſtones found on the ſhore, and many others: but therefrom are excepted waith goods, and goods by ſhipwreck, which become eſcheat, as publick.

Secondly, Things loſt, (of which we ſee the rule for *Iſrael* [n],) [o] may be poſſeſt without delinquence. In theſe our cuſtom agrees with the *Roman* law, and other nations, (except in the matter of waith and wrack goods, of which before,) that ſuch things, not being concealed, may remain with the poſſeſſors; and if none claim them, they become their own; and they may diſpoſe of them, if they cannot be conveniently preſerved without hazard [p].

IV. *Thirdly*, Things belonging to others *come* [q] to our hands without delinquence, *when* [r] we acquire *bona fide* either the property, uſe, or ſecurity thereof (*as pledges* or *depoſita* [s].) In *which* [r] caſes we are bound to reſtore [r] to the owner, though thereby we loſe what we gave, except in ſome caſes, wherein poſitive law ſecures the buyer, and leaves the owner to ſeek the ſeller.

[q] This reſtitution takes place, notwithſtanding any obligement in the contrary: whereof we have an excellent ſpecies in the law [t]. A robber depoſitate with *Seius* that, which he ſpoiled or robbed from *Mævius*. To which is *Seius* obliged to reſtore? If *we* [u] look only upon his engagement, truly to the robber; but if upon the whole matter, certainly to *Mævius*. For the precept of law is

* Here ſome may incline to controvert the reading, and for *waith* to read *waif*, as in *Quon. att. c.* 48. § 14. But *waith* is ſufficiently ſupported by the authority of *Gawin Douglas, prol.* VI. *Æn.* where the rhime excludes all ſuſpicion of a falſe reading. And even in *Quon. att. loc. cit.* ſome MSS. exhibite *waith*, not *waif*.

[c] MSS. [d] MSS. A. B. & H. [e] *l.* 4. *pr. D. de pactis.* [ee] *l.* 4. *D. pro ſoc. l.* 6. § 2. *D. mandati, l.* 13. § *ult. D. locati.* [f] MSS. [g] *Deut.* xxii. 1—3. [h] I. edit. & MSS. A. & B. [i] MSS. [m] I. edit. & MSS. A. & B. [n] *Deut. loc. cit.* [o] MSS. [p] See below II. 1. 5. & III. 3. 27. [q] MSS. [r] I. edit. & MSS. [s] MSS. A. B. & H. [t] *l.* 31. § 1. *D. depoſiti.* [u] MS. A.

is to render every thing to the owner. And therefore no promise or engagement can here prevail against the natural obligation of restitution: because, that being natural and indispensable, the engagement, whether ignorantly *made or wittingly*, is *illicite and obligeth not*; *though an engagement* [w] willingly made, to restore that which the engager knows to be another's, is a delinquence [u], inferring punishment for engaging, but *not obliging* [u] to perform. So also he, who ignorantly takes in custody or pledge that which is his own, though thereby he promise to restore it; yet his obligation, being by error in the substance of the contract, makes it void, and he may retain or recover it as his own.

V. *Fourthly*, Things recovered from thieves, robbers or pirates, are liable to this obligation of restitution. Wherein these things may be lawfully detained for the expences and labour in recovery: especially if the labour was undertaken of purpose to recover such things: and if it was but by accident, the recoverer projecting some other thing, the satisfaction is due, as a remuneration of the trouble and pains, which it might have cost the owner in the recovery; which, with the expences following thereon, being saved to him, he ought to recompense the profit, accruing to him, to the author [a] *of it* [b].

VI. *Fifthly* [b] The doubt remaineth greater [a], Whether what enemies *have* [c] possest, being recovered by a nation or party, ought not to be restored to the proper owners, of that nation, who bore the equal expence of the war, and who, being *all* [d] engaged in that quarrel, cannot but acknowledge the war of their enemies to be unjust. And therefore, as to these things, I think, that equity would require restitution upon satisfaction and gratification *for* [e] the favour received: which ought to take place, unless by the peculiar *custom* of *the nation* [f] it hath been otherwise agreed, which may alter or derogate from this common law. And therefore *David*, recovering back his *wives* [g] and his spoil from his enemies, delivered every man his own [h].

VII. *Sixthly* [i], The duty of restitution extendeth to those things, *quæ cadunt in non causam*, which coming warrantably to our hands, and without any paction of restitution, yet if the cause cease by which they become ours, there superveeneth the obligation of restitution of them. Whence are the condictions in law, *sine causâ*, and *causa data causa non secuta* [k], which have this natural ground: and of which there are innumerable instances. As all things that become in the possession of either party in contemplation of marriage, the marriage (which is the cause) failing to be accomplished, the interest of either party ceaseth, and either must restore: or if it be dissolved within year and day, without a living child born, our custom makes all to return, as if there had been no marriage; of which formerly [l].

VIII. But there is not the same ground for things given for an unjust cause [m], *ob turpem causam:* in which the will of the owner, and his purpose to transfer the property, is effectual, though his motive was not good. But positive law doth sometimes obviate the inconveniency by such donations, and makes them void, and either to return, or become caduciary and escheat. But in things received *ex turpi causa*, if both parties be *in culpa*, *potior est conditio possidentis:* so there is no restitution. *As* [m] for those things which are attained by force or fear, they have their original from delinquence, and *come* [n] not under this consideration.

IX. *Seventhly*, Restitution extendeth to *indebitum solutum*, when any party through error delivereth or payeth that, which he supposeth *is* [o] due, or belongeth to another: if thereafter it appear, that it was not due to that other, he who received it is obliged to restore, and yet not by paction or contract. Therefore the law calleth this *promutuum* and [p] *quasi mutuum* [q], having in it the same natural obligation which *mutuum* or loan hath by voluntary engagement. There is this exception against *indebitum solutum*, that it cannot be repeated, when the creditor gets that

[u] MS. A. [w] MSS. [a] I. edit. & MSS. [b] MSS. [c] MSS. A. B. & H. [d] MSS. B. G. & H. [e] MSS. [f] MSS. A. & B. [g] MSS. A. B. & G. [h] 1. *Sam.* xxx. [i] MSS. G. & H. [k] *D. lib.* xii. *tit.* 7. & 4. [l] I. 4. 19. [m] I. edit. & MSS. [n] F. *comes.* [o] MSS. A. B. & G. [p] MSS. A. B. & H. [q] *Cujacius paratit. ad C. de condict. indeb.*

that which is due to him, though not due by that party who paid the ſame, *l.* 2. *C. de condict. indeb. l.* 44. *D. eod.* Which was not found, when the payment was made to an executor-creditor, purſuing upon his confirmation, and before ſentence obtaining payment from the debitor's heir, who was decerned to refound, upon a diſcharge of the debt, granted to the defunct debitor, whereby it appeared the debt was not truly due, but twice paid, *January* 10. 1673, *Ramſay contra Robertſon: nam jus non patitur idem bis ſolvi.*

Poſitive law, for utility and quietneſs ſake, excepteth tranſactions, which are properly ſuch: and which are of two ſorts. The one extrajudicial, when in any matter doubtful and debateable either party, to ſhun the hazard and trouble of a legal *deciſion* [r], is willing to tranſact and agree, ſo as thereby they quit or abate part of what they claim as their right, and ſo they tacitely renounce all future queſtion upon any appearing of right, either judicially or extrajudicially. And therefore, what either quitteth to other of their rights, is *done* [s] for the ſame cauſe; and hath in it, either expreſly or implicitely, that the tranſaction ſhall not be *retracted* [t] upon any thing that ſhall accidentally appear thereafter, fraud and force only (as the common exception in all human actions) being excepted: and therefore ſuch things, though they appear not to be the havers, are not to be reſtored. The other tranſaction is judicial by *Litiſconteſtation*, when any cauſe *in difference* [u] is *put upon* [w] the oath of the party, or other probation, and particular diets for that effect aſſigned: wherein if either party fail, he loſeth what is *put thereupon* [w] by his implicite conſent. *As* [a] when the right of any thing is referred to the haver's oath, and he ſweareth it to be his own, though thereafter it may be made palpably appear not to be ſo, yet it will not be reſtored, becauſe of the owner's reference, implying that condition, that he ſhall ſtand to *the* [b] oath, without queſtioning right or wrong, (becauſe an oath is an end of all controverſy,) though the ſwearer may be puniſhed as a wilful perjurer. And thus moſt of things, that *become* [c] ours by ſentences and decreets of judges, are not liable to reſtitution upon any ſubſequent queſtion. Of which afterwards in their proper places [d].

X. Under reſtitution *do* [e] fall not only the things of others, but their natural *births* [f] and fruits extant, not *bona fide* conſumed; which are accounted as parts of the things, being acceſſory thereto, and belonging to the ſame owner. But induſtrial and artificial profits, in ſo far as *ſuch* [e] ariſe from the haver [g], and not from the thing, fall not under reſtitution, if once ſeparate [h].

XI. In all theſe the obligation of reſtitution is formally founded upon the having of *the* [i] things of others in our power: and therefore, that ceaſing, the obligation alſo ceaſeth. As he who *bona fide* did buy that which did belong to another, if while he hath it, it *appear* [i] to be that other's, he muſt reſtore it without expectation of the price he gave for it, (but as to that he muſt take himſelf to his warrandice, expreſt or implied, *by* [k] the ſeller:) but if *bona fide* he *have* [h] ſold it before he be queſtioned, he is free, and not obliged to reſtore it; though, in ſo far as he *did profit by* [i] receiving more for it than he gave, he be liable by the obligation of remuneration or recompence, of which in the next title. And as to the fruits of that which is another's, the obligation of reſtitution takes only place againſt the haver, where they are extant. And therefore, where they are neglected, or being reaped have periſhed, yea where they are conſumed by the haver's making uſe of them, the obligation of reſtitution takes no place; though the obligation of recompence hath place in ſo far only as, by ſuch fruits the haver *conceived* to be his own, *he* [l] is gainer, and in better condition than if he had not had them. But if he have increaſed his ſpending *bona fide* becauſe of his having, he is free, *l.* 25. § 12. *D. de her. pet.* Under his profiting comes his paying of his debt, or even his beneficence, where it appears he would have gifted,

[r] I. edit. & MSS. [s] MSS. [t] MSS. A. B. & D. [u] *indifferent*, MSS. [w] I. edit. & MSS. [a] MSS. [b] I. edit. & MSS. [c] I. edit. & MS. B. [d] I. 17. 2. & IV. 39. 1. [e] I. edit. & MSS. [f] MSS. A. & B. [g] MSS. [h] I. edit. & MSS. [k] MS. G. [l] MSS.

whether ſuch a thing had come to his hand or not: for in either caſe he is *locupletior*, and muſt recompenſe. So if he *have* [l] ſold *and* [l] delivered that which was another's, and which came to him without price, he is not obliged to reſtore the thing, but to recompenſe what he hath enriched himſelf by the price; and that without any queſtion of the proportionable value of it to the thing.

XII. In the *enjoyment* [l] of fruits, the poſitive law of the *Romans*, and of this and moſt [l] other nations, *have* [l] not only owned what is before ſaid of reſtoring no more than that, by which the haver hath profited; but have extended it this much further, for utility and common quietneſs ſake, that *bonæ fidei poſſeſſor facit fructus perceptos & conſumptos ſuos*. Whereby what fruits he, who hath poſſeſſed *bona fide*, hath conſumed, though he hath profited, and been enriched thereby, he is not obliged to reſtore the ſame. Which doth much ſecure and quiet mens enjoyments, that they may freely uſe and enjoy that which *bona fide* they have, and *ſhun* [m] the hazard of their ruin by anſwering for the bygone fruits, or their great vexation in clearing, whether they be enriched thereby or not [n].

XIII. Amongſt theſe obligations neither by contract nor delinquence are commonly accounted the obligations, which are incident to thoſe who *enter heirs* [o] or are ſucceſſors to others: whereby they are obliged to perform all their predeceſſors obligations, and ſatisfy their debts in ſuch manner as in law is preſcribed; and yet it is not by their own engagement, nor by their fault, but by their fact of entring [p]. Such alſo are the obligations upon executors to ſatisfy the children and relict, legatars *and* [q] *creditors* of defuncts, by, or for whom they are intruſted. And indeed the reſtitution of the relict's part is properly ſuch; as alſo the legatars, to whom the right by [r] legacy is tranſmitted oft-times of *particular* [s] things: the giving alſo to *the* [s] children, or neareſt of kin, is a reſtitution, becauſe the property of the defunct's goods by his will, expreſſed or preſumed, is tranſmitted to them after his death. But for payment of the defunct's debts, they are not properly by reſtitution, becauſe the creditor had no property in the goods, but an obligation upon the perſon [t]: and they ariſe either from that natural obligation that lies upon children from their parents engagement, of which before [u]; or by the natural obligation of remuneration or recompence, by which *other* [w] ſucceſſors, in ſo far as they are profited by the ſucceſſion of the defunct, *muſt* [a] ſatisfy or recompenſe. And *though* [b] the poſitive law in ſome caſes makes them liable ſimply, yet in equity they are liable *but* [b] in ſo far as they are gainers, *ſecundum vires hereditatis* [c].

In the reſtitution of the goods of others, though the ground thereof be the having of that which is to be reſtored, yet if the haver ceaſe to have through his own fraud, his delinquence therein obliges him to reparation, as if he ſtill had it: *whence is* [d] the maxim of law, *pro poſſeſſore habetur, qui dolo deſiit poſſidere* [e]. And this extendeth not only to the thing itſelf, which he muſt reſtore, tho' he hath fraudulently put it away, or at leaſt the value of it; but alſo it extends to the fruits [f] which he enjoyed *mala fide*, and after he knew, and had intimate to him, the right of another. So that ſuch fruits muſt be reſtored, though the enjoyer become not the richer thereby.

XIV. From the right of reſtitution ariſeth the action of exhibition and delivery. The exhibition is but preparatory to the delivery, that thereby the thing in queſtion may be known to the parties, judge and witneſſes: and therefore *majori ineſt minus*, he that hath right to crave delivery hath much more right to crave the production, or the inſpection. This action may be *inſtitute* [g] concerning any moveable *thing* [h], that can be conveyed before the judge or his delegates; as if the queſtion were of an horſe, if he be extant, he may be fitly craved to be exhibite, that the witneſſes may be in the clearer capacity to depone, to whom he doth belong: but the ordinary ſubject of this action is, the exhibition and delivery

[l] MSS. [m] F. *to ſhun*. [n] See below, II. 1. 23. & 24. [o] I. edit. & MSS. [p] MSS. A. B. & H. [q] MSS. [r] MSS. B. & G. [s] MSS. [t] I. edit. & MSS. [u] I. 5. 9. [w] MSS. [a] F. *they muſt*. [b] MS. H. [c] I. edit. & MSS. [d] MSS. A. B. & H. [e] *l.* 131. *D. de reg. juris.* [f] MS. G. [g] I. edit. & MSS. [h] MSS.

livery of writs. Wherein the tenor and ſtile of the action is, that the defender hath, or had, and fraudfully put away the *thing* [g] in queſtion.

His [g] having is probable by witneſſes; and relates not unto the time of probation, but unto the time of the citation. For if after citation the defender had the thing in queſtion, he ought to have acknowledged it; and if he have juſtly or neceſſarily put it away, or wanted it, he ought to have pleaded that as a defence, which therefore would exeem the purſuer from probation of the libel, as being acknowledged by the defence: and ſo being omitted, and the purſuer proving his libel, the exception is not competent; but the defender is accounted as a fraudful away-putter after citation. So [i] this defence, that the writs in queſtion were given to be regiſtrate, and were burnt in the tolbooth, was found relevant, and probable by the members of court, *Haddington*, *January* 12. 1610, *Home contra Wilkieſon*.

There is a ſecond member in this action, to wit, that the defender at any time before the citation had the *writ* [k] in queſtion, and fraudulently put *it* [k] away, and is therefore repute as haver of *it* [k]. Both theſe members muſt be proven: for it will not be ſufficient to prove, that the defender had the *writ* [k] before the citation; but it muſt *alſo* [k] be proven, that he fraudfully put *it* [k] away. (Which therefore, *as* [k] being a matter of fraud, concerning the mind and purpoſe, is not probable by witneſſes, but by writ or oath of party, *November* 17. 1627, *Inglis contra Kirkwood*; *January* 30. 1629, *Captain Crawford contra L. Lamington.*) Yet if fraud otherwiſe appear, witneſſes will be admitted to prove the having before citation, that the haver may inſtruct that he warrantably put the ſame away, *July* 14. 1666, *Fountain and Brown contra Maxwell of Nethergate*. But the ſimple proving the having of *it* [k] after citation is ſufficient to infer the concluſion, unleſs the lawful cauſe be alledged in the defence, and proven. And the having of writs, though of great importance, is probable by witneſſes.

For the better diſcovery of the havers of writs, the lords by a late act of ſederunt, *February* 22. 1688, ordained defenders in exhibitions to depone, if ever they had the writs in queſtion; and when, and how they ceaſed to have them; and whether or not they know, who had them afterward, or who now hath them. Whereas before they did only depone they had them not ſince the citation in the exhibition, or did not at any time fraudfully put them away. Whereby they were judges of what did import fraudful away-putting: whereas this ſpecial way of their examination gives the lords opportunity to judge, whether the way, they ceaſed to have them, was fraudulent or not.

Witneſſes will not be admitted to prove the delivery of any writ by the granter thereof, whether it be bond or aſſignation, *becauſe* [l] *chirographum, apud debitorem repertum,* [m] *præſumitur ſolutum* [mm]. Which was ſuſtained as to an aſſignation in the hands of the granter's ſon, who did his affairs *; and witneſſes were not admitted to prove, that the ſame was delivered to the ſon, as agent for the purſuer, *December* 14. 1666, *Fairly contra creditors of Sir William Dick*. This preſumption is ſtronger in relation to bonds, which are moſt ordinarily taken away by retiring the ſame, without taking diſcharge. And therefore, being found in the hands of the debitor or his heir, they are preſumed to be ſatisfied and retired; or being in the hands of a cautioner, if it appear by his oath, or other evidence, that he got the bond from the principal debitor to take his name from it, *June* 26. 1623, *Carmichael contra Hay of Monkton*. Otherwiſe the preſumption would not hold by the bond's being found in the hands of a cautioner, or of an executor: for whom ſimple retiring of the bond will not be ſufficient without diſcharge or aſſignation.

Exhibition and delivery is competent to any party, in whoſe favours a writ is conceived, without neceſſity to prove that it was delivered. For that is preſumed, if the writ be out of the granter's hand: ſo that the granter is neceſſitate to prove that the

* The aſſignation was in the hands of the ſon, who had granted it as factor for the father.

[g] I. edit. & MSS. [i] MSS. A. & H. [k] MSS. [l] F. *as being*. [m] I. edit. [mm] *l.* 2. § 1. *D. de pactis.*

the writ was *depoſitate* upon terms not performed, or that it was lent, loſt, ſtoln, or paſſed otherwiſe from him, than by delivery; for prevention of which, the *Engliſh* cuſtom is good, that the writ bears, *not only ſigned and ſealed, but delivered before the witneſſes*. But, ſeeing with us delivery is preſumed, it is ordinarily required, that the granter of the writ be called in the exhibition, that he may be heard to propone any thing that may take off the preſumption. Yet this will not be neceſſary in recovering ſecurities of land or other real rights, eſpecially if the Purſuer be in poſſeſſion.

But in ſeveral caſes writs are effectual without delivery. As, *firſt*, writs granted by parents in favours of their children, *November* 11. 1624, *bairns of Ellerſly contra his heir*. *Secondly*, mutual contracts or minutes, *June penult.* 1625, *Crawford contra heirs of Valance*. *Thirdly*, writs bearing a clauſe diſpenſing with delivery. *Fourthly*, by reſervation of the granter's liferent, and power to diſpone, *June* 19. 1668, *Hadden and Lawder contra Shorſwood*. *Fifthly*, an aſſignation [n] by a debitor for his creditor's relief as cautioner for him, intimate by the debitor in name of his creditor [n], was found effectual without delivery, *January* 18. 1677. *Dick of Grange contra Oliphant of Gask*; *February* 24. 1680, *Maclurg contra Blackwood*. The like was found, where the debitor took a bond in name of his creditor: which was preſumed for that creditor's ſatisfaction or ſecurity, and not in truſt; and *was found* [o] not affectable by arreſtment for the procurer's debt, before it was delivered, *July* 12. 1677, *Bayn contra Macmillan* [oo]. But where the bond was taken blank, and arreſtment laid on, before it was filled up with the creditors name, or delivered to him, the arreſter was preferred, *February* 27. 1678, *Campbell and Cuningham contra Bayn and Macmillan*.

Delivery of bonds of proviſion to children in the family is not preſumed in competition with creditors, though their debts be poſterior to the dates of the bonds of proviſion; unleſs the delivery thereof be proven anterior to the debts [p]: otherwiſe creditors would be moſt unſecure by parents making large bonds of proviſion, which they ordinarily keep by them. Which will not be extended to bonds, taken from debitors in the names of children, or wherein they are ſubſtitute, theſe not being latent, but known to the debitor [q].

XV. Under the obligation of reſtitution is comprehended the obligation of diviſion, whereby what we poſſeſs in common with others, *as* [r] indiſtinct from that which they poſſeſs, we are naturally obliged to divide *with* [s] them, whenſoever they deſire to quit that communion: for thereby we reſtore what is their own, and we are not obliged thereto by any contract or delinquence. It is true the contract of ſociety includeth the obligement to divide after the ſociety is ended. But communion falleth many times, where there is no ſociety *nor* [t] contract, as by ſucceſſion, legacy, gift, *&c.* Hence ariſe thoſe three actions frequent in the *Roman* law, *actio familiæ erciſcundæ*, *actio communi dividundo*, and *actio finium regundorum* [tt]. The firſt is *for* [u] diviſion of that which falls by ſucceſſion. The ſecond for diviſion of that which is otherwiſe common. The third for diſtinction *and* [w] clearing *of* [a] the marches of contiguous grounds. In theſe either party may be purſuer: and he is held to be purſuer, who did firſt provoke to judgment. But, becauſe they do chiefly concern *immoveables* [b] or ground-rights, we ſhall ſay no more here of them; but leave them to their proper places, to be treated of hereafter [c].

TIT.

[n] Decc. [o] dec. [oo] See below, I. 8. 2. [p] F. *debt*. [q] See above, I. 5. 6. [r] MSS. A. B. & H. [s] F. *it with*. [t] MSS. [tt] *D. lib.* X. *tit.* 2. 3. & 1. *C. lib.* III. *tit.* 36, 37, 38, & 39. [u] MSS. A. & B. [w] MSS. A. & G. [a] MSS. [b] MS. G. [c] IV. 3. 12. *& ſeqq.* IV. 27.

TITLE VIII.

Recompence or remuneration.

I. *Recompence or remuneration a natural obligation.*
II. *Gratitude.* Donatio non præſumitur.
III. Obligatio negotiorum geſtorum.
IV. Actio negotiorum geſtorum directa & contraria.
V. *The diligence of negotiators.*
VI. *The natural obligement to recompence* in quantum locupletiores facti ſumus.
VII. Actio de in rem verſo.
VIII. Lex Rhodia de jactu.
IX. *Relief of Co-principals and Cautioners.*

THE obligation of remuneration or recompence is that bond of the law of nature, obliging to do one good deed for another.

II. And it comprehends, *firſt*, all obligations of gratitude, which are generally acknowledged by all nations. The breach whereof is abhorred: *ſi ingratum dixeris, omnia dixeris.* Yet becauſe the complaints of ingratitude are ſo frequent and unclear, every one eſteeming highly of the demerit of his own actions, therefore moſt of them are laid aſide without any legal remedy. *For* [d] that which is done *animo donandi*, though it doth induce an obligation upon the mind and affection of the receiver to be thankful, yet doth not bind to the like liberality *of* [dd] neceſſity, *l.* 25. § 11. *ff. de her. pet. except* [e] in few caſes. As a maſter, gifting liberty, upon this ground did put an obligation upon the ſervant, who thereby became free: whence alſo aroſe that right of patronage, of which before [f]. But that is rather by [e] poſitive law, and tacit conſent, as a condition implied in the gift. So alſo in every gift there is a correſpondent duty of gratitude: and therefore by ingratitude the donation becomes void and returns. Which the *Romans* extended only to the donor, not to his heirs, *l.* 1. *& l. ult. C. de revoc. don.* nor againſt the donatar's heirs, *l.* 7. *C. eod.* and betwixt thoſe in a few caſes expreſt *in d. l. ult.* ſo that it is penal.

It is a rule in law, *donatio non præſumitur:* and therefore, whatſoever is done, if it can receive any other conſtruction than *donation*, it is conſtructed accordingly. Whence ariſeth that other rule of law, *debitor non præſumitur donare* [g]. So that any deed done by the debitor is either preſumed to be in ſecurity, or in ſatisfaction of his debt. As if he aſſign his creditor to any thing due to him, or diſpone any thing to him, it is underſtood to be in ſecurity or payment; unleſs the deed expreſs it to be a donation, or done *for love and favour*. Yea truſt is rather preſumed than donation. As if a man take a bond, aſſignation, diſpoſition, or other right in another man's name, it is held to be a truſt; and he may force that other to denude himſelf, if he was not creditor to the acquirer [h]. Yet theſe rules have their limitations.

As *firſt*, Bonds, aſſignations or other rights in the names of children unforisfamiliat and unprovided, are preſumed to be donations, becauſe of the parents natural affection, and natural obligation to provide children [i]. Which was extended to ſome goods and money of a ſmall value, delivered by a rich brother, who wanted children, to his brother who was no merchant: which was preſumed to be *animo donandi*, and was not imputed in part of an annual legacy, left thereafter by that rich brother to the other, *November* 13. 1679, *Anderſon contra Anderſon*. Yea an aſſignation to one's neareſt of kin *mortis cauſa* was found a donation, and not in ſatisfaction of a debt due to that party, *June* 16. 1665, *Crookſhank contra Crookſhank*. And bonds of proviſion to children are not interpreted in ſatisfaction of prior bonds, but to be a further addition. And ſo are any other

[d] I. edit. & MSS. [dd] F. *in caſe of.* [e] MSS. [f] I. 2. 13. & 14. [g] *l.* 25. *pr. D. de prob. & præſ.* [h] See above I. 7. 14. [i] *l.* 26. *D. de prob. & præſ.*

rights taken in the name of children, eſpecially if unforisfamiliat. Yet a tocher in a contract of marriage was found to be in ſatisfaction of all former proviſion, though it did not ſo expreſs, *June* 29. 1680, *Young contra Pape and Vans* [k].

And aliment to children is ordinarily interpreted to be *ex pietate*, and not to oblige them. As was found in the caſe of a mother, where the children had no conſiderable eſtate, *February* 2. 1672, *captain Guthry contra L. Mackerſton and his brother*. The like, though the mother was married, alimenting her daughter, who was apparent heir to her father, though ſhe renounced to be heir, *July* 16. 1667, *Hamilton contra Symonton*. The like was found in the mother's father alimenting his oye, *July* 21. 1665, *L. of Ludquhairn contra L. Gight:* and in the caſe of a Grandmother alimenting her oye in the father's life, till ſhe *required* [l] the father to take her home, *June* 11. 1680, *Gordon contra Leſly*. Yet aliment by a ſiſter's husband, who was alſo debitor, was not found to be a donation, ſeeing it began in minority, and was continued after, though without paction, *February* 16. 1681. *Spence and her husband contra Foulis*.

In all caſes aliment or entertainment, given to any perſon without paction, is preſumed a donation, if the perſon was major, and capable to make agreement. But entertainment to minors or weak perſons doth ever infer recompence according to the true value of the benefit received *. And in the caſe of thoſe, who are in uſe to furniſh proviſions for money, the preſumption ceaſeth, and recompence is due. In like manner where more perſons are bound for the ſame debt, when any one payeth the whole debt, or more than his ſhare, recompence by way of relief is due, although there be no clauſe of relief. And generally the delivery of any thing is not preſumed to be a donation, but for recompence, or loan. And ſo the delivery of victual to an ordinary buyer or ſeller of victual was found to infer the ordinary price, though no agreement or price was proven, unleſs the receiver *ſhould* [m] inſtruct another cauſe of the delivery, *June* 15. 1667, *Home contra Jamiſon* [mm].

III. *The* [m] matter is more clear, when the good deed is done, not *animo donandi*, but of purpoſe to oblige the receiver of the benefit to recompenſe. Such are *the* [n] obligations *negotiorum geſtorum*; and generally the obligations of recompence of what we are profited by the damage of others without their purpoſe to gift, or (as the law expreſſeth it) *in quantum locupletiores facti ſumus ex damno alterius* [o].

As to the firſt [p], The obligation betwixt negotiators and thoſe, *in* [q] whoſe *behalf* [q] they negotiate, *tying* [r] to recompenſe what others without our *command or knowledge and* [s] *preſence* have neceſſarily or profitably done for carrying on of our affairs, *l.* 2. *D. de neg. geſt.* theſe deeds muſt be done without command or commiſſion, otherwiſe they come *under* [t] the nature of the contract of mandate or commiſſion; yea what is done in our preſence, with our knowledge, in our affairs, is repute as with our tacit conſent and commiſſion, (*nam qui tacet, conſentire videtur*;) *they* [u] muſt alſo be done for the carrying on of our affairs, for a negotiator cannot begin any new buſineſs, but only carry on that which is begun, *l.* 11. *D. eod.* and they muſt be neceſſarily or profitably done, otherwiſe he hath his labour for his pains, and he, that ſet him on work, muſt pay him his expences. And *laſtly*, though theſe deeds may be done without knowledge or conſent, yet they may not be contrary to our will and command: for ſuch obtruders can expect no recompence, *l. ult. C. de neg. geſt.* Though, if no poſitive law hinder, we may be liable even to ſuch *in quantum facti ſumus locupletiores*. But the obligement to the negotiators is greater: for if they do that which is neceſſary and profitable for

* 2. *February* 1672, *Captain Guthry contra laird of Mackerſton and his brother*, it was found that the entertainment of any perſon (being of diſcretion) after-pupillarity, without agreement, is preſumed to be freely gifted, and infers no obligation; but that a ſtranger entertaining perſons within pupillarity, though without agreement, is not preſumed to gift, but the party alimented is liable *ſecundum valorem*.

[k] See above I. 5. 6. [l] dec. [m] dec. [mm] See below IV. 45. 17. n. 14. & ſeqq. [m] F. *But the*. [n] MSS. [o] *l.* 14. *D. de cond. indeb.* [p] MSS. [q] MSS. A. & H. [r] MSS. B. & G. [s] F. *command, knowledge or*. [t] MSS. A. B. & H. [u] MSS.

for carrying on our affairs, though by ſome accident that affair may periſh or miſcarry, and we no richer, but (it may be) poorer, yet are we obliged, *l.* 10. § 1. *D. eod.*

The ground of *this obligation* [uuu] is, becauſe it is frequent for men to go abroad upon their affairs, ſuppoſing quickly to return, and leave no mandate for managing of *any thing* [u] § 1. *Inſt. de oblig. quæ quaſi ex contr.* and yet being detained [u] beyond expectation, they *may eaſily loſe* [w] (for inſtance [a]) redemptions, *which* [b] muſt be *peremptorily* [c], and the *failure whereof* [d] hath a great inconvenience; or the perfecting of ſome great bargain, a great part whereof is already done, and the not perfecting the reſt loſeth the whole; or the *managing* [e] of *a* [f] work of great profit, that for want of ſome pains or expences *may* [f] be loſt. Thoſe, who interpoſe themſelves in ſuch caſes, do neceſſarily and profitably for the good of the abſent, and ſo are under no delinquence; neither are they preſumed to gift their pains and expences; nor have they any conventional obligation upon their part: and yet, though there were no poſitive law for it, the very light of nature would teach us, it ought to be recompenſed. And therefore can be no other than an obediential or natural obligation, by the authority of God, and our obedience to him. *Grotius* [g] doth not own this obligation as natural, but as ariſing *ex lege civili: nullum enim* (ſaith he) *habet eorum fundamentorum, ex quibus natura obligationem inducit.* But the contrary appeareth not only from what is ſaid, but by the teſtimony of the law itſelf, which reckons *obligationem* [h] *negotiorum geſtorum*, not among contracts or obligations or actions *ex lege*, but amongſt thoſe which are *quaſi ex contractu.*

That this obligation is effectual, if it be *profitably* [i] carried on, though the ſucceſs anſwer not, is acknowledged *by* [k] law, [l] ſet forth *in* [k] an excellent ſpecies by *Ulpian* [m]. "It *ſufficeth* [m] (ſaith he) if the negotiator did act profitably, although "the affair had not the effect: as if he had cured a ſick ſervant, if notwithſtanding "the cure the ſervant died, he hath this action competent to him."

IV. From this obligation there ariſe mutual actions: the one *direct*, whereby he, whoſe affair is managed, craveth accompt and reſtitution of the negotiator, and reparation of what he hath done amiſs; and the *contrary* action to the negotiator, whereby he craveth recompence and ſatisfaction of what he hath profitably expended, and for his labour and pains. But the action is valid on either part, whether intented *directe* or *utiliter*, *l.* 47. § 1. *D. de neg. geſt.*

V. The negotiator is holden not only to anſwer for fraud, but *pro culpa levi*, for his fault, though light, yea if any other negotiator offered, (whom he excluded) for the lighteſt fault, *l.* 6. § 12. *D. eod.* He may be made alſo to follow forth his negotiation, (according to *the* [n] precept, *ſuſceptum perfice munus*,) *l.* 21. § 2. *D. eod.* But this, and the exactneſs of diligence, is *introduced* [n] by poſitive law, equity leaving the negotiator free, if he [o] acted profitably (though he might have acted more profitably,) in making his party liable to him according to his acting.

VI. The other obligation of recompence is for that whereby we are enriched by another's means, without purpoſe of donation, which is only preſumed in few caſes. *Even* [p] he who *mala fide* buildeth upon another man's ground, or repaireth unneceſſarily his houſe, is not preſumed to do it *animo donandi*, but hath recompence by the owner *in quantum lucratus*, *l.* 38. *D. de her. pet.* This remuneration is a moſt natural obligation. As *Cicero* [q] ſaith, *That it is againſt nature for a man of* [qq] *another's damage to increaſe his profit:* and again, *Nature* [qq] *ſuffers not, that with the ſpoil of others we ſhould augment our own riches.* And therefore this is a common exception in all poſitive laws, that every one ſhould be liable *in quantum locupletior factus ſit* [p]. So pupils, though they cannot oblige themſelves by contract, yet if they receive that which is another's, they are liable

[uuu] MS. G. [u] MSS. [w] F. *may be eaſily loſt.* [a] MSS. [b] MSS. A. B. & H. [c] MSS. A. & B. [d] MSS. A. B. & H. [e] MSS. [f] MS. G. [g] *de jure bel. ac pac. lib.* II. *c.* 10. § 9. *n.* 1. [h] MSS. A. B. & G. [i] I. edit. & MSS. [k] MS. H. [l] MSS. [m] *l.* 10. § 1. *D. de neg. geſt.* [n] MS. G. [o] MSS. [p] I. edit. [q] *de off.* III. 5. [qq] MSS.

liable to recompence *in quantum locupletiores facti, l.* 3. *pr. D. commod. l.* 5. *pr. D. de act. tut.* Minors alſo, though by poſitive law they are not liable for what they borrow and receive and miſpend, yet they are liable *in quantum locupletiores facti ſint.*

VII. Hence ariſes the action in law *de in rem verſo* [r]: whereby whatſoever turneth to the behoof of any makes him [s] liable *for recompence* [t], though without any engagement of his own.

VIII. We are enriched either by acceſſion of gain, or prevention of loſs. Whence is the obligation of contribution for making up of goods thrown overboard to lighten ſhips in danger of ſhipwrack, whereby the loſs of all is prevented, *lege Rhodia de jactu* [u]. By which, whatſoever is thrown out to lighten a ſhip, for preventing of ſhipwrack, is to be ſatisfied by the contribution of all who enjoy that common benefit of ſafety from ſhipwrack, proportionally, according to the value of what is thereby ſaved. Wherein the owners of the ſhip bear their ſhare [w]. And wherein not only jewels, though of ſmall weight, but even the cloaths and rings of paſſengers bear a ſhare [w]. And the maſter of the ſhip may detain their goods till their ſhare be paid [a]. Which holds alſo when there is hazard of naufrage by entring a ſhallow river or port; if a part of the goods be put in a boat, and it periſh, the value thereof is to be ſatisfied by contribution [b]. Contribution is alſo made for what is paid for redemption of ſhips from pirates: which is not extended to things taken away by pirates or robbers out of ſhips [c]. This *lex Rhodia* is now become *a* [d] law of nations, as commonly received by [d] all for its expediency to prevent ſhipwrack, and to encourage merchants to throw out their goods, when thereby they will but bear their ſhare of the loſs. But this law is not declaratory of pure equity, but doth hold by cuſtom. Otherwiſe what any party doth for his own profit, though it have a conſequential advantage to others, it will not oblige them to bear a ſhare of the expences; nor will it be interpret as *negotium geſtum* [e]. For he who improves any right, though it becomes ſimply void, and *other* [d] right beſide his be preferred, yet he was doing his own buſineſs, not theirs, and can claim no ſhare from them of his expences. So it was found, that, to evite capture by a privateer a skipper having by conſent of ſome merchants aboard, and of the company, made a hole in the bottom of the ſhip, that he might run near the ſhore at a creek, and opening the hole make the ſhip ſo far ſink, that ſhe could not be carried off by the privateer, yet that privateer having reached her near the ſhore, but before the hole was opened, and having agreed for a ranſom, for which the merchants contributed, the ſhip having been wracked five days after by a ſtorm, which ſhe might have prevented by going off before the ſtorm aroſe, the merchants and paſſengers were not *liable* [f] to contribution of their ſhares for the loſs of the ſhip, *January* 15. 1680, *Leſly and Millar contra Logan, Weir and others: vide l.* 2. § 1. *in fine, D. de L. Rhod. l.* 4. § 1. *eod.*

IX. From the natural obligation of recompence doth ariſe the obligation of relief, whereby, when many perſons are obliged *in ſolidum*, and thereby liable conjunctly and ſeverally, payment and ſatisfaction made by one for more than his own ſhare doth oblige all the reſt *pro rata*, although there be no conventional clauſe of relief, nor any law or ſtatute, but the natural obligation of recompence, (for he who paid, not only for himſelf, but for others, is not preſumed to do it *animo donandi:*) as was found in the caſe of coprincipals, *June* 19. 1662, *Wallace contra Forbes*; *June* 28. 1665, *Monteith contra Anderſon*. And upon the ſame ground relief is competent amongſt cautioners, without any clauſe of relief, becauſe the payment of one liberates all, *January* 27. 1675, *Monteith contra Roger*. Yea relief was found competent to a cautioner, who in a new bond of corroboration had engaged for the debt with the [g] cautioner in the firſt bond, *and that*

[r] *D. lib.* XV. *tit.* 3. [s] MSS. A. B. & H. [t] MSS. [u] *l.* 1. *D. de L. Rhod.* [w] *l.* 2. § 2. *eod.* [a] *l.* 2. *pr. eod.* [b] *l.* 4. *pr. eod.* [c] *l.* 2. § 3. *eod.* [d] I. edit. [e] *l.* 6. § 3, & 4. *D. de neg. geſt.* [f] F. *found liable.* [g] dec.

that againſt the principal [g], though he had no aſſignation to the clauſe of relief, granted to the firſt *cautioner* [g], *Spotiſwood, cautioners, Lybrak contra Vaus*. The ſame muſt hold in co-tutors, co-curators, and wherever more debitors are liable *in ſolidum* for the ſame debt or deed [h].

TITLE IX.

Reparation, where of delinquences, and damages thence ariſing.

I. *The obligation of reparation of damage by delinquence a natural obligation.*
II. *Delinquence infers the obligation of puniſhment, and reparation of the injured.*
III. *Damage deſcribed.*
IV. *Kinds of delinquence.*
V. *Concurrents and acceſſories in delinquence how liable.*
VI. *Special kinds of delinquences by our cuſtoms.*
VII. *Aſſythment.*
VIII. *Extortion.*
IX. *Circumvention.*
X. *The edict* de dolo malo.
XI. *Circumvention how inferred and proved.*
XII. *Simulation.*
XIII. *Colluſion.*
XIV. *The effect of fraud.*
XV. *Deeds done* in fraudem creditorum, *contrary to the act of* parl. 1621, *anent bankrupts.*
XVI. *The nature of ſpulzie.*
XVII. *The purſuer's title poſſeſſion.*
XVIII. *Oath* in litem *in ſpulzie.*
XIX. *Spulzie elided by a ſufficient warrant, or any colourable title and* bona fides.
XX. *By voluntary delivery.*
XXI. *By lawful poinding.*
XXII. *Replies againſt poinding.*
XXIII. *Spulzie elided by reſtitution within twenty four hours.*
XXIV. *Preſcription of ſpulzie.*
XXV. *Intruſion and ejection deſcribed and diſtinguiſhed.*
XXVI. *Ejection proper to the natural poſſeſſor.*
XXVII. *Exceptions againſt ejection.*
XXVIII. *Moleſtation.*
XXIX. *Breach of arreſtment, and deforcement.*
XXX. *Contravention.*

AMongſt obligations obediential we have placed thoſe, which are by delinquence: becauſe they ariſe without any convention, conſent or contract either particularly, or only by virtue of any poſitive law; and therefore they muſt needs have their original from the authority and will of God, and [i] our obedience due thereto. For though they do proceed from our fact, and from our will, whence that fact is voluntarily committed, yet it is not from our contracting will: and therefore theſe obligations do not receive their effect, and meaſure or extent, by our will.

I. That obligations *by* [k] delinquence are introduced by the law of nature, the ſuffrage of all men and all nations will evince, who do every where acknowledge the reparation of damages, and puniſhment of crimes and injuries, as having by nature a clear evidence and ſharp ſenſe thereof, and thereupon can without reluctancy concur with the magiſtrate in the puniſhment of citizens, and of enemies by the ſword.

But it may be doubted how the law of nature, which is perpetual, and had place chiefly in innocency, can preſcribe any thing in relation to delinquency or malefice, which was not to be found in that condition. This will be eaſily cleared, if it be conſidered that, though man was made in the ſtate of innocency, yet he had a natural inſtability, for which God did *forewarn* [l] and arm him; and tho' the principal and direct law of nature did teach man to love his neighbour as himſelf, yet he could not but by conſequence know, (though he had ſtood in innocency

[g] dec. [h] See below I. 17. 13. [i] MSS. [k] MSS. B. & G. [l] MSS.

nocency, as the angels do,) that any who acted againſt that royal law of love by doing evil to his neighbour, and taking away from him that which is his, ought to repair him, and to be liable to divine juſtice, which is that certification [m] God put upon his natural law, as he did more expreſly upon the forbidden fruit *morte morieris*.

II. *An* [n] obligation *by* delinquence [o] then is that whereunto injury or malefice doth oblige, as the meritorious cauſe thereof; *as the will of God thereupon is the efficient cauſe* [n]. And it is twofold: either that which relateth to God, or that which relateth to man. The former is the obligation of puniſhment, pain or penalty: for unto God there can properly no reparation be made by the creature, whoſe *whole* [p] duty and ſervice is due to him, *and being due cannot make up that ſhort-coming of anterior delinquence* [p]: ſo that to him the creature is obliged to underly [p] puniſhment. In reference to man is the obligation of repairing his damage *by* [q] putting him in as good a condition as he was in before the injury. And this only is man's part for himſelf. For the inflicting of puniſhment is for God, in ſo far as it is authorized *and* [r] allowed by him: but it is not for, or from man of himſelf, (*vengeance is mine; I will repay, ſaith the Lord* [rr].) For, as hath been ſaid before [s], an obligation in the debitor, hath a correſpondent power of exaction in the creditor, which is the perſonal right. So in delinquence the power of exaction of reparation of his damage is man's for himſelf: but the power of exacting puniſhment is in God; and as *from and for him* [ss] it is committed to man, it is but a miniſterial power, and not diſpenſable at man's pleaſure, and hath an obligation whereby man ſtands bound to God for doing his duty therein. Though *the* poſitive *laws* [t] and pactions of men, and in ſome things the poſitive law of God itſelf, may conſtitute a penalty, and employ it for the proper uſe of the injured; yet it is not a proper puniſhment, that hath its force by paction or poſitive law, and not by the law of nature. The obligation to puniſhment, ariſing from delinquence, and man's power and duty to inflict the ſame, is a publick right: which, though naturally it did [u] concern every man, yet is now with divine approbation for the moſt part devolved upon publick authority. Which is ſaid [w] *to be a terror to evil doers; and not to bear the ſword in vain, for he is the miniſter of God, a revenger to execute wrath upon him that doth evil.* By which it is clear, that the magiſtrate, as he executeth revenge, doth it not of or for himſelf, nor for, or from the people, as their proper right or power of exaction; but, therein as he is the miniſter of God, he doth it for, and from God. Even though his authority and commiſſion were not immediately from God, but from *men* [a], yet he ſtands in the place of thoſe men to God, to execute that revenge, which they themſelves were naturally obliged unto. But how far man's natural *duty* [b] or the magiſtrate's, in the puniſhment of crimes reacheth, the lines of the law of nature are become dark in many points. It is manifeſt and agreed by all, that, though in all damages done to man there are alſo puniſhments which may be inflicted by God, yet where the matter is chiefly man's intereſt, and ſo reparable to him, none will think that it is a duty, in all of theſe caſes, to inflict vengeance on ſuch. Neither doth any own a power and neceſſity to inflict *puniſhment* [c] for man's ſpiritual delinquences, ſtanding in his mind and *affections* [cc], as for want of love, confidence, hope, *&c. Cogitationis pœnam nemo patitur* [d]. In ſome things alſo the power of puniſhment is no leſs evident, even when there can be no reparation to man, as in that general precept of equal crimes and puniſhments, life for life, eye for eye, tooth for tooth, *&c.* [e] But there are many middle crimes [f] much more unclear, wherein the word of God, even in the judicial law, is an excellent light; for we may ſafely conclude, that it would be no injuſtice or intruſion for man to vindicate thoſe crimes for God, which himſelf gave order to revenge. But our purpoſe being here only to inſiſt *on* [g] private rights, we ſhall not

[m] MSS. A. B. & H. [n] I. edit. & MSS. [o] MSS. A. & B. [p] MSS. [q] MS. G. [r] MSS. A. G. & H. [rr] *Rom.* xii. 19. [s] I. 1. 22. [ss] MSS. B. & G. [t] MSS. [u] I. edit. & MS. G. [w] *Rom.* xiii. 3. & 4. [a] MS. A. [b] MSS. [c] MSS. A. G. & H. [cc] MSS. B. G. & H. [d] *l.* 18. *D. de pœnis.* [e] *Deut.* xix. 21. [f] MSS. A. B. & H. [g] MSS.

not follow theſe, nor [g] many ſublime queſtions that *ariſe* on *this* [h] matter, but ſhall return to the private rights of men, ariſing to them by delinquence, *of* [g] exacting reparation of their damages inferred thereby.

III. Damage is called *damnum a demendo*, becauſe it *diminiſheth* [i] or taketh away ſomething from another, which of right he had [k]. The *Greeks* for the like reaſon call it ἐλατ῀ον, *or* [l] which man hath leſs than he had. It is not every damage that raiſeth this obligation: for ſome damages may be juſt, as thoſe which are inflicted by [m] puniſhment. And others may have their reparation ariſing from contracts; whereby, though a delinquence may ariſe in non-performance of the contract, yet the original cauſe of the obligation is the contract. Some alſo ariſe from deeds or things, the non-performance whereof is *alſo* [n] a delinquence; as in the obligations of reſtitution and recompence. But here are only underſtood obligations, which originally ariſe from *delinquence* [o], as the firſt cauſe thereof.

IV. *Delinquences* [p] in the *Roman* law *are* [p] reduced *to* [p] theſe four, *furtum*, *rapina*, *damnum*, *injuria* [r], (*all which are ſeparate from the publick crimes* [q].) Wherein we ſhall not inſiſt; but follow private delinquences, and obligations and actions thence ariſing, as they are known by the terms in our law *accuſtomed* [rr], in ſo far as they uſe to be civilly proſecute. For though in publick crimes, which are criminally purſued, there is competent *a* [s] reparation, either from the nature of the crime, or from law or cuſtom; yet that is incident unto a publick right, and not ordinary [t].

It ſhall in general ſuffice here to conſider, that, according to *our* [u] ſeveral rights and enjoyments, damages and delinquences may be eſteemed. As *firſt*, *our* [t] life, members and health; which tho' they be ineſtimable, and can have no price [w], yet there are therewith incident damages *reparable* [a], and that either *lucrum ceſſans* or *damnum emergens*. So the life of any *perſon* [a] being taken away, the damage of thoſe who were entertained and maintained by his life, as his wife and children, may be repaired [b]. So likewiſe the loſs any man hath *in* [c] the *expence* [d] of his cure, or the loſs of his labour, and induſtry in his affairs, is alſo reparable [e].

Next to life is liberty: and the delinquences againſt it are reſtraint and conſtraint. And though liberty itſelf be ineſtimable, yet the *damages* [f] ſuſtained through theſe delinquences are reparable.

The third is fame, reputation and honour, which is alſo in ſome way reparable [g]: *firſt*, by making up the damage that is inferred in men's goods by the hurt of their fame, whereby their gain ceaſeth, in that being repute ſuch perſons they are diſenabled for their affairs. As if a merchant be called a bankrupt, it may not only hinder his traffick, but make all his creditors fall upon him ſuddenly to his ruin. So if a man be called a cheater, deceiver, or the like, it diſables him to manage his affairs, men being unwilling to meddle with ſuch. And if a man, being about to marry, be called impotent, or infected with any noiſome diſeaſe, he may be damnified in his match and tocher. Such actions upon injurious words, as they may relate to damage in means, are frequent and curious among the *Engliſh*: but with us there is little of it accuſtomed to be purſued, though we own the ſame grounds, and would proceed to the ſame effects with them, if queſtioned. *Secondly*, damage in fame or honour is repaired by homage, acknowledgment or ignominy put upon the delinquent. *Thirdly*, by equivalent honour *for* [h] vindication of the injured. *Slander* is competent to be judged by commiſſaries. And therefore a decreet of the commiſſaries of *Edinburgh*, upon a purſuit for ſlander and defamation, decerning the ſlanderer to make acknowledgment of the injury before the congregation, and to pay an hundred pounds *Scots* to the party, and as much to the poor, was ſuſtained by the lords, *February* 5. 1669, *Deans contra Bothwell*.

The

[g] MSS. [h] MSS. A. & H. [i] MSS. [k] *l.* 3. *D. de damn. inf.* [l] MSS. A. B. & H. [m] MSS. [n] I. edit. & MSS. [o] MSS. [p] MS. G. [q] I. edit. & MSS. [r] *pr. Inſt. de oblig. quæ ex del.* [rr] MSS. B. & G. [s] MSS. [t] I. edit. & MSS. [u] MSS. B. & G. [w] *l.* 3. *D. ſi quad. paup.* [a] MSS. [b] *Cujac. obſ.* XIV. 4. [c] MSS. A. B. & H. [d] MS. A. *l.* 3. [e] I. edit. & MSS. A. B. & H. [g] *l.* 5. § 1. *D. qui ſatiſdare cog. l.* 31. § 5. *D. de reb. auth. jud. poſ. l.* 15. § 31. & 33. *l.* 19 *l.* 20. *D. de injuriis.* [h] MSS. A. B. & H.

The *fourth* intereſt, that may be damnified, is our content, delight *and* [i] ſatisfaction; and eſpecially by the ſingular affection to, *or* [k] opinion of the value or worth of any thing that *the owner hath* [l]. In which conſideration it is ſaid, that every thing is to every man as he eſteemeth it. And though this be not the intrinſick value of the thing, nor the common rate of it in the account of men, but *pretium affectionis*, the rate that the affection of the owner puts upon it; yet that being free to him, and his right, his damage therein ought to be repaired according to the value himſelf eſteemed the thing taken from him worth. On this ground in moſt actions in the civil law, wherein there is force or atrocious injury, reparation is to be made according to the reaſonable eſtimation of the injured. And therefore he *had* [m] *juramentum in litem* [n], his oath to declare how much he accounted himſelf damnified: the exorbitancy whereof might have been taxed by the judge; but otherwiſe, though his eſtimation be much above the common value, it were receivable. This hath alſo place with us, as in actions of ſpulzie, *and other delinquences by violence*, &c. [o]

The laſt damage is in goods and *poſſeſſions* [p]; the redreſs whereof is more clear, becauſe the things themſelves are more valuable and eſtimable. In all reparations the natural fruits and profits of the things taken away come in as *a* [p] part thereof; and in many caſes, the induſtrial fruits and profits which the owner might have had, at leaſt uſed to make thereof. Reparation is either by reſtitution of the ſame thing in the ſame caſe, that it would have been in, if it had remained with the owner, (and this is moſt exact:) or, where *that* [q] cannot be, by giving the like value, or that which *may come* [qq] neareſt to make up the damage, according to the deſire of the damnified. And if none be found fitter, reparation muſt be made in money, which is the common token of exchange, and hath in it the value of every [s] eſtimable.

V. In the reparation of *delinquence* [r] it would be conſidered, when many have a hand in it, who *are* [ss] liable, and how far.

For in ſome caſes the delinquence is committed by one principally, and others are but acceſſory: in other caſes the delinquence is equally and principally committed by more, though unto thoſe alſo there may be acceſſories. Acceſſion to delinquence is either anterior, concomitant, or poſterior to the delinquence itſelf. Anterior is, either by *command or* [t] counſel; inſtigation or provocation; or by connivance in foreknowing, and not hindering thoſe, whom they might and ought to have ſtopped, and that either ſpecially in relation to one ſingular delinquence, or generally in knowing and not reſtraining the common and known inclination of the actors towards delinquences of that kind, as when a maſter keeps outragious and pernicious ſervants or beaſts. And therefore in many caſes, even by natural equity, the maſter is liable for the damage done by his beaſt. As is clearly reſolved in the judicial law, in the caſe of the puſhing ox, which if it was accuſtomed to puſh before time, the owner is liable for the damage thereof, as being obliged to reſtrain it, but if not, he is free [u]. So the like may be ſaid of maſtives and other dogs, if they be accuſtomed to aſſault men, their goods and cattle, and be not deſtroyed or reſtrained, *the* [t] owner is liable. The remeids adhibite by the *Romans* ſee *l.* 40. *&* *ſeqq. D. de ædil. ed. &* *tot. tit. D. &* *Inſt. ſi quad. paup.* Hence alſo is that famous edict of the prætor in the *Roman* law, *Nautæ, caupones, ſtabularii, quod cujuſque ſalvum fore receperint, niſi reſtituent, in eos judicium dabo*; by which the maſters of taverns, ſtables or ſhips, are liable for [t] the damages, that may be ſuſtained by their ſervants, or any other that ſhall happen to be there for the time, in what is brought *in* [w] upon the account of their employments [a]: but theſe obligations are rather introduced by ſtatutory law for common utility, than by natural obligation. Concomitant acceſſion is, when the *acceſſory is* [b] not equally concurrent in the act, but countenances, or otherwiſe aſſiſts, abetts, cheriſhes, praiſes

[i] MSS. G. & H. [k] *our*, MSS. [l] MSS. [m] F. *hath.* [n] *D. lib.* XII. *tit.* 3. [o] F. *&c. and o. d. by violence.* [p] MSS. [q] I. edit. [qq] MSS. B. & G. [r] MSS. [s] MSS. B. & H. [ss] F. *are to be* [t] MSS. [u] *Ex.* xxi. 28. *&* *ſeqq.* [w] I. edit. & MSS. [a] *l.* 1. § *ult. l.* 2. *l.* 3. *pr. D. nautæ, caup.* [b] MSS. B. & G.

praiſes, or connives at the delinquence. Poſterior acceſſion is by ratihabition, approbation, praiſe, gratification, defence, or ſupport of the delinquents in order to the delinquence. All which *acceſſories* [b] in our law are called *art and part*.

As to the queſtion then, Who of theſe co-operants are obliged, and how far? *Firſt*, It is clear that, where the delinquence is committed by many alike, there all of them are liable alike. But whether in equity they be all liable *in ſolidum*, or for the whole reparation, it is not ſo clear. Poſitive law hath made them all liable *in ſolidum*, for the repreſſing ſuch concurrences, and that the injured be not put to the trouble of ſeeking in by parts from the ſeveral delinquents. Yet equity would rather lay the reparation of every man's part *firſt* [c] upon himſelf; and, in caſe of his not being found ſolvent or ſufficient, upon the reſt, making up with all the trouble of obtaining reparation from many, by refounding the expences in obtaining thereof, and the labour and pains, and content of the injured. As to the obligation of puniſhment of many concurring delinquents: if an army *or party* [d] in a mutiny all ſhoot *at once* [c] at one perſon, if he be killed, it would not be thought juſt, for that *one* [d] life, to take the lives of all; and therefore, becauſe it cannot be known whoſe ball killed the man, it is accuſtomed (and not without good ground) by lot to ſingle out who are to ſuffer, and the reſt are free. From whence it may be gathered, as in the puniſhment, ſo in reparation fellow delinquents *(ſocii criminis)* are to concur in the reparation, as they concurred in the action: though, as hath been ſaid, poſitive law doth well to make all liable *in ſolidum*; yet ſo, that the ſatisfaction of one or more liberates the reſt. But when it is not the private intereſt, but the publick puniſhment of a crime, it ſhould be extended ſo far, as may reſtrain the crime.

Secondly, As to the acceſſory delinquents. Though delinquents by command be numbered among them, yet (as we ſay) *He doth that cauſeth* [c] *do:* therefore ſuch are proper efficients, tho' mediate, and therefore no leſs liable [e] than concurrents. [f] Other acceſſories, albeit by poſitive law they are oft-times all, or many of them made liable *in ſolidum*, yet, as was ſaid of concurrents, in equity they are liable but according to the influence they had in the delinquence. But in theſe the obligation may be much more to the puniſhment, where the will comes in to be conſidered with the act, than in the reparation, where the damage (which is the outward and more conſpicuous thing) is mainly conſidered. *But on this* [g] we ſhall inſiſt no further.

VI. *We* [h] come to the obligations by *delinquences* [g], which are civilly cognoſcible by our cuſtom, according to their known names and titles in our law; which, though they do rather ſignify the *acts* [i] or actions, whereby ſuch obligations are incurred or proſecute, than the obligations themſelves, yet will they be ſufficient to hold out both. Theſe are either general, having no particular name or deſignation: and ſuch are purſued under the general *name* [k] of damage and intereſt. Which hath as many branches and ſpecialties, as there can be valuable and reparable damages; beſides thoſe of a ſpecial name and nature, which are chiefly theſe, aſſythment, extortion, circumvention, *defraud of creditors* [l], ſpulzie, intruſion, ejection, moleſtation, breach of *arreſtment* [m], deforcement, contravention, (forgery, which comes in more properly in the proceſs of improbation [n].)

VII. Aſſythment, as it ſignifies the reparation made, ſo it inſinuates the obligation to repair damage, ſuſtained by ſlaughter, mutilation, or other injuries *to* [o] the members or health of the body. But it is chiefly purſued by the wife, *children* [o], or neareſt of kin of *the party* [o] ſlain. In other caſes it is competent to the party mutilate or hurt, or otherwiſe prejudged by the mutilation or hurt. And though the private intereſt be only for reparation of *the* [o] damage and loſs; yet our cuſtom applieth much of that, which is penal, therein to the injured. And therefore conſideration is had of the ability and eſtate of the offender, and the aſſythment is accordingly modified, all circumſtances being conſidered; and that either

[b] MSS. B. & G. [c] MSS. [d] MSS. A. B. & H. [e] *l.* 15. *D. ad L. C. de ſic.* [f] MSS. G. & H. [g] MS. G. [h] MS. B. [i] F. *act.* [k] MSS. [l] MS. G. [m] MSS. [n] IV. 20. 5. [o] MSS.

apart [p] againſt the principal offender, or the acceſſories. So it was found in the purſuit at the inſtance of *Patrick* and *Iſabel Drews*, for the aſſythment and ſlaughter of their brother, againſt *Thomas Horn* baxter in *Montroſe* [pp], *Nicolſon, de ſicariis*. This action *is* [p] ſo favourable, that it was ſuſtained, though there was no particular quantity of damage libelled, but the ſame referred to the lords, *Spotiſwood, ſummons and libel. It* [q] was ſuſtained [r] at the inſtance of ſome of the kin, tho' not of the neareſt degree, and though there were not *ſome concurring* [rr] of the four branches of the ſlain. [rr] It is a ſufficient proof in this action, if the defender have taken remiſſion *, as was found in the caſe of *Drews contra Horn* foreſaid, *likewiſe obſerved by Hadington, January* 25. 1611. where the defender was not freed, though he had an acknowledgment under the defunct's hand, that he was the cauſe of the wound, and therefore quit the wrong. [rr] Aſſythment is a privileged action, as recent ſpulzie [rr], *parl.* 1528. *c.* 7.

VIII. Extortion ſignifies the act of force or other mean of fear, whereby a perſon is compelled to do that, which of *his proper inclination he* [rs] would not have done. It doth alſo imply the obligation of the injurer to the injured, to repair his loſs and damage by ſuch acts. [rr] Things ſo done are ſaid to be done *vi majori* or *metus cauſa*, by force or fear.

Deeds or obligations extorted are *of* [s] their own nature, and *in* [s] equity, efficacious, becauſe they have truly the conſent or act of the will, by which ſuch rights are conſtitute [t]. And therefore the *Romans* had no civil remeid in their ancient law for ſuch, till the edict of the pretor, *Quod metus cauſa geſtum erit, ratum non habebo* [u]. But by that edict, and the cuſtom of this and other nations, ſuch deeds and obligations, as are by force and fear, are made utterly void. Though in equity the effect would be *almoſt* [w] the ſame: for ſeeing the delinquence done by extortion obliges to reparation, if any ſhould be purſued upon an extorted obligation, he would have the exception of compenſation upon the obligement of reparation; and [a] might alſo by action obtain ſuch [w] obligation or other right to be annulled.

This edict was not competent upon every force or fear. But *firſt*, it behoved to be unlawful [b]; *ſecondly*, preſent [c]; *thirdly* [d], ſuch as might befal a conſtant man, as of life [e], or torment of the body [f], or of bondage [g], or the loſs of eſtate, or infamy *and* [gg] diſgrace [h], or of bonds and priſon [i], (but only unlawful and private, and not publick impriſonment [k].) It was not competent upon reverential fear [l]; nor upon fear contracted upon power and dignity [ll]; nor of threats [m], except they were from powerful perſons [n]. [o] The effect of *the* [o] edict was: being purſued within a year, (which afterwards was made four years in place of *annus utilis* [p],) unleſs reparation was made before ſentence, the party was condemned in the quadruple, and *ſo* [q] the penalty was *the* [q] triple, and applied to the injured; and after *a* [r] year, ſimple reparation [s].

Our cuſtoms go much along with the courſe of the civil law in this, but ſo as not bound thereby, reſpecting moſt when the true reciprocal cauſe of the obligation or deed is force or fear, not being vain or fooliſh fear. And it is competent *either* [t] by way of action, or ſometimes by exception, *Spottiſwood, exceptions, tenants of Cockburnſpath contra Lord Home and his ſon.* [w] It was elided by a judicial ratification of the deed upon oath [a], *July* 8. 1642. *Grant contra*

Extortion is more eaſily ſuſtained in the deeds of weaker perſons. And therefore extortion was found relevant to reduce a diſpoſition by a facile weak perſon, who was apprehended by the purchaſer upon a caption of a third party, and detained

* If the defender have taken *and uſed* a remiſſion. See the deciſion here cited, and *January* 9. 1662, *Baird contra Baird.*

[p] MSS. B. & G. [pp] dec. [q] F. *Yea it.* [r] *Balfour tit. aſſythment, c.* 7. [rr] I. edit. & MSS. [rs] F. *their propet incl. they.* [s] MSS. A. & H. [t] *l.* 21. § 5. *D. quod. met. cauſ.* [u] *l.* 1. *eod.* [w] MSS. [a] MS. B. [b] *l.* 3. § 1. *eod.* [c] *l.* 9. *pr. eod.* [d] MSS. [e] *l.* 5. *l.* 6. *l.* 7. *l.* 8. *l.* 9. *eod. l.* 9. *C. de his quæ vi.* [f] *l.* 4. *eod.* [g] *l.* 4. *l.* 8. § 1. *D. quod met. cauſ.* [gg] MSS. A. B. & G. [h] *l.* 8. § 2. *eod.* [i] *l.* 22. *eod.* [k] *l.* 3. § 1. *eod.* [l] *arg. l.* 21. *l.* 22. *D. de rit. nupt.* [ll] *l.* 6. *C. de his quæ vi.* [m] *l.* 9. *eod.* [n] *l.* 23. § 1. *D. quod met. cauſ.* [o] I. edit. & MSS. [p] *l.* 7. *C. de temp. in int. reſt.* [q] MSS. [r] MS. G. [s] *l.* 14. § 1. *D. quod met. cauſ.* [t] MSS. D. [w] I. edit. & MSS. [a] below I. 17. 14.

detained by his ſervants and officers, and not by meſſengers, and keeped latent in obſcure houſes, and carried from place to place in the night, till he ſubſcribed a diſpoſition of his whole eſtate for a cauſe, not near the third of its value; albeit there was produced a cancelled minute to the ſame effect with the diſpoſition in queſtion, wherein the two actors of the force were witneſſes inſert, but the diſponer's name nor no part of it was to be ſeen, but a lacerate place, as if it had been cancelled, without any anterior adminicle to aſtruct the truth of it, *January* 10. 1677. *Stewart of Caſtlemilk contra Whiteford and the Duke of Hamilton.*

Therefore extortion falls moſt to be controverted in deeds done by wives. And when the deed is extreamly to their prejudice, and to the behoof of *the* [b] husbands, it is preſumed as done *ex reverentia maritali.* Thus a wife's diſcharge of her whole contract was found null, without alledging any compulſion, *January* 9. 1623, *Marſhall contra Marſhall.* But ordinarily marital reverence is not ſufficient, though the husband were *vir ferox*, and was thereafter divorced *, *Hope, husband and wife, Hepburn contra Naſmith.* It *was* [c] found relevant to reduce a wife's conſent to her husband's diſpoſition, that before he had beaten, menaced and extruded her for not conſenting: but in this caſe it being alledged, that the wife appeared well content at the ſubſcription, witneſſes were examined *hinc inde ex officio*, for trial of the truth, *Spotiſwood, metus,* [d] *and Dury, June* 27. 1632. *Caſſie contra Fleming*, where this caſe of *vis & metus* is accurately debate and determined. But a wife ſubſcribing her husband's teſtament, containing proviſions prejudicial to her [e], was not reponed, as having done it *ex reverentia maritali*, at her husband's deſire, who was *moribundus*; he having lien long ſick, and ſhe having married within a year thereafter, and the deed done to her only daughter, *January* 24. 1674, *Murray and Jaffrey contra Murray* [ee].

Upon the like ground extortion will be [f] more eaſily preſumed and ſuſtained in the deeds of [g] perſons, who are weak and infirm of judgment or courage, as ſaid is, than of thoſe who are knowing and confident; and more eaſily in deeds and obligations gratuitous and free, than in ſuch as are for an onerous cauſe. Which will not eaſily be annulled, unleſs manifeſt leſion do appear, or that the compulſion be very evident. Yet the reſignation of the earldom of *Morton* in the hands of king of *James* V. was reduced, becauſe the reſigner was then *charged* [g] [*toward* [h]] by the king without any viſible cauſe, and was diſcharged the ſame day he made the reſignation, *Sinclair, April* 12. 1543, *Earl of Morton contra Queen's advocate and laird of Lochleven.* And a diſpoſition granted by the Lord *Gray* and his Lady to a great man for the time, after menaces, and without an adequate onerous cauſe, was reduced *ex capite metus*, and upon concuſſion, *February* 22. 1688, *Lord and Lady Gray contra Earl of Lauderdale* [i]. And the like ſuſtained againſt a decreet at the king's inſtance againſt the maſter of the mint, *aſſigned* [k] to the lord chancellor, together with the bond and tranſaction thereupon [l], *Earl Lauderdale and Lord Hatton contra Earl Aberdeen, Junuary* 13. 1692 [m]. [n] *Metus* was ſuſtained to reduce a bond granted by a party, becauſe he was taken by caption, being ſick, *January* 22. 1667, *Mair contra Stewart of Shambelly.* It was alſo ſuſtained to reduce a bond granted by two ſons for freeing their father, who was taken by a caption, though the charge was ſuſpended, he being carried to the hills, and menaced *on* [n] his life; though the ſons got abatement, and ſo there appeared a tranſaction, *December* 8. 1671, *Macintoſhes contra Spalding and Farquharſon.*

IX. Circumvention ſignifieth the act of fraud, whereby a perſon is induced to a deed or obligation by deceit. *It* is [o] called *dolus malus* in oppoſition to *dolus bonus*, or *ſolertia* [p]. And it muſt needs be the cauſe of the obligation or deed, and ſo not be known to the party induced, before it can have any legal effect. For he

* There is no mention of a divorce in *Hope. MS. bibl. jurid.*

[b] MS. A. [c] F. *was alſo.* [d] MSS. [e] dec. [ee] See above I. 4. 18. [f] MSS. A. & H. [g] MSS. [h] dec. [i] *Fountainhall, Home.* [k] F. *and aſſigned.* [l] *Fountainhall* 4. *February* 1685. [m] See below I. 17. 11. [n] I. edit. [o] I. edit. [p] MSS. *l.* 1. § 3. *D. de dolo, l.* 16. § 4. *D. de min.*

he who knoweth the ſnare, cannot be ſaid to be inſnared, but to inſnare himſelf. And though deceit were uſed, yet where it was not deceit, that was the cauſe of the obligation or deed, but the parties proper motion, inclination, or an equivalent cauſe onerous, it infers not circumvention [q]. So neither doth error *or* [r] miſtake, though it be the cauſe of the obligation or deed, and be very prejudicial to the erring party. And though, if it had been fraudulently induced by the other party, it would have been ſufficient; yet not being ſo, there is no circumvention: and the deed is valid, unleſs the error be in the ſubſtantials of the deed. And then there is no true conſent, and *ſo* [r] the deed is null; as if one married *Sempronia*, ſuppoſing ſhe were *Mævia*, *the marriage (but by ſubſequent conſent) is void* [s]. But if he married *Sempronia*, ſuppoſing her to be a virgin, rich or well natured, which were the inductives to his conſent; though he be miſtaken therein, ſeeing it is not in the ſubſtantials, the contract is valid [t]. But if the error or miſtake, which gave the cauſe to the contract, were by *the* [u] machination, project or endeavour of any other *party* [w] than the party errant, it would be circumvention, *l.* 2. § 1. *D. de doli mali & met. exc.* So that there is nothing more frequently to be adverted, than whether the error be through the parties own fault, or through the deceit of another. And therefore *errore lapſus* and *dolo circumventus* are diſtinct defects in deeds.

X. The *Roman prætors* [w], among other perpetual edicts, did give this of fraud, *Quæ dolo malo facta eſſe dicentur, ſi de his rebus alia actio non erit, & juſta cauſa eſſe videbitur, judicium dabo* [a]. This edict was competent either by way of action or exception [b]. And, in hatred of fraud, thoſe who were condemned *in* [c] this action became infamous [d]. And therefore, as the edict expreſſes [e], it was not competent, if there was any other more favourable remeid: neither was it competent for a very ſmall ſum, not exceeding two crowns [f]: neither was it competent to children againſt their parents, nor to the vulgar againſt thoſe of conſular dignity, nor to vile perſons againſt thoſe of an orderly life [g]. It was alſo perſonal; and *ſo* [h] reached no further than the perſon committing the fraud, and not *in rem*, reaching the thing, if lawfully it came to any other not partaking of the fraud: *dolus auctoris non nocet ſucceſſori* [i], *niſi in cauſa lucrativa* [k]. So that the deed, done thereby, was not rendered null, as in extortion; but reparation given to the injured to the ſingle value only, (infamy being a ſufficient penalty,) but according to the eſtimation of the party injured by his oath *in litem* [l].

The *Romans* had alſo their *actio redhibitoria & quanti minoris* [m], whereby the deceived might obtain what damage they had ſuſtained by the fraud, or might thereby annul the bargain. And where the leſion was very great, fraud was preſumed [n], as when the price exceeded the double value of the ware [o]. But they did not conſider ſmall differences betwixt the ware and price, which would have raiſed multitudes of debates hurtful to trade: the deſign whereof is to gain; and therefore nothing to induce a moderate gain was queſtionable. As when merchants ſet out their ware, or though they ſhould falſely aſſert it coſt them ſo much, and others had given them ſo much, or that the ware was faſhionable or good [p], there was no civil remeid, unleſs the damage were conſiderable. In which ſenſe only it is true, *in commercio licet decipere* [q]; becauſe, though it be not ſimply lawful, yet it is againſt no civil law. But the ſophiſtication of ware, or concealing of the inſufficiency thereof, was held fraudulent, and reparable *actione redhibitoria, aut quanti minoris.*

XI. We have *in this alſo* [r] *reſumed* [s] the *ſentence* [t] of the civil law [u], becauſe it is moſt equitable and expedient, and therefore is generally followed by our cuſtom

[q] *l.* 34. *C. de tranſact.* [r] MSS. [s] F. *the marriage hath no further progreſs (b. b. f. c.) and it is void.* (*The marriage, if it have no further progreſs than conſent, is void,* MSS.) [t] See above I. 4. 6. and below IV. 40. 24. [u] MSS. [w] MSS. B. G. [a] *l.* 1. § 1. *D. de dolo.* [b] *l. ult. D. eod.* [c] MS. H. [d] *l.* 1. *D. de his qui not. inf.* [e] MSS. A. B. & H. [f] *l.* 9. § *ult. l.* 10. *l.* 11. *pr. D. de dolo* [g] *d. l.* 11. § 1. *l.* 12. *l.* 13. *pr. D. eod.* [h] MSS. A. B. & G. [i] *l.* 4. § 27. *de doli mali & met. exc.* [k] *l.* 4. § 29. *eod.* [l] *l.* 18. *pr. D. de dolo, l.* 68. *de rei vind. l.* 5. § 3. *D. de in lit. jur. l.* 2. *C. eod.* [m] *D. lib.* xxi. *tit.* 1. [n] *l.* 36. *D. de verb. obl.* [o] *l.* 2. *C. de reſc. vend.* [p] *l.* 18. *pr. l.* 19. *pr. &* § 3. *D. de adil. ed.* [q] *l.* 16. § 4. *D. de min.* [r] MSS. [s] MSS. A. G. & H. [t] I. edit. & MSS. [u] MSS.

cuſtom. Which regardeth not inconſiderable damages in traffick, that it may be current and ſecure. For nothing is more prejudicial to trade, than to be eaſily involved in pleas; which diverts merchants from their trade, and frequently marrs their gain, and ſometimes their credit. Therefore we allow not the quarrelling of bargains upon preſumed fraud *ex re ipſa*, although that which is bought be within the half of the juſt price; if there be not ſophiſtication or latent inſufficiency, which we exactly conſider, becauſe it is deſtructive to trade [w].

Fraud is not to be preſumed, but muſt be proven [a]: and is always competent to be proven by the oath or writ of the party committing the fraud, when the queſtion is betwixt himſelf and the party prejudged; whereby it may be proven, that he deſigned to deceive, or that he did ſuch acts from whence fraud is preſumed. (Which by his oath he may qualify, what he did, and why he did it.) And if there be a probable conſtruction, that the deeds done were not to deceive, fraud will not be thence preſumed: and will be hardly preſumed in a perſon of intire fame and honeſt life; but much more eaſily in thoſe, who have been found to defraud, or are ſo reputed. And it being ordinary for parties to alledge contrary or different circumſtances to infer or exclude fraud, therefore the lords do neither give the benefit or burden of probation to one party: but do ſtate the points of moment alledged, or what others they think fit for clearing the truth, and allow either party to prove where their alledgeances are not contrary; and where they are contrary, there are abſtract queries ſtated, as to which either party may adduce ſuch an equal number of witneſſes as is preſcribed, as whether a writ was read at the ſigning, and what the condition of parties then *was* [b]. For the not reading of a writ at ſubſcribing will not alone infer fraud, becauſe it might have been read before. Yea it was not ſuſtained to be proven by witneſſes, that a writ was not read at ſubſcribing, tho' there was great leſion to the ſubſcriber, *and done* [c] in favour of his curator *ſine quo non*, within ſix months after his majority, *ante redditas rationes*, and that *only* [d] a wadſet was communed, yet the writ bore an irredeemable diſpoſition, *July* 4. 1635, *L. Monimusk contra L. Leſly:* but theſe circumſtances would have been certainly relevant by the oath of the party, or writ. Neither were witneſſes admitted to prove circumvention in cauſing a teſtator give warrant to a notar to ſubſcribe a teſtament unread, of a tenor contrary to what the teſtator expreſſed, *Hope, teſtament, neareſt of kin of the lady Innerleith contra her executors.* Neither were witneſſes admitted to prove the fraud of a debitor, retiring a bond from a perſon, whoſe name was only in truſt for another to whom the debitor had paid annualrent, *Hadington, July* 4. 1622. *Barclay contra Cuningham.* But where the deeds alledged can have no fair conſtruction, but do infer fraud, witneſſes are receivable, *March* 1682, *Ogilvy contra Gourley* [e], and thereupon an [*agreement*, [ee]] bond and ratification for a conſiderable eſtate were reduced, *March* 1682, *Ballenden contra Bonnar and Neilſon* [f]. So *in* [g] a colluſion betwixt a creditor and debitor, whom the creditor brought home from abroad, that he might prevent the diligence of another creditor, who had denounced that debitor's lands to be appriſed upon ſixty days, but upon return of the debitor, this creditor denounced upon fifteen days, and ſo did firſt appriſe, (yet the firſt denunciation and laſt appriſing was preferred) *Hope, de dolo, Wardlaw contra Dalziel.* And the liferent eſcheat of a vaſſal was excluded, becauſe the ſuperior, (upon whoſe horning it fell,) had taken payment of the debt, and had not acquainted the vaſſal that he was denounced, that he might have relaxed within the year, *ibidem, Lauder contra Kincaid.* Though this caſe, and that of latent inſufficiency, be rather *lata culpa, quæ dolo æquiparatur:* for the difference betwixt *dolus* and *lata culpa* is, that *dolus eſt magis animi*, and oftentimes by poſitive acts, and *lata culpa* is rather *facti*, and by omiſſion of that which the party is obliged to ſhow. A diſcharge was *found null (as to an aſſigny)* [h] *of* [i] a bond granted by one brother to another, the diſcharge being of the ſame date with the bond, which could have no conſtruction

[w] See below I. 10. 14. & 15. [a] *l.* 18. § 1. *D. de prob. & præſ. l.* 6. *C. de dolo.* [b] F. *were.* [c] MSS. [d] MS. [e] *Home.* [ee] dec. [f] *Home.* [g] I. edit. [h] I. edit. [i] F. *to.*

ction, but that the brother by aſſigning the bond might deceive, unleſs there were inſtructed a juſt cauſe of that date, *December* 4. 1665, *Thomſon contra Henderſon*. And a diſcharge by a ſon to his father, of a ſum provided to him by his contract of marriage, without ſatisfaction, but upon agreement betwixt the father and the ſon the time of the contract, that the ſum in the contract ſhould be diſcharged *gratis*, was found fraudulent and null, as to the ſon's creditors, who traded with him even after the diſcharge, *January* 21. 1680, *Caddel contra Raith* [ii]. And a liferent by a husband to his wife of his whole eſtate, providing ſhe diſponed the half to the children of the marriage, was found fraudulent as to that half, and the creditors of the husband preferred to the children therein, *December* 23. 1679. *Erskine contra Carnegies and Smith*. But where the liferent was but ſuitable to the parties, a *clauſe* [k], that ſo much of it ſhould be applied for the aliment of the children, *was* [l] not found fraudulent in prejudice of the husband's creditors, but was ſuſtained to the children, it flowing only from the mother, *November* 16. 1665, *Wat contra Ruſſel* *.

XII. Under fraud ſimulation and colluſion are comprehended. Simulation occurs mainly in two caſes: in gifts of eſcheat and liferent; and in diſpoſitions, *retenta poſſeſſione*. For altho' the diſpoſition be delivered, and that there be inſtruments of delivery of the goods diſponed; yet if the natural poſſeſſion be retained, the diſpoſition is preſumed ſimulate, and others affecting the things diſponed by legal diligence, or by natural poſſeſſion, are preferred [ll]. [m] Simulation in gifts of eſcheat and liferent *is* [n] very frequent; and eaſily preſumed, *retenta poſſeſſione* [nn].

XIII. Colluſion occurs chiefly, when the debitor or common author oppoſes ſome creditors, and concurs with others, that theſe may attain the firſt compleat *diligences* [m]; which imports direct fraud. Or if he oppoſe one, though he do not concur with another, but only not oppoſe that other, his oppoſition is holden as fraudulent [m].

XIV. Fraud gives remeid by reparation to all that are damnified thereby, againſt the actor of the fraud, either by annulling of the contract or other deed elicite or induced by fraud, or by making up the damage ſuſtained by the fraud, at the option of the injured. And ſo fraud was ſuſtained at the inſtance of a ſeller, to annul a bargain *of ſale* [m] of wines, delivered to a skipper upon the buyer's order, becauſe the time of that order the buyer knew himſelf to be inſolvent, (which might appear by his books:) and tho' the wines were arreſted by a creditor of the buyer's in the ſhip, and a decreet for making forthcoming recovered; yet the wines were ordained to be reſtored to the ſeller, *December* 22. 1680, *Prince contra Pallat*. Reparation of fraud is not only competent to the party defrauded, but alſo to his creditors or aſſignies.

XV. *The* [o] *Romans* had a peculiar remeid *per actionem Paullianam* for annulling all deeds *in fraudem creditorum* [p]. In imitation whereof the lords made an act of ſederunt in *July* 1620, againſt unlawful diſpoſitions and alienations made by dyvours and bankrupts, which was ratified by act of *parl.* 1621. *c.* 18.

By this [q] act of ſederunt the Lords declare, "That, according to the power "given to them to ſet down orders for adminiſtration of juſtice, meaning "to follow and practiſe the good and commendable laws, civil and canon, "made againſt fraudful alienations in prejudice of creditors, and againſt the au"thors and partakers of ſuch fraud, they will decern all alienations, diſpoſiti"ons, aſſignations and tranſlations, made by the debitor of any of his lands, "teinds, reverſions, actions, debts or goods whatſoever, to any conjunct or confi"dent perſon, without true, juſt and neceſſary cauſes, and without a juſt price "really paid, the ſame being done after the contracting of lawful debts, to have "been from the beginning null, by way of action or exception, without further "de-

* The laſt two deciſions are not *hujus loci*, but belong to § XV. *h. t.* the debts in both the caſes being anterior to the contracts of marriage.

[ii] See below, § 15 *n.* 1. [k] F. *clauſe therein*. [l] F. *that clauſe was*. [ll] See below II. 3. 27. & III. 2. 13. I. edit. [n] F. *are*. [nn] See below III. 3. 21. [o] F. *for which the*. [p] *D. lib.* xlii. *tit.* 8. [q] I. edit.

" declarator. But prejudice to purchaſers of the bankrupt's lands and goods for " juſt and competent prices, or in ſatisfaction of their lawful debts, from the in- " terpoſed perſons: but the receiver of the price from the buyer, ſhall be holden " to make it forthcoming to the creditors. And it ſhall be ſufficient to prove by " writ or oath of the receiver of the diſpoſition from the bankrupt, that the ſame " was made without a true and juſt cauſe, or that, the lands and goods being " ſold by him that bought them from the dyvour, the moſt part of the price was " converted or to be converted to the bankrupt's profit and uſe. And in caſe the " bankrupt or interpoſed perſon ſhall make any voluntary payment or right to a- " ny perſon *in defraud of the lawful and more timely diligence of another creditor*, " he ſhall be holden to make the ſame forthcoming to the creditor, having uſed " the firſt lawful diligence; and he ſhall be preferred to the con-creditor, who " being poſterior to him in diligence, hath obtained payment by the partial fa- " vour of the debitor, or his interpoſed confident, and ſhall recover from the ſaid " creditor what he hath ſo obtained: but what the interpoſed perſon hath paid " or aſſigned to the bankrupt's lawful creditor, before preferable diligence done " by others, ſhall be allowed to him; and he ſhall be liable to make forthcoming " the reſt of the price. Yea the ſaid bankrupts and interpoſed perſons, and all others " who ſhall give counſel and aſſiſtance in deviſing and practiſing the fraud, ſhall " be holden infamous, incapable of honour, dignity and office, or to be witneſſes " or aſſizers."

This excellent ſtatute hath been cleared by [r] limitations and extenſions, in multitudes of deciſions occurring ſince, relating to defrauding of creditors: which being of the greateſt importance for publick good and ſecurity, we ſhall diſtinctly and in order hold forth the ſeveral caſes, *that have been decided* [r] in this matter.

Firſt then, though the ſtatute be only in favours of anterior creditors, for annulling poſterior deeds; yet it is not excluſive of other remeids for annulling deeds done in defraud of creditors, though contracting after thoſe deeds, where fraud in the deſign doth evidently appear: whereof we *have* now *inſtanced* [r] ſeveral deciſions [s]. So a bond granted by a father to a ſon *foriſfamiliat*, payable after the father's death, was reduced at the inſtance of the father's poſterior creditors, continuing traffick with him, *February* 12. 1669, *Pot contra Pollock*. And a bond payable only by the granter's heir, if he had no heir of his own body, was reduced as fraudulent, *January* 24. 1677, *Blair of Ardblair contra Wilſon*. And a diſpoſition of lands, purchaſed by a merchant to his ſon, was found affectable for the debts of merchants ſtrangers, who began to trade with the father before the diſpoſition, and continued after, even as to the poſterior debts, ſeeing the father continued ſtill to act as proprietar, tho' by his compt-book it appeared he knew himſelf to be inſolvent; and tho' the ſon's infeftment was publick and regiſtrate, which ſtranger merchants were not obliged to know, *July* 2. 1673, *Street and Jackſon contra Maſon*. Yea an infeftment by a father to his eldeſt ſon, an infant, was reduced at the inſtance of poſterior creditors, his neighbours, where the ſaſin was regiſtrate, ſeeing the regiſter was carried out of the country, and the father continued to act, not as liferenter, but as proprietar, *December* 4. 1673, *Reid of Ballochmiln contra Reid of Daldilling*. And generally latent rights amongſt confident perſons are reduceable by poſterior creditors. But the liferent of the *half of the* [t] conqueſt of a merchant, provided in a contract of marriage to his wife, (being an ordinary clauſe) was not found fraudulent, *February* 10. 1674, *Marion Gray contra the ſon and creditors of her husband*.

Secondly, Though this ſtatute bears all alienations, without a cauſe onerous, in prejudice of prior creditors to be null *ab initio*, and (without declarator) by exception or reply: yet cuſtom hath found this inconſiſtent with the nature of infeftments, which cannot be reduced till they be firſt produced, and all the authors called:

[r] I. edit. [s] Above § 11. [t] dec

called; which cannot be by way of exception, but by action [u]. Yet a diſpoſition of moveables was found annullable by reply, *June* 16. 1671, *Bowers contra Lady Couper*; and likewiſe a profitable tack, *June* 8. and 9. 1670, *doctor Hay contra Marjory Jamieſon* *. Neither are the receivers of ſuch alienations countable for the profits *ab initio*, till they be put *in mala fide* by the purſuits of anterior creditors: whoſe rights they are not preſumed to know, till they be produced and found preferable, either evidently, when the caſe is clear to common apprehenſion, or *in dubio*, when it is ſo found by the judge.

Thirdly, Though the title of this ſtatute, and much of the body of it, be againſt the alienations of bankrupts in prejudice of their creditors; yet the ſtatutory part declares *all* [w] alienations to any conjunct or confident perſon without a juſt price, being in prejudice of anterior creditors, to be annulled. (Which hath always been extended, not only to diſpoſitions of bankrupts made to confident perſons, but to any perſon, without a competent price, or equivalent cauſe onerous.) And therefore ſuch gratuitous deeds are reduceable by anterior creditors, though the granter was not then bankrupt, as a broken merchant flying. But if he were before, or did by thoſe fraudulent deeds become inſolvent [a], *Hope, uſury, Pringle contra Ker*; *February* 16. 1628. *Kilgour contra Thomſon*; *January* 17. 1632, *Skene contra Betſon*; yea if thereby his eſtate cannot afford ready ſatisfaction or ſecurity, as being incumbred with many appriſings or adjudications, though the reverſions may be equivalent to all his debt: yet anterior creditors may reduce gratuitous deeds done by ſuch perſons, it being more fit that anterior creditors ſhould be preferred, and the obtainers of thoſe gratuitous rights ſhould be put to recur upon the reverſions by their warrandice, *February* 10. 1665, *Lady Craig contra Lord Loure* [b]. But there is nothing in this ſtatute, or by cuſtom, to annul any gratuitous deed in favours of wives, children or ſtrangers, if at the time of the granting and delivery thereof the granter had an eſtate ſufficient for theſe and all his debts, unaffected by appriſing, adjudication or arreſtment. Neither will inhibition ſuffice, nor appriſing or arreſtment for ſmall ſums, *to* [c] be a ground for this reduction.

[c] Competent proviſions to wives or husbands are not accounted gratuitous, but onerous *ad ſuſtinenda onera matrimonii*, and for [c] mutual proviſions. But, if exorbitant, they will be liable *in quantum locupletiores facti* [d], *December* 23. 1665, *Burnet contra Lepers* **. Neither are proviſions or gifts to children annullable by anterior creditors, if the granter had then a viſible eſtate, ſufficient for theſe and all his debts, as was found in a proviſion by a father to his ſon by his contract of marriage, though the ſon received the tocher, *June* 22. 1680, *Grant contra Grant of Elchies*; *June* 30. 1675, *Clerk contra Stewart and Watſon*. Yea the portions of children were not excluded by prior creditors, their father having then a ſufficient viſible eſtate, though *ex eventu* it proved inſufficient, by running on of annuals, and accumulations of appriſings ***, *December* 11. 1679, *creditors of Mouſewell contra children of Mouſewell*. And ſo a diſpoſition by a grandfather to his oy was not annulled by anterior creditors, *March* 6. 1632, *L. Garthland contra Ker*; *November* 10. 1680, *Mackell contra Jamieſon and Wilſon*.

Fourthly, Though this ſtatute requires a juſt price, it did not annull a diſpoſition, albeit a prior creditor offered a greater price, if the price received was the ordinary rate of the country [e], and though there was a perſonal reverſion to the diſ-

* Here the queſtion did not relate to the proceſs for annulling deeds made *in fraudem creditorum*, but to the effect of ſuch a nullity, as to the bygone profits; and came not to a deciſion.

** This deciſion doth not relate to the matter of alienations *in fraudem creditorum*, but to the ſubſiſtence of the marital obligation (whereby the husband is liable for the wife's debt) even after the diſſolution of the marriage, *in quantum vir lucratus eſt*. See above, I. 4. 17.

*** During the currency of two long liferents, which in the computation of the father's eſtate were eſtimated not *ſecundum eventum*, but as they were worth when the bonds were granted to the children. But afterwards in the ſame caſe (*Harcarſe, bonds*) 28. *July* 1688. the liferents were computed according to the full time they ſubſiſted.

See above I. 1. 16. [w] F. *againſt all*. [a] § 3. *Inſt. quib. ex cau. manumit.* [b] And *February* 6. 1663. *Lord Loure contra Earl of Dundee*. [c] I. edit. [d] *arg. l. ult.* § 1. *in fine.* § 2, *junct. l.* 6. § 11. *D. qui in fraud. cred.* [e] *d. l.* 6. *pr.*

diſponer's eldeſt ſon only, *January* 16. 1677, *E. Glencairn contra Briſbane*. The like, where the purſuer had obtained a prior minute of ſale for a greater price: yet it *did*[f] not reduce a poſterior infeftment purchaſed *bona fide*, tho' for a leſſer price, being competent, *July* 18. 1677, *Murray of Keilor contra Drummond of Maclanie*.

Fifthly, Tho' the ſtatute mentions only the annulling of diſpoſitions, *&c.* yet it is ordinarily extended to bonds or obligements, whereupon appriſing, adjudication or arreſtment *follows*[g], and likewiſe to renunciations and diſcharges of perſonal faculties and reverſions[h].

Sixthly, Tho' diſpoſitions or other rights be for equivalent cauſes onerous; yet by the poſterior part of the ſtatute they are accounted fraudulent and reducible, if the bankrupt, or the interpoſed perſon in truſt, do by voluntary gratification prefer one creditor to another, who hath done more timeous and lawful diligence, *December* 11. 1691, *the creditors of Langtoun and Cockburn competing*. Where the *Lords* found, That the execution or the charge given upon letters of horning againſt a debitor, who is *obæratus*, and burdened with great debts, and againſt whom ſeveral legal diligences are beginning to be raiſed and execute, albeit the debitor did not appear at the time to be altogether inſolvent, and not proved to be ſo by the event, and likewiſe the executions upon letters of inhibition againſt the debtor himſelf ſo burdened, do render the debitor incapable to grant voluntary rights and infeftments in prejudice of the other creditors their ſaid prior diligence. But where a debitor of an entire eſtate pays his lawful creditor, or ſatisfies him by diſpoſitions or aſſignations, neither the tenor nor extenſion of the ſtatute reacheth theſe caſes, albeit there be inchoate and incomplete diligence at the inſtance of other creditors againſt him.

Seventhly, Where that clauſe of the ſtatute bears the annulling of deeds done in gratification, or preference of one creditor to another, who hath done more timeous diligence by inhibition, horning, arreſtment, compriſing or other lawful mean, duly to affect the dyvour's lands or goods, or price thereof; the meaning is, that, when theſe diligences are not complete, but inchoate, and the creditor is *in curſu diligentiæ*, the debitor or his truſtee cannot prevent the courſe of that diligence by preferring another creditor, doing leſs diligence. For, if the meaning were of an appriſing perfected by infeftment, or arreſtment by a decreet to make forthcoming, there needed not this remied; for theſe diligences, being complete, would exclude any other poſterior diſpoſition or diligence: yea inhibition, if the executions were complete and regiſtrate, would of itſelf be effectual to reduce poſterior deeds *ex capite inhibitionis*. But if theſe diligences be only inchoate; as if the inhibitor had begun his execution, but had not compleated it at all the market-croſſes requiſite[i], yet any diſpoſition, infeftment or other real right made to another creditor *medio tempore*, leſs vigilant, is annullable thereby[k], *December* 15. 1665, and *February* 27. 1667, *Elies contra Keith and Wiſhart* *: or, if lands be denounced to be appriſed, or ſummons of adjudication be execute, rights thereafter made to other creditors doing leſs diligence, *(tho') in curſu diligentiæ*, with the firſt, are thereby reducible, altho' done before the decreet of appryſing or infeftment[l].

But inhibition, appriſing or adjudication, inchoate, have no effect as to moveable rights, not being, as the ſtatute requires, diligences which duly can affect *(ſuch)* ſubjects[ll]. Neither doth the laying on of arreſtment affect heritable rights, and ſo cannot hinder the debitor to diſpone theſe to lawful creditors doing leſs diligence**. But horning is a diligence, relating both to the moveable eſtate by ſingle eſcheat, and to the heritable eſtate by liferent eſcheat; and therefore, after

* Theſe two deciſions have nothing in relation to the challenge of deeds upon the inchoated execution of inhibitions.

** This muſt be underſtood of heritable rights to land property, and obligations upon which infeftment has followed. By act 51. P. 1661. all bonds, *&c.* upon which no infeftment has followed, tho' heritable, are declared arreſtable.

[f] I. edit. [g] F. *follow*. [h] *l.* 1. § 2. *l.* 3. *D.* eod. [i] See below IV. 50. 10. [k] See below IV. 50. 11.
[l] *Hactenus emendavit, notaſque adjecit Joannes Gordon Juriſconſultus.* [ll] F. *that ſubject*.

the charge of horning, *(this diligence)* is effectual, *February* 12. 1675, *Vietch contra the executors of Ker and Pallat*; *July* 18. 1677, *Murray of Kilor contra Drummond of Machany*; *January* 25. 1681, *Bathgate contra Bowden*. And lately in the forecited caſe of *the creditors of Cockburn and Langtoun*, which occaſioned a difficulty in the ranking of the voluntary rights and adjudications, which the Lords *have* [m] determined [mm].

But this ſtatute will not annul diſpoſitions or other rights made in favour of thoſe perſons, who have uſed the moſt effectual diligence duly to affect the ſubject, becauſe this prevents expences, prejudicial both to the debitor and co-creditors, and is not contrary to this ſtatute.

Neither will diſpoſitions or other rights, for equivalent cauſes onerous, made to creditors, be annulled if not done *in curſu diligentiæ*; but if the co-creditor inſiſt not in his inchoate diligence till it be complete, he hath not the benefit of the ſtatute, *nam vigilantibus et non dormientibus jura ſubveniunt* [n]; and therefore *the* diſpoſition was not reduced at the inſtance of a creditor who had appriſed before a diſpoſition, but for *ten* years had neither obtained infeftment nor charged the ſuperior, *February* 8. 1681, *Neilſon contra Roſs of Pittindrich*. But how long this negligence muſt be to exclude, muſt neceſſarily be *in arbitrio judicis**. Neither will this clauſe of this ſtatute annul diſpoſitions made to buyers for a juſt price paid, where the price was not an anterior debt due to the buyer; for there, there is no preference of one creditor to another, but a lawful bargain in commerce, where the buyer neither doth nor can know inchoate diligences, but only ſuch as are complete and regiſtrate, (except in the caſe where the ſubject becomes litigious, which is not to be extended to every diligence in prejudice of purchaſers of lands, whereby rights would become very uncertain, eſpecially when irredeemable rights are purchaſed; but againſt the purchaſing of bonds, annualrents or wadſets it may be more extended) [nn] as in the former caſe, *Neilſon contra Roſs*, where this defence was alſo ſuſtained, that the diſpoſition was for a price paid and for no anterior debt. And in the former caſe *Bathgate contra Bowden*, the diſpoſition after horning, tho' it was in the terms of ſale, was only annulled becauſe it was granted for anterior debts due to the buyer, in prejudice of another creditor's prior diligence, and ſo fell under the act of parliament.

Fraud is no *vitium reale* affecting the ſubject, but only the committer of the fraud and thoſe who are partakers of the fraud, as is clear by this ſtatute *(which bears)*[o] an exception of lawful purchaſers not partakers of the fraud. But where the right purchaſed hath evidence of fraud in itſelf, the purchaſer, tho' for a juſt price paid, is thereby partaker of the fraud, and ſo may be excluded. As, if the right acquired bore "for love and favour," or if it be betwixt conjunct perſons, the purchaſers muſt inſtruct the cauſe onerous. As when the right purchaſed was from one brother to another, *December* 23. 1679, *Gordon of Troquhen contra Ferguſon of Keiroch*; *January* 24. 1680, *Crawfurd contra Ker*.

Eightly, Tho' the manner of probation by this ſtatute, be by the oath of the purchaſer or writ, yet the narrative of ſuch rights being betwixt conjunct perſons, albeit it bear cauſes onerous, muſt be otherwiſe aſtructed, wherein witneſſes and other evidences will be received [oo], which is not only ſuſtained as to diſpoſitions by parents to children, but by brothers and ſiſters to brothers or to good-brothers and good-ſiſters, yet not to two perſons marrying two ſiſters, where there is but *affinitas affinitatis*: it hath alſo been extended to uncle and nephew where other circumſtances concurred, *January* 18. 1678, *Kinloch of Gourdie contra Blair*; *December* 18. 1673, *creditors of Tarſapy contra L. Kinfauns***. The like effect is in rights acquired in name of children in the family who have no viſible eſtate [p], for theſe

* Denunciation having been delayed for *five months* after the horning, this was found a ſufficient degree of negligence, to exclude reduction of a diſpoſition granted to another creditor in ſecurity, after the horning, but before the denunciation, *July* 9. 1709, *Drummond contra Kennedy*.

** Tho' in the caſes here quoted the diſponee was uncle to the bankrupt, yet that circumſtance appears to have had no influence in the deciſion. The queſtion was not with reſpect to the neceſſity of inſtructing the onerouſity of the deeds, which in the whole of the argument was ſuppoſed to have been ſufficiently inſtructed; but the diſpoſitions were in both caſes reduced as being fraudulent *omnium bonorum* to one creditor in preference of others.

[m] F. *has* [mm] See below IV. 35. 17. & 18. [n] *L.* 24. *ff. Quæ in fraud. credit.* [nn] F. no parentheſis.
[o] F. *bearing*. [oo] See below III. 7. 2.

theſe are held fraudulent, and may be affected for the father's debt, as hath been frequently decided *.

XVI. *Spuilzie* [q] is the taking away of moveables without conſent of the owner or order of law, obliging to reſtitution of the things taken away, with all poſſible profits, or *to* reparation *(therefor)* according to the eſtimation of the injured, made by his *juramentum in litem*. Thus things ſtollen or robbed, tho' they might be criminally purſued *(for)* as theft or robbery, yet they may be *(alſo)* civilly purſued *(for)* as ſpuilzie.[qq]

Spuilzie *inurit labem realem*, whereby the goods may be recovered from purchaſers *bona fide*, *November* 91. 1677, *Hay contra Leonard and others*. The profits of things ſpuilzied are called violent profits, becauſe they are not ſuch ordinary profits as the perſon ſpuilzied uſed to make of the goods, but ſuch as he might have made thereof, where the things ſpuilzied have profits, as horſe, oxen, or other cattle, and inſtruments, or other tools. But corns and the like have no profits. The violent profits of *an ox* ſpuilzied in labouring time, was modified to five ſhillings *Scots per diem*, *February* 28. 1668, *Lord Juſtice Clerk contra Hume of Linthill*. But the modification depends much upon the violence and atrocity of the ſpuilzie, and the arbitriment of the Judge.

XVII. In ſpuilzies the purſuer needs no other title but poſſeſſion, from whence a right in moveables is preſumed; and therefore *(proceſs for)* ſpuilzie of goods in coffers was ſuſtained upon the purſuer's having the keys, and the defender's breaking up the coffers, not being done by parents or maſters, *July* 25. 1676, *Maxwell contra Maxwell*. A relict in poſſeſſion was admitted to purſue a ſpuilzie of corns, ſowen and reaped by her huſband, tho' not confirmed by her, *July* 26. 1626, *Ruſſel contra Kerſe*.

Spuilzies muſt be by unlawful meddling or acceſſion thereto; and therefore it was found relevantly libelled, that the goods ſpuilzied were immediately received into the defender's houſe, *January* 26. 1628, *E. Roxburgh contra Lugtoun*; *Had. December* 2. 1609, *contra Denniſtoun*. But a ſpuilzie was not ſuſtained againſt a perſon as acceſſory, who being charged by the meſſenger, did appriſe the goods upon the ground, tho' in other ſolemnities the poinding was illegal, for which he was not anſwerable, Hope, ſpuilzie, Butter contra Gordon. *Spuilzie makes all perſons acceſſory or concurring liable* in ſolidum, *and decreet obtained againſt ſome of them hinders not proceſs againſt the reſt, till ſatisfaction be made*, Hope, *ſpuilzie*, *Bane contra Bruntfield*; *January* 17. 1668, *Strachan contra Moriſon*.**. *But, if the purſuer tranſact with one of the parties guilty for good deed, all the reſt are freed, tho' he may freely paſs or forbear the purſuit of any one*, Had. *June* 20. 1611, *Douglas contra Loch and Jamieſon. The like found in the caſe of a diſcharge to one of the parties, tho' it did not bear ſatisfaction, but money was proved paid*, Hope *ſpuilzie*, *Douglas contra Young. The like, tho' the diſcharge bore, but prejudice of the ſpuilzie againſt the reſt*, Hope, *ſpuilzie*, *Douglas contra Keith*.

XVIII. In a ſpuilzie, the fact being proved or acknowledged, as to ſome particulars libelled, the purſuer's oath will be admitted to prove the reſt of the libel, tho' conſiſting of divers kinds of things, *March* 8. 1628, *Broun contra Murray*.

XIX. Spuilzie is elided, *Firſt*, if the deed was warrantably done, at leaſt *bona fide* by a colourable title, as by cuſtom; and ſo the ſpuilzie of a horſe was elided, becauſe he was meddled with (as being carrying corn out of the thirle to another mill [r]) according to the cuſtom of the country, whereby the horſe is forfeited to the maſter of the mills, and the corn *and ſeck* to the miller, *March* 14. 1635, *M'kay contra Menzies*; [rr] but was not elided by a diſpoſition of the goods libelled for relief, being meddled with *brevi manu*, ſeeing diſtreſs was not inſtructed, *July* 19. 1633, *Kirkwood contra Ferguſon* ***; but where there was a diſpoſition, and inſtrument

* By act 5. P. 1696. further remedies are provided againſt alienations fraudulently made by bankrupts, in order to gratify favourite creditors.

** In this caſe it was found, that where ſpuilzie is purſued after three years as wrongous intromiſſion, each defender is liable *pro rata*, and this intromiſſion is preſumed to have been equal without proof. It ſeems to have been found, *December* 2. 1609, *contra Kenneſtoun*, That defenders, in an action of ſpuilzie, were only liable *pro rata*.

*** This deciſion was afterwards altered, and the contrary found, *December* 14. 1633, betwixt the ſame parties.

[p] See above I. 9. 15. 3. [q] See below IV. 30. 1. *et ſeq.* 2. *Stat. Rob.* I. *c.* 12. [qq] See II. *Stat. Rob.* I. *c.* 12. P. 1449. *c.* 20. [r] F. no parentheſis. [rr] *Stat. Gulielmi*, *c.* 9. § 8. *Craig* II. *D.* 8. § 9. 10.

inſtrument of poſſeſſion, albeit the diſpoſition was *omnium bonorum*, and poſſeſſion retained for two years, yet it was found ſufficient *contra ſpolium*, eſpecially ſeeing there was no violence uſed in attaining real poſſeſſion of the goods, *January* 30. 1662, *Irvine contra M'cartney*. And the ſpuilzie of a horſe was elided, becauſe the purſuer having committed hameſucken and ſlaughter, was taken by the defender with the horſe, as being Baillie of the barony where he did it, *Had. January* 8. 1611, *Baillie contra Lord Torphichen*. And a ſpuilzie of corns was elided by the defender's entering in poſſeſſion of the ground, whereupon the corns were growing, *Hope, ſpuilzie, Eliot contra Lord Buckleugh*. It was alſo elided as to a meſſenger, becauſe he poinded the goods libelled by virtue of letters of poinding directed againſt the purſuer, *(tho')* unwarrantably raiſed, there *being* no concluſion in the decreet againſt him, *March* 4. 1628, *Scot contra Banks*. Or if the defender meddle with goods by a title or warrand from any other party to whom they belonged, *and by whom they were poſſeſſed*: and tho' this be contrary to the libel it will be ſufficient; and if either party alledge right, the moſt pregnant will be preferred*, *Nicolſon de bonis vi raptis, Guthrie contra Richie. So ſpuilzie was elided, becauſe the defender bought the horſe in queſtion from a horſe-cowpar, who had rode upon him to ſeveral markets as his own horſe, for the ſpace of ten days, Nicolſon, ibid. Roſs contra Steuart.*

XX. The *ſecond* exception againſt ſpuilzies is voluntary delivery, which was ſuſtained, tho' it ſeemed contrary to the libel, *Spotiſwood, ejection, Cunninghame contra M'Culloch, p.* 90. *Nicolſon de bonis vi raptis, Ruſſel contra Carſe.*

XXI. The *third* exception againſt ſpuilzie, is, that the goods libelled were lawfully poinded; for, tho' the decreet whereupon the poinding was raiſed ſhould be reduced for want of formality, yet it will not be a ſpuilzie, unleſs it proceeded *mala fide*, or *ſpreta authoritate judicis*, as when a decreet *proceeded and* was uſed after advocation intimated to the party, tho' the inferior judge refuſed to receive, or record it judicially; or when the debt contained in the decreet was fully ſatisfied before the poinding, *Spotiſwood, ejection, Vans contra Broun, p.* 88. But the exception of poinding will be elided by this reply, That the purſuer offered the ſum poinded for, at the time of the poinding, when the poinded goods were offered; *and upon refuſal conſigned, Nicolſon de bonis vi raptis, Herdman contra Walwood.*

XXII. The moſt ordinary reply againſt poinding, is, that the goods were not poindable, as being plough-goods, which are not poindable the time of labouring the ground, if there be other goods upon the ground ſufficient for paying the debt, according to the act of parliament, *P.* 1503. *c.* 98.[s] And it was found ſufficient, that there were other goods upon the ground, without neceſſity to alledge, that they were the debitor's proper goods; or that the goods poinded were then in labour, *having been* two or three days before in the plough, *December* 1. 1630, *Gibſon contra Corſbie* **. Yea poinding of plough-goods was found a ſpuilzie, being done in the ordinary time of plowing, tho' the goods were not yoked that year, becauſe of froſt, *June* 7. 1678, *Wood contra Stuart*.

There is another reply againſt poinding, that the goods poinded were not the debitor's, but another offered to depone they were his, or that this offer was made by his warrand, or by his ſervant; but it is not enough that this offer was made by thoſe who had no direct, or preſumed commiſſion, *July* 6. 1666, *Corbet contra Stirling*. This offer muſt be made before the ſolemnity of poinding be ended, but an offer was not ſuſtained, being offered about an hour after, to give ſummary reſtitution, *July* 9. 1675, *Cotts contra Harper*. But this oath will not exclude probation, that the goods were the debitor's, or another's by way of declarator, that thereafter they *(may)*[ss] be affected by poinding, but is only like an oath of calumny, that *in poſſeſſorio* hinders poinding.

XXIII. The *fourth* exception againſt ſpuilzie, is reſtitution of the goods ſpuilzied

* By the ancient practice of the court of ſeſſion, proofs before anſwer to each party were not allowed; ſee below IV. 39. 4. & 5.

** In the deciſion here quoted, it was not found neceſſary to libel that other goods were ſhown to the perſons who came to poind, but it was expreſsly libelled, that they were the debtor's proper goods.

[s] See below IV. 47. 34. [ss] F. *might.*

zied within twenty four hours, *re integra*, *or* reſtitution[t] *at any time*, if the *goods* be accepted and kept by the purſuer.

XXIV. There is alſo a common exception againſt ſpuilzies upon preſcription of three years not being purſued within that ſpace, after the committing thereof, and that by expreſs ſtatute, *parl.* 1579, *c.* 81. But this preſcription is only againſt the ſpuilzie as ſuch, ſo that it taketh away the privilege thereof, as to the violent profits, *et juramentum in litem*; *but* it may thereafter be purſued, as wrongous intromiſſion for reſtitution only; (and if many be purſued they are not liable *in ſolidum*, but equally, unleſs a greater intromiſſion of ſome of them be proven, *January* 17. 1668, *Captain Strachan contra Moriſon,)* which alſo is competent in many caſes, where ſpuilzie is either not ſuſtainable, or elidable in its atrocity, as a ſpuilzie, *nam levis exceptio excuſat a ſpolio*, and yet action for reſtitution remains; and ſometimes the ſpuilzie may be reſtricted thereto, if the purſuer pleaſe, before litiſconteſtation; otherwiſe he hath a ſeveral action therefor; as if ſpuilzie be *purſued*, and an exception of lawful poinding admitted to be proved, the defender will be aſſoilzied from the ſpuilzie, even tho' the decreet, whereupon the poinding proceeded, be reduced for informality; and yet the *(purſuer)* will have a ſeveral action for reſtitution, which may be alſo decerned in the action of ſpuilzie.

But ſpuilzie is not elided by maſters of the ground their bringing back the goods of their tenants, by virtue of their hypotheque, *ex intervallo*, *February* 9. 1676, *Park contra Cockburn of Ryſely*. Neither was the ſpuilzie of a horſe elided, becauſe he was found in the ſkaith, and was offered back within forty eight hours, upon payment of the ſkaith, unleſs he had been put in a poind-fold, or ſafe place, having water, graſs, or fodder, and that by the ſentence of a judge the ſkaith hath been eſtimated, and the horſe poinded therefor, *February* 10. 1676, *Duncan contra Kids*; *December* 2. 1679, *Beaton contra Hume*. So ſpuilzie was not elided upon alledging the purſuer had ſpuilzied or reſet as much of the defender's goods, by the *act* 112. *parl.* 7. and *act* 16. *parl.* 10. K. *James* VI. unleſs the purſuer had been a broken man and notorious thief of a clan, who could not be reached by the ordinary courſe of law, *November* 29. 1678, *More contra M'Fedrick* *.

XXV. *Intruſion* and *ejection*[u] are delinquencies in lands and immoveables, as ſpuilzie is in moveables, and they differ in this; that intruſion is the entering in poſſeſſion, being for the time void, without conſent of the parties intereſted, or order of law[w]; but ejection, as its *etymon* intimates, is not only the unwarrantable entering in lands, but the caſting out violently the then poſſeſſor[x]. In this there is violence, in the other wrong, but no violence in the entry, tho' it be a violent detention; and, in either caſe, the injured muſt be at leaſt repute in poſſeſſion: but *(tho')*[y] the poſſeſſion muſt begin by ſome bodily act[z], it may be continued[a] by the act of the mind *(alone)*[b] willing or affecting the poſſeſſion, which is conjectured or preſumed from circumſtances[c]: for if it be but a ſhort time ſince the poſſeſſor did corporally poſſeſs, and nothing appear that he hath relinquiſhed his poſſeſſion, or his affection thereto ceaſed, he is ſtill poſſeſſor, and is ſo preſumed, becauſe of his intereſt; but if his abſtinence be *long and total*[d], that he hath retained nothing, as the keys, or keeping of doors cloſs, then the poſſeſſion is holden as relinquiſhed[e]; and he who enters by a real or colourable title, is no intruder, and cannot be extruded, but by warning, and proceſs of removing; and therefore, tho' intruſion be ſaid to be in the void poſſeſſion, it is only meant as to corporal poſſeſſion, there being ſtill a preſumed poſſeſſion *animo* on the part of the injured. In other things intruſion and ejection do in all things agree; ſo ejection muſt be purſued within three years, *parl.* 1579, *cap.* 81. which is extended to intruſion by theſe words of the ſtatute, *That ejection, and others of that nature, be purſued within three years after committing thereof*, *Had. February* 2. 1610, *L. Craigball contra Kinninmouth* **.

* Summonds of recent ſpuilzie may be executed on fifteen days, *P.* 1555. *c.* 39.

** The antient method of removing maſterful poſſeſſors of land is mentioned, *P.* 1457 *c.* 78.

[t] F. *of the goods if they be accepted.* [u] See below IV. 28. 1 *et ſeq.* II. 1. 19. & 20. [w] *L. ult. C unde vi.* [x] *Toto tit. ff. de vi et vi arm.* [y] F. *as.* [z] *L.* 8. *ff. de acq. vel amit. poſ.* [a] F. *continued along by the act of the mind.* [b] *L.* 25. § 2. *ff. eod.* [c] *L.* 6. §1. *l.* 7. *ff. eod.* [d] F. *total or long.* [e] See below II. 1. 20.

XXVI. *Ejection* is only competent to natural poſſeſſors, poſſeſſing by themſelves, their hinds and cottars; but not to an heritor for ejection of his tenants, unleſs the tenants concur, *Hope, ejection, Cunningham contra M'Culloch.* This muſt be underſtood as to the oath *in litem*, for none can have the price of affection, but the natural poſſeſſor, nor the violent profits, unleſs the tenants inſiſt not; in which caſe the heritor may claim them, and in all caſes may purſue the ejector, or intruder to pay the rent, or remove without warning. Intruſion *and* ejection *are* not committed, but by entering into the natural poſſeſſion, or at leaſt by out-putting, or in-putting of tenants: for tho' *tenants* invert there maſters poſſeſſion, and pay their rents to another, this will not infer intruſion or ejection: but in both theſe caſes, there are other remeids in law, by removing, or action for maills and duties, which is competent againſt intromitters.

Tho' ejection and intruſion preſcribe by ſtatute, yet it is only as ſuch, for taking away *their* ſingular privileges, *viz.* the violent profits; *for* tho' they be not purſued within three years, yet they are competent, being libelled *or*[f] reſtricted to reſtitution of poſſeſſion, and the ordinary profits; and in this they differ from removing, which cannot be purſued but upon warning forty days preceeding Whitſunday; but theſe may be purſued at any time without warning, *March* 16. 1627, *Hay contra Ker, Spotiſwood, ejection, Mowat contra Davidſon, July* 15. 1626, *M'Fedrick contra M'Clachlan.*

Ejection and intruſion are founded eſpecially upon poſſeſſion, and the purſuer needs not diſpute his right, neither his *way of* entering *to the* poſſeſſion, which, tho' it were vitious, yet if it be continued by a conſiderable ſpace, and the poſſeſſor be then ejected, he will not be excluded, by alledging his entry was vitious, as if he had entered in the vice of a tenant, removed by the defender. *After the death of the perſon ejected, action was ſuſtained at the inſtance of his apparent heir, on condition that he ſhould infeft himſelf before extracting the ſentence, Nic. Blair contra Matthew* *. *But it was not ſuſtained at the inſtance of the ſon of a woman ejected, who could have no heir, being neither prelate, baron nor burgeſs, Hope, ejection, Anderſon contra Yule.* *But* ejection was ſuſtained at the inſtance of infants, whoſe father died in poſſeſſion, and had an old infeftment, albeit a decreet of removing was obtained againſt *their* mother, they not being called, nor was the ejector allowed *in hoc proceſſu* to diſpute the infants right. But *ſpoliatus* was found inſtantly to be reſtored to poſſeſſion, *February* 19. 1663, *Scot contra E. Hume.* Here the heir, tho' in the mother's family, was not held as removed as her bairn; yet the ſpuilzie was reſtricted to re-poſſeſſion.

XXVII. Ejection and intruſion are *elided*, by alledging the purſuer relinquithed the poſſeſſion, or did voluntarily remove, which muſt be proved by writ, or oath of party, if there be no matters of fact, from whence the dereliction doth evidently appear, as tranſporting of the parties goods, *March* 2. 1637, *Keith contra Simpſon.* This was alſo found proved by inſtrument, and the witneſſes inſert, tho' the purſuer libelled violence, contrary to the inſtrument, *Hope, ejection, Cunningham contra M'Culloch.* And alſo found proved by a renunciation, atteſted by the act of the defender's court, and other circumſtances, *Hope, ejection, Lady Monymuſk contra her tenants*; the like upon voluntary removing, and renouncing in the purſuer's maſter's court, *Had. June* 15. 1610, *Brown contra* Ejection was alſo elided by voluntary removing or renouncing, after the defender's entry, *Nic. de vi*, 31. *June* 1619, *Robertſon contra Gray.* But ejection was not elided by a perſonal obligement, to *put in poſſeſſion* the ejector, or by a decreet-arbitral, ſeeing the entry thereto was not by order of law, or *(by)* conſent to poſſeſs, *Spotiſ. arbiter, Wood contra Scot.*

Violent profits in ejection and intruſion within burgh are ordinarily ſuſtained for the double maill; but in landward, the violent profits are accompted by the quantity of the ſeed the land can ſow, and the increaſe ſuch lands can yield deducing

* In this caſe the defender in the action of intruſion, inſiſted againſt the heir apparent of the purſuer, that he ſhould either be ordained to carry on the action, or that the defender ſhould be aſſoilzied from the action for ever. The heir apparent made this defence, that he was not infeft, which was not ſuſtained.

[f] F. *and.*

cing the expences of ſeed and labourage, and the profits the ſoums can yield which the land can hold, wherein are comprehended the calves and milk of cows; and the wool, lambs, and milk of ſheep, deducing the expences of herding [g]. In ejection and intruſion, the defender muſt find caution for the violent profits at the firſt term of litiſconteſtation, or otherwiſe, decreet is to be given againſt him, *parl.* 1594. *cap.* 221.

Succeeding in the vice is a kind of intruſion; but becauſe it is ordinarily conſequent upon removing, it is ſpoken to *below* [h].

XXVIII. [i] *Moleſtation* is the troubling of poſſeſſion chiefly in and about marches of lands; the party injurer is obliged to refound the damage to the party injured, and the marches being cognoſced, he will be decerned to deſiſt, and ceaſe from troubling in time coming; whereupon all perſonal execution is competent: It is alſo competent when poſſeſſion is otherwiſe troubled. This is a mutual action, and probation *ordinarily is* allowed *hinc inde*; for it is the ſame with the *Roman* action *finium regundorum* [k]; and in caſe of further trouble, *lawborrows* and *contravention* will be ſuſtained, after the marches are cognoſced, which otherwiſe can have no effect, while the marches and poſſeſſion are dubious. The proceſs *by which* moleſtation is determined, is called a *cognition*, the whole courſe whereof is clearly ordered, and ſet down by the ſtatute of ſeſſion, ratified in parliament 1587. *cap.* 42. whereby it is clear, that moleſtations were of old decided by ſheriffs, baillies of regalities, and other judges ordinary where the lands lay, by the determination of an aſſize, or inqueſt of the beſt and worthieſt *in* the country, *and* they may be ſtill ſo purſued; but if *(they be purſued)* before the ſeſſion, the Lords are not to hear and determine the cauſes themſelves, but to remit the ſame to the judges ordinary; or in caſe they be ſuſpect, to name others as judges delegate for that act, except only in thoſe moleſtations which do concern any of the *Lords* of ſeſſion, which are to be heard and determined before themſelves. The ſaid judges ordinary, or delegates are firſt to hear parties debate, and to determine the relevancy of the points to be proved; the probation *(of ſuch points as are probable by witneſſes)* [kk] muſt be before the inqueſt, and muſt be decided by their verdict; the moſt part of the inqueſt is to be landed men, worth three hundred merks of rent and above, in the pariſh where the lands lie, or failing them in the next adjacent paroches, as is fully ſet forth in the ſaid ſtatute. In theſe cognitions, the ſuperior muſt be called in all the diets of proceſs, *Hope, perambulation, Calder contra Forbes.* And if the cognition be purſued by a liferenter or others, the heritor muſt be called, or otherwiſe the cognition is null. *Ibid. Lothian contra Farquhair.*

XXIX. [l] *Breach of arreſtment*, and *Deforcement*, are by our law and cuſtom in all things *equiparate*, both being violations of legal acts; and concerning both, it is ſtatute [m], That breakers of arreſtment, or the deforcers of poinding, or any other legal execution, ſhall eſcheat their whole moveables, and the party injured ſhall be firſt paid of his debt and damages, for which he ſhall have ready execution againſt the injurer; which is further extended [n], *That the one half of the eſcheat of the moveables ſhall belong to the party injured, if the executor of the proceſs or letters be deforced or moleſted in the execution, which yet ſhall ſtand as a valid execution*, which muſt be underſtood in executions of ſummons, or charges of horning *. Tho' the latter act be more favourable to the injured, yet being in his favour, he may make uſe of the firſt, which will infer a perſonal obligement upon the deforcer, or breaker of arreſtment to pay the ſums *which were* due to the injured, whereupon the arreſtment or execution did proceed, with the damage and intereſt, *July* 25. 1633, *Mitchel contra Laws and Stuart.* The like was found in the deforcement of a caption, and that the purſuer's having inſiſted criminally, *ad vindictam publicam*, did not hinder him to inſiſt civilly for private intereſt, *December* 13. 1672, *Murray contra French of Frenchland*, which takes no place where the arreſtment is not for debt, but upon controverted rights and poſſeſſion, which hinders

* Deforcers may be ſummoned civilly or criminally on fifteen days, *P.* 1587. *c.* 85.

[g] See below II. 9. 44. IV. 29. 3. [h] See below II. 9. 45. [i] See below IV. 27. 1. [k] *l.* 13. *ff. de judiciis.* [l] *P.* 1587. *c.* 42. [l] See below IV. 49. 3. & 4. & 7. [m] *P.* 1581. *c.* 118. [n] *P.* 1592. *c* 152.

hinders not continuation of poſſeſſion, but only innovation, as when tenants continue to pay controverted farms to the former poſſeſſor [o].

Deforcement of a poinding was elided, becauſe the ſame was not done in lawful time of day, but before the ſun, *February* 11. 1675, *Douglaſs contra Jackſon*; but was not elided, becauſe the goods were atteſted to belong to another party, whoſe oath had not been made thereon the time of the poinding; neither when kept on the ground for the maſter's rent by his ſervants, ſeeing they expreſſed not that cauſe, nor craved ſecurity therefor from the poinder, *February* 1. 1628, *Lord Hakertoun contra Kadie and Grieves:* but if it had been expreſsly *done* for the rents reſting, it would not infer deforcement, if ſuch were truly reſting. Neither doth reſiſtance of poinding of plough-goods in labouring time, where there *are* other goods ſufficient, infer deforcement; ſo ſtopping of poinding by the maſter of the ground, or landlord of an houſe for that year's rent, infers not deforcement, or that he hindred entry, unleſs there were ſpecial warrant in the letters to make open doors, *December* 7. 1630, *Dick contra Lands.*

XXX. [p] *Contravention*, as it ſignifies any act done againſt lawborrows, ſo it implies the obligation of the contravener, and the perſonal right, which the uſer of the lawborrows hath thereby, and likewiſe the action, by which it is purſued. For the uptaking of all, it muſt be conſidered what lawborrows are, which the word itſelf inſinuates to be caution found to do nothing but by order of law; for a burrow or burgh, in our antient language, is a cautioner, and lawborrows is caution to keep the law, the reaſon whereof is, the ſafety and ſecurity of the people, who in equity have no more than the reparation of the damage they ſuſtain thro' delinquences, or illegal acts: but, to prevent ſuch *delinquences*, and terrify evil doers, a greater penalty than reparation is appointed, according to the quality and eſtate of the injurer [q]. The half of the penalty is applied to the injured, and the other half to the public [r]. By the narrative of the ſtatute 117. *P.* 1581. it is clear, that *formerly* [s] lawborrows were granted only for ſafety againſt bodily harm, in the perſons of the complainers, yet, for the reaſon therein expreſſed, the ſame was extended *(thus)* That *the complainers, their wives, bairns, tenants and ſervants, ſhall be harmleſs and ſkaithleſs in their bodies, lands, tacks, poſſeſſions, goods and gear, and no ways moleſted or troubled therein, by the perſons complained on, nor no others of their cauſing, ſending, hunding out, reſetting, command, aſſiſtance, and ratihabition, whom they may ſtop, or let, directly or indirectly, otherwiſe than by order of law or juſtice.* By the ſame ſtatute it is alſo evident, that lawborrows are granted upon the ſupplication of parties fearing harm, who without citing the other party, but making faith upon their complaint, have letters of horning, ſummarily to charge the party complained on, to find caution *ut ſupra*; and if caution be found, the action of contravention doth proceed upon, and conform to the act of caution; but if obedience be not given, the complainer may proceed to denunciation *and* caption; but the contravention will proceed, tho' there be no caution found, but only a charge upon the letters without denunciation [t], *July* 8. 1628, *Semple contra Cunningham* *, unleſs the charge be ſuſpended, as uſes to be done when the penalty charged for is exorbitant, and not conform to the act of parliament.

Contravention may proceed upon any delinquence, according to the tenor of the act of caution or letters of lawborrows, which, tho' very comprehenſive, yet is not ſuſtained upon any illegal deed, when the matter of right is dubious, as in matters of moleſtation, before the cognition, or before the marches be clear, *Spotiſwood, contravention, Lord Balkaſkie contra Strang.* Neither upon a deed done by a colourable title, tho' afterward reduced, as entering in poſſeſſion by a null decreet, *Hope, contravention, Moorhead contra Lord Barſkub* **. Neither

* Tho' the libel in this caſe was only founded on the charge, yet the defender had found caution before the contravention, which is mentioned as the ground of the deciſion. It may ſtill therefore be doubted, whether a charge on the letters of lawborrows, without denunciation, is ſufficient. The act *P.* 1597. *c.* 273. mentions *paſſing to the horn*, and the *Rubrick* explains this to be the ſame with denunciation

** The queſtion which occurred in this caſe, was, whether a tenant, who had been removed by a decreet, and another put in poſſeſſion, re-entering violently, could be aſſoilzied from contravention, by reduction of the decreet of removing. It was found that he could not.

[o] See below I. 18. 3. [p] See below IV. 48. 1. *et ſeq.* [q] *P.* 1593. *c.* 170. [r] *P.* 1579. *c.* 77. [s] *F. before.* [t] *P.* 1597. *c.* 273.

Neither upon paſturing upon bounds controverted, or where there was no violence or *wilfulneſs* in paſturage, upon clear marches, *Hope, contravention, Anderſon contra Galbraith*; *July* 14. 1626, *Grange contra Leſley*. Neither upon a deed of ſpuilzie againſt the purſuer's tenant not complaining, tho' the lawborrows bears, men, tenants and ſervants to be harmleſs, which was eſteemed *ſtilus curiæ*, *January* 28, 1632, *Grant contra Grant*; *and February* 9. 1633, *Lindſay contra Denniſtoun*. Neither was it ſuſtained upon deeds done by the defender's tenants, without alledging command or ratihabition, *or proving great violence*, *Had. July* 9. 1611, *Vauns contra Balnagown*, *or* unleſs the deeds be manifeſt, or known to their maſters, as in conveening daily, and cutting another's woods. Neither upon deeds done by ſervants without warrand, unleſs they be menial ſervants, *Hope, contravention, Galbraith contra Anderſon*: yet contravention was ſuſtained upon hurt done to the purſuer's ſervant, tho' he was then rebel, being afterwards relaxed, *Hope, horning, Bruce of Clackmannan contra Bruce*. It was alſo ſuſtained upon attempts of injury, tho' there was no hurt, as a ſtroke on the breaſt, and offer to ſtrike with a whinger, *Had. December* 21. 1609, *Greenyards contra Clackmannan*. And alſo upon a violent troubling the purſuer, without order of law, tho' without damage, *Spotiſwood, contravention, Balcaſkie contra Strang*. It is alſo ſuſtained upon *any* delinquence, tho' there be another action competent therefor, as *upon* moleſtation, *Had. November* 29. 1609, *Dundas contra Cumming of Ironſide*. Or for violent poſſeſſion after warning, *Hope, de actionibus, Cunningham contra* But, *where* the ordinary action was inſiſted in, and decreet obtained, contravention was not ſuſtained, tho' the other *was* offered to be renounced, *Hope, contravention, Johnſtoun contra Charters*.

Contravention was elided by the purſuer's granting *permiſſion* after the deeds libelled to do the like, reſerving only damage and intereſt, *January* 11. 1633, *Denniſtoun contra Lindſay*. Contravention on ſeveral deeds may be ſuſtained, *ſeparatim toties quoties*: and againſt many contraveeners, contraveening in one act; but in ſuch caſes the Lords will modify and leſſen the penalty, within the rates of the act of *parliament*, *Had. November* 29. 1609, *Dundas contra Cumming of Ironſide*. Contravention is not found purſuable before any inferior judge, otherwiſe the decreet thereon will be null by exception, *Had. July* 6. 1611, *Kennedy contra Kennedy of Garrihorn*. In contraventions, the King's Advocate muſt concur for the King's intereſt, but he cannot inſiſt alone, as when the private party hath diſcharged the deeds, even after the intenting of the cauſe, *Hope, contravention, Forreſt contra Turnbul*.

TITLE X.

Obligations Conventional, by Promiſe, Paction and Contract.

I. *The original of conventional obligations.*
II. *The acts of the will, deſire, reſolution and engagement, and their effects.*
III. *Pollicitation or offer, and its effects.*
IV. *Promiſe.*
V. *Contracts in favours of third parties valid.*
VI. *Pactions.*
VII. *Naked pactions.*
VIII. Pactum corvinum. Pactum de quota litis.
IX. Locus pœnitentiæ. *Solemnities of writs of importance.*
X. *Promiſes and pactions are morally obligatory, and by canon law, and by our cuſtoms.*
XI. *Kinds of contracts among ſt the* Romans. *The exception* de non numerata pecunia. *Homologation. Conſent by fact.*
XII. *Diſtinction of contracts according to the matter.*
XIII. *Common requiſites to contracts.*
XIV. *Permutative contracts. The equality to be kept in them.*
XV. *Latent inſufficiency altereth contracts.*
XVI. *How far mutual contracts are effectual to aſſignies, without performing the cedent's part.*

FROM obediential obligations, flowing from the will of God, order leads us next to conventional obligations, ariſing from the will of man, whereby our

own will tieth us in that, wherein God hath left us free; for as obediential obligations deſcend from the principle of obedience to God, and have their riſe and reaſon from his ſovereign power to command, and our abſolute obligement to obey; ſo in his gracious goodneſs, in the greateſt part he hath left us free, and hath given power to none to exact, or compel us: yet ſo as he hath given that liberty in our power, that we may give it up to others, or reſtrain and engage it, whereby God obliges us to performance, by mediation of our own will; yet ſuch obligations, as to their original, are conventional, and not obediential.

Conventional obligations do ariſe from our will and conſent; for, as in the beginning hath been ſhown, the will is the only faculty conſtituting rights, whether real or perſonal; for it is the will of the owner, that naturally transferreth right from him to the acquirer: ſo in perſonal rights, that freedom we have of diſpoſal of ourſelves, our actions and things, which naturally is in us, *is* by our engagement placed in another, and ſo *engagement* is a diminution of *freedom*, conſtituting that power in another, *whereby he may reſtrain from the doing, or compel us to the performing of that whereof we have given him power of (reſtraint or) exaction. For in the creditor, the obligation is the power of exaction, and in the debtor, it is the debtor's duty or neceſſity to perform.*

But it is not every act of the will that raiſeth an obligation, or power of exaction: and therefore that it may appear, what act of it is obligatory;

II. We muſt diſtinguiſh three acts of the will, *deſire*, *reſolution*, and *engagement*. 1. Deſire is a tendency of inclination of the will towards its object, and it is the firſt motion thereof, which is not ſufficient to conſtitute a right; neither is reſolution (which is a determinate purpoſe to do that which is deſired) efficacious, becauſe, whatſoever is reſolved or purpoſed, may be without fault altered, unleſs by accident the matter be neceſſary, or that the reſolution be holden forth to aſſure others; the alteration whereof, without evident ground, importeth levity and inconſtancy, and ſometimes deceit and unfaithfulneſs; but ſtill reſolution is but an act of the will with itſelf, as deliberation is of the underſtanding, acting within itſelf, and it is unqueſtionable, nothing can be obliged to itſelf, tho' it be obliged to God, or to another in relation to itſelf; and therefore, if a party ſhould expreſs a reſolution, to give unto, or to beſtow upon another any thing, tho' that reſolution related to the good of another; yet it is not obligatory, nor can that other compel the reſolver to perform, tho' it were never ſo fully cleared, or confirmed by word or writ. So it was found, that a reſolution expreſſed both by word and writ, in favour of near relations, did infer no obligation, *February* 27. 1673, *Kincaid contra Dickſon*. It remaineth, then, that the only act of the will, which is efficacious, is that whereby the will conferreth or ſtateth a power of exaction in another, and thereby becomes engaged to that other to perform.

III. Again, we muſt diſtinguiſh betwixt *promiſe*, *pollicitation* or *offer*, *paction* and *contract*, the difference amongſt which, is this, that the obligatory act of the will is ſometimes abſolute and pure, and ſometimes conditional, *(in which caſe)* the condition relates either unto the obligation itſelf, or to the performance, ſuch *as* are the ordinary conditional obligations, which, tho' they be preſently upon the granting thereof binding, and cannot be recalled, yet they are only to be performed, and have effect, when the condition ſhall be exiſtent; but when the condition relateth to the conſtitution of the obligation, then the very obligation itſelf is pendent, till the condition be purified, and till then it is no obligation [u]; as when an offer or tender is made, there is implied a condition, that before it becomes obligatory, the party to whom it is *made* muſt accept; and therefore an offer by a ſon, to pay a debt due by his mother, *if it were* made known to be accepted at ſuch a time, and in ſuch a place, was found not obligatory after the mother's death, unleſs it had been ſo accepted, *June* 24. 1664, *Allan contra Collier* [w]. So then an offer accepted is a contract, becauſe it is the deed of two, the offerer and accepter.

IV.

[u] See above I. 3. 8. 2.

[w] See above I. 3. 9. See below I. 10. 5. & 6. 2.

IV. But a promiſe is that which is ſimple and pure, and hath not implied *in it* as a condition *of its being*, the acceptance of another. In this *Grotius* [x] differs; holding, "that acceptance is neceſſary to every conventional obligation in equity, "without conſideration of poſitive law;" and to prevent that obvious objection, that promiſes are made to abſents, infants, idiots, or perſons not yet born, who cannot accept, and therefore ſuch *promiſes* would ever be revokable, till their acceptation, which ſome of them can never do: he anſwereth, that the civil law only holdeth, that ſuch offers cannot be revoked, until theſe be *of* ſuch capacity as to accept or refuſe. Promiſes now are commonly held obligatory; the canon law hath taken off the exception of the civil law, *de nudo pacto*. It is true, if he in whoſe favour they are made, accept not, they become void, not by the negative non-acceptance, but by the contrary rejection. For as the will of the promiſer conſtitutes a right in the other, ſo the other's will, by renouncing and rejecting that right, voids it, and makes it return. This alſo quadrates with the nature of a right, which conſiſts in a faculty or power which may be in theſe, who exerce no act of the will about it, nor know of it; ſo infants truly have right as well as men, tho' they do not know, nor cannot exerce it.

Promiſes with us are not probable by witneſſes, tho' within an hundred pounds, *July* 3. 1668, *Donaldſon contra Harrower*; *February* 9. 1672, *Wood contra Robertſon*. The like was found of a promiſe engaging for a party, who bought goods, not being a partner in the bargain; for promiſes, when they are parts of bargains about moveables, are probable by witneſſes, *January* 19. 1672, *Dewar contra Brown*. And the reaſon that our cuſtom gives no legal remedy for performance of promiſes of things of importance by witneſſes, is the ſame that the *Roman* law gave no action upon naked pactions, *but required that parties ſhould uſe a ſet form of words in ſtipulation*, to prevent the miſtakes of parties and witneſſes in communings; ſo now, when writ is ſo ordinary, we allow no proceſſes for promiſes, as a penalty againſt thoſe who obſerve not ſo eaſy a method; yet the promiſe obliges the conſcience and the honeſty of the promiſer.

V. It is likewiſe the opinion of *Molina* [xx], and it quadrates *with* our cuſtoms, that when parties contract, if there be any article in favour of a third party, at any time, *eſt jus quæſitum tertio*, which cannot be recalled by *either or* both *of* the contractors, but he may compel either of them to exhibit the contract, and thereupon the obliged may be compelled to perform. So a promiſe, tho' gratuitous, made in favour of a third party, that party, albeit not preſent nor accepting, was found to have right thereby, *January* 9. 1627, *Supplicants contra Nimmo*; *June* 25. 1634, *Renton contra Aiton*; *July* 7. 1664, *Ogilby contra Ker*; *June* 8. 1676, *Irving contra Forbes*. Promiſes dependent upon acceptance may either be made by way of offer, or when the promiſe requires ſomething to be done on the part of him to whom it is made, not as *a* condition annexed only to the performance (for then the promiſe is preſently obligatory tho' the effect be ſuſpended till the condition exiſt) but if the condition be ſo meant or expreſſed, that it muſt preceed the obligation itſelf, as in mutual contracts, the one party ſubſcribing is not obliged until the other *party* alſo ſubſcribe, or that he accept or conſent: and ſo a contract being regiſtrate, *a charge againſt the party who had ſubſcribed and conſented to the regiſtration*, was found orderly proceeded, tho' he who *raiſed the charge* had not ſubſcribed, ſeeing at the diſcuſſing he did ſummarily *ſubſcribe and* conſent to *execution againſt himſelf thereon*, *as if* the regiſtration *had been originally againſt him likewiſe*, *February* 9. 1627, *M'Duff contra M'Culloch* [xxx]. Hence is our vulgar diſtinction betwixt obligations and contracts, the former being only where the obligation is μονοπλευρος, on the one part; the other where the obligation is δευπλευρος, obligatory on both parts, whereby both parties are obliged to mutual preſtations.

VI. *Pactum* or a paction, in law is defined, *duorum pluriumve in idem placitum conſenſus atque conventio*, *l.* 1. § 2. *ff. de pactis*, *et l.* 3. *ff. de pollicit.* It is the conſent of two or more parties, to ſome things to be performed by either of them; for it is not a conſent in their opinions, but a conſent in their wills, to oblige any of

[x] *De jure belli*, *l.* 2. *c.* 11. § 14. [xx] Diſp. 265. [xxx] See above I. 3. 9. I. 10. 3. & 6.

of them. And it is much to be conſidered, whether the conſent be given *animo obligandi*, to oblige or not; for the ſame words will ſometimes be interpreted as obligatory and ſometimes not, according to the circumſtances; as if it be jeſtingly or merrily expreſſed, whatſoever the words be, there is no obligation; becauſe thereby it appears there is no mind to oblige; or if the words be in affairs or negotiations, they are interpreted obligatory, tho' they expreſs no obligation but a futurition, which otherwiſe would import no more than a reſolution; as *Titius* is to give *Mevius* an hundred crowns, in any matter of negotiation, this would be obligatory, but otherwiſe it would *import* no more but an expreſſion of *Titius*'s purpoſe ſo to do; yet becauſe (*this purpoſe*) is inward and unknown, it muſt be taken by the words or other ſigns, *and* if the words be clearly obligatory and ſerious, no pretence that there was no purpoſe to oblige will take place.

If the promiſe be pendent upon acceptation, and no more than an offer, it is imperfect and ambulatory, and in the power of the offerer, till acceptance; and if he die before acceptance, it is revoked as a commiſſion or mandate, which neceſſarily imports acceptance, and expires by the mandater's death, *morte mandatoris perit mandatum*; ſo acceptance cannot be by any third party, unleſs he have warrant for that effect; and ſo if a promiſe be made by one to another in favour of a third *party* importing the acceptance of that third, it is pendent and revokable by theſe contracters, till the third accept [y].

VII. The *Romans*, that they might have clear proof of pactions and agreements, would ſecond none with their civil authority, but ſuch as had a ſolemnity of words, by way of ſtipulation, whereby the one party going before, by an interrogation, the other party cloſed by an anſwer conform, which was clear *both* to the parties and witneſſes; or otherwiſe, unleſs there were the intervention of ſome deed or thing beſide the conſent, or that it were a contract allowed of the law, or ſuch other paction as it ſpecially confirmed [z], without all which, it was called *nudum pactum inefficax ad agendum*. We ſhall not inſiſt on theſe, becauſe the common cuſtom of nations hath reſiled therefrom, following rather the cannon law, by which every paction produceth action, *et omne verbum de ore fideli cadit in debitum* [zz].

And ſo obſerveth *Guidelinus*, *de jure Nov.* [zzz] and *Corvinus ad jus canon. de pactis.* We have a ſpecial ſtatute of ſeſſion, *November* 27. 1592, *acknowledging all pactions and promiſes are effectual:* and ſo it hath been ever ſince decided, *January* 14. 1631. *Sharp contra Sharp* [a].

VIII. Even *pactum corvinum de hæreditate viventis*, is found binding with us, tho' among the moſt odious, *July* 6. 1630, *Aikenhead contra Bothwell.* But *pactum de quota litis*, whether it be a naked paction or promiſe, or a mutual contract, is rejected both by the civil law and our cuſtom; whereby advocates, in place of their honorary, take a ſhare of the profit of the plea; which is to prevent the ſtirring up, and too much eagerneſs in pleas, and was extended to an agent or writer, if he had made ſuch a paction before, or during the plea; but not after all plea was ended, having given bond to an apparent heir to denude himſelf of a right (*which*) he had acquired for ſums of money, *and had thereupon led adjudication contra hæreditatem jacentem, on condition of* getting his expences, and a fourth part for his pains and hazard, *February* 24. *and July* 23. 1675, *and January* 6. 1676, *Hume contra Niſbet writer* [b]. *An alledgeance of* pactum de quota litis *being proponed by the defender, debtor, and not by the party who became bound by the paction; the Lords inclined to ſuſtain the nullity, and ordained the purſuer to depone in preſence of his cedent, but reſerved to themſelves to determine what it ſhould operate, June* 23. 1680, *Ruthven contra Weir.*

Pactions for money, or other prize played at games of chance, ſuch as cards, dice, &c. *found valid as to the debtor; but the excreſs to be conſigned for the uſe of the poor, if it exceed an hundred merks, by the act of Parl.* 1621. *c.* 14. *November* 12. 1668, *Park contra Sommervile* *.

until

* See further regulations with regard to money won at play, 9th *Ann. c.* 14. 18th *Geo.* II. *c.* 34.

[y] See above I. 3. 9. I. 10. 3. & 5. [z] *Vide l.* 6. *l.* 7. § 5. *ff. de pactis.* [zz] *C.* 1. *&* 3. *Corp. jur. canon. de pactis.* [zzz] *L.* 3. *c.* 5 § *ult.* [a] See below I. 13. 14. See below I. 14. 2. & *P.* 1594. *c.* 220. prohibiting even onerous purchaſſes of depending pleas by members of the College of Juſtice.

IX. *Inſtead of the remedy of ſtipulation, the inconveniencies that rejected naked pactions among the Romans are remedied with us by theſe means*; *Firſt*, If the matter be of great moment, or which requires to its perfection ſolemnity in writ, all ſuch agreements, promiſes and pactions are accounted imperfect, and not obligatory until writ be ſubſcribed, ſuch as diſpoſitions of lands and heritable rights, tacks, rentals, and aſſignations to writs, *&c.* In all which, there is *locus pœnitentiæ*, even after the agreement, and either party may reſile, till the writ be ſubſcribed and delivered. And it was ſo found, tho' the buyer, by a miſſive letter, wrote, that he thought he would not be able to furniſh the money, but that he would not paſs from the communing; ſeeing there was no minute nor obligation otherwiſe, *January* 28. 1663, *Montgomery of Skelmory contra Brown.* So it was alſo found, that a cautioner ſubſcribing a bond, *given to him in order to be ſubſcribed*, might reſile before it was re-delivered by him, tho' it was ſubſcribed, and delivered by the principal and other cautioners before, *March* 5. 1628. *M'Gil contra Edmonſtoun.* The like of a bargain of land, agreed upon by word, *tho'* ſome things *were* done by the buyer in contemplation thereof, *theſe* being reſtored, *December* 5. 1628, *Oliphant contra Monorgan* *. The like in a tack for ſeveral years, which was found to endure but for one year, tho' the tackſman was thereby in poſſeſſion, *January* 29. 1630, *Laurie contra Kier*; *July* 16. 1636, *Keith contra his tenants. Yet a verbal tack for a year it was found could not be paſſed from, ſeeing the tenant was thereby in poſſeſſion, and had been warned before the agreement was made, Hope, promiſe, Adamſon contra Fullerton.* Neither is there *locus pœnitentiæ in pactis liberatoriis*, where any right is paſt from or reſtricted, and no new right to be made, *December* 12. 1661, *Hepburn contra Hamilton of Orbiſtoun.* The like in reſtricting an annualrent to a part of lands affected therewith, *February* 8. 1666, *Ker contra Hunter. But, where a defender, in a ſuſpenſion of a charge againſt him for payment, produced a bond granted by the charger to a third party with a blank aſſignation, and pleaded compenſation thereon, after this defence was ſuſtained, and decreet pronounced, having got up from the proceſs the bond and aſſignation before it was delivered to the charger; and having purſued the charger for payment*, locus pœnitentiæ *was found competent to him, and that he was ſtill* in tuto *to purſue on the bond which he had before made uſe of for compenſation; ſeeing the decreet was never extracted, nor the debts thereby mutually extinguiſhed*, and no minute of the decreet extant, *December* 9. 1674, *Lord Balmerinoch contra the tenants of Northberwick and creditors of Sir William Dick.* Yea, *locus pœnitentiæ*, was found competent to reſile from a bargain, which might have been valid without writ; becauſe it was expreſsly agreed to be redacted in writ, *January* 12. 1676, *Campbell contra Douglas* **.

The other remedy we have inſtead of ſtipulation, is, that by a ſtatute of *Parl.* 1579, *cap.* 80. all writs of great importance are to be ſubſcribed by the party, or by two notaries, *before* four witneſſes ***, wherein cuſtom hath interpreted matters of importance to be that which exceeds an hundred pounds *Scots*; and it is ſo far extended, that, in matters where writ may, and uſes to be adhibited, probation is not admitted by witneſſes, but only by oath of party, or writ; and by theſe remedies, very neceſſarily introduced, the inconveniencies foreſaid are ſufficiently caveated.

X. But let us inquire whether promiſes, or naked pactions, are morally obligatory by the law of Nature? Few do contravert it, yet *Conanus* [c] holdeth, that promiſes, or naked pactions, where there is no equivalent cauſe onerous interveening, do morally produce no obligation or action, tho' in congruity and decency it be fit to perform, leſt it be an argument of levity; againſt which, there is not

* The contrary found, 23d *July* 1674, *E. Kinghorn contra Hay.*

** See a deciſion obſerved by *Stair* and *Dirleton*, 1ſt *December* 1674, *Gordon contra Pitſligo*, where *locus pœnitentiæ* is ſaid to have no place in gratuitous promiſes; *Stair* mentions a different *ratio decidendi.*

*** By act 5. *Parl.* 1681, the witneſſes to the party, or the notary's ſubſcription, muſt themſelves ſubſcribe, and they and the writer muſt be deſigned in the deed.

[c] *Lib.* 1. *c.* 6. *L.* 5. *c.* 1.

only the teſtimony of the canon law, which inſinuates an anterior reaſon to its own poſition; but alſo *of* the civil law [cc], "There is nothing (ſays it) ſo congruous "to human truſt, as to perform what is agreed among men;" and the edict *De conſtituta pecunia*, ſaith, "It is ſuitable to natural equity;" and ſaith further, "That he is debtor by the law of Nature, who muſt pay by the law of nations, "whoſe faith we have followed [d];" but eſpecially this is confirmed by the law of God [e], "If thou be ſurety for a friend, if thou haſt ſtriken thy hand with a "ſtranger, thou art taken with the words of thy mouth;" and the performance of words is acknowledged "a part of Gods righteouſneſs [f]," and acknowledged "a part of God's faithfulneſs." And if promiſes were not morally obliging, they could have no effect, but by poſitive law, which is no more itſelf than a public paction, *communis reipublicæ ſponſio* [g], *et communis ſponſio civitatis* [gg], and ſo *laborans eodem morbo*; and then all pactions and agreements among nations would be ineffectual, and all commerce and ſociety among men would be deſtroyed.

Pactions, contracts, covenants, and agreements, are ſynonymous terms both in themſelves, and according to the recent cuſtoms of this and other nations; ſo that it will be unneceſſary to trace the many and ſubtile differences amongſt pactions and contracts in the *Roman* law.

XI. This much only in a word for clearing this matter. Their contracts were of four kinds, either perfected by things, words, writ, or ſole conſent [h]. Contracts by intervention of things, *are ſuch as* remain naked pactions, ineffectual, until ſomething be given or done by either party to *the* other; ſuch are all theſe contracts, which are called *innominati*, which have not a ſpecial name *or* nature acknowledged in the law [i]; and therefore oblige not by ſole conſent, but the giving or doing of the one party obligeth the other; as permutation, excambion or exchange, when either a thing is given for another, or a thing is given for a deed, work or uſe, or one deed or work is done for another *(deed or thing)* for the which the law hath no ſpecial name; and therefore names them, *do ut des, do ut facias, (facio ut des), facio ut facias.*

Amongſt real contracts *(there are others which have a ſpecial name, and of theſe)* the law numbereth *four*, *mutuum* and *commodatum*, (for which we have but the ſole name of Loan,) Depoſitation or Cuſtody, *Pignus* or Pledge, of which hereafter.

Contracts perfected by words, are ſtipulations, which being wholly out of uſe, we ſhall ſay no more of them, than what before is hinted.

The third kind of contracts are theſe, which have their force by writ; and therefore are called *chyrographarii*, *from* the hand-writ and ſubſcription of the debtor, by which he acknowledges the receipt of ſo much money, either in borrowing, or *in* tocher, and accordingly is obliged to pay at his day, or at the diſſolution of the marriage. Theſe writs, for the ſpace of two years after their date and delivery, did not prove the receipt of the money as they expreſſed, but during that time, if the creditor purſue thereupon, he muſt prove the delivery of the money; and the law preſumed, that the writ was given *ſpe numerandæ pecuniæ*, upon hope of delivery of the money; but after the two years, it preſumed the money to *have been* delivered, after which the writ is probative, and is the cauſe of the obligation, whether the money was delivered or not; and after which the debtor could not prove the not delivery of the money, even by the oath of the creditor [k]; but this is alſo changed with us, and with *the* neighbouring nations, as *Balduinus* teſtifieth [l]; and *Boëtius De conſuetudine*; and *Rebuffus* [m]. So *that* now the cuſtom is, that the writ is not the ſubſtance of the obligation, but is only a probation of the promiſe, tho' in ſome caſes it be a neceſſary ſolemnity till which the parties may reſile, as hath been formerly ſhown; but the writ being ſubſcribed

[cc] *L. 1. ff. De pactis.* [d] *L. 84. § 1. De regulis juris.* [e] Prov. vi. 1, 2. [f] Nehemiah ix. 8. Hebrews x. 23. [g] *L. 1.* [gg] *L. 2. ff. De legibus.* [h] *§ 2. inſt. De oblig. L. 1. § 1. De oblig. et act.* [i] *L. 2. et ſeqq. De præſc. Verb. L. 7. § 2. ff. De pactis. L. 10. C. eod.* [k] *L. 14. C. De non num. pecun.* [l] *Ad tit. inſt. De lit. oblig.* [m] *Tom. 1. un. conſtit. regias in proœm. gloſſ. 5. num. 59.*

ſubſcribed and delivered, proves from its date, and is valid unleſs it be improven; yet ſo, as it admits contrary probation by the creditor's oath or writ, even tho' the writ bear the numeration of the money, and do expreſsly renounce the exception of not numerate money.

The laſt kind of contracts are theſe, which are by ſole Conſent, as are the contracts of Sale, Location or Hyring, Society, and Mandat or Commiſſion; but not only theſe, but all other promiſes and pactions are now valid contracts by ſole conſent, except where writ is requiſite, as is before expreſſed; and this conſent may be either expreſſed by Word *or* Writ, or Fact, by doing deeds importing conſent, which therefore is called Homologation [n], whereof acceptance of any right is a ſpecial kind. It takes place in many caſes, but it cannot take place unleſs it be proved, or preſumed that the homologator knew the right; and therefore a bond drawn in name of ſeveral appryſers, to communicate their rights, and ſubſcribed by ſome, was found not homologated by one who ſubſcribed not; ſeeing it appeared not that he knew thereof, tho' *de facto*, he concurred in purſuits with theſe appryſers to exclude other rights, *July* 6. 1661, *Telzifer contra Maxtoun and Cunningham.* Neither doth homologation take place, where the deed done may be attributed to another cauſe. *And ſo a daughter poſſeſſing lands, in which ſhe was infeft by her father, in ſatisfaction of her proviſions by her mother's contract, this poſſeſſion was not found to infer homologation and acceptance of the infeftment, ſo as to exclude her claim for thoſe proviſions; ſeeing her poſſeſſion of the lands might be aſcribed to her apparency,* 12*th December* 1665, *Barns contra Young. But an infeftment in ſatisfaction of a wife's proviſions, was found homologated by her poſſeſſion five or ſix years, and ſetting ſeveral tacks as liferenter, tho' there was a general obligement in the marriage contract, to infeft the wife in lands of a higher value; and it was not inſtructed, that ever the bond, containing the clauſe in ſatisfaction, which was the warrant of the ſaſine, was known to the wife, and was only generally mentioned in the ſaſine, "according to the "conditions mentioned in the bond;" but her knowledge was preſumed, after ſo many acts,* 14*th November* 1665, *Skeen contra Ramſay.* Neither doth payment of one article of a decreet-arbitral, homologate others of a different nature, *November* 22. 1662, *Primroſe contra Duy* *. Homologation of a father's legacy to his children, was inferred by his relict's confirming the teſtament without proteſtation, not to approve that legacy, *February* 19. 1663, *Muir contra Stirling* **. But where a relict in the confirmation, proteſted not to prejudge her own right, by a proviſion contained in the teſtament, in favour of her daughter, it was not found to homologate the ſame, *July* 12. 1671, *Murray contra Murray* [o]. Homologation of a feuar's right was not inferred by acceptance of two years duty, after declarator of nullity *on a clauſe irritant*, further than that *the full mails and duties could not* be demanded for theſe two years, *June* 6. 1666, *E. Caſſils contra Sir Andrew Agnew.* Neither did the payment of ſome years annualrent *after majority* homologate a decreet of poinding the ground, as being an act neceſſary to ſhun poinding of the tenants, *February* 9. 1672, *Cockburn contra Halyburton.* Neither did a miniſter receiving a tack-duty of teinds, hinder him to reduce the tack thereafter, as being *ſet by his predeceſſor* without conſent of the patron, *February* 27. 1668, *Chalmers contra Wood of Balbegno.* Neither did the payment of annualrent after majority, by a minor cautioner, paying it with the principal's money, and taking diſcharge to him only, hinder the minor to reduce, *February* 14. 1668, *Mackenzie contra Fairholm* ***. Neither did the payment of annualrent to an indigent ſiſter after majority, exclude reduction upon minority, *of a bond granted by the minor to that*

* The payment in this caſe was made, in virtue of a precept drawn by the one party-ſubmitter upon the other; and the precept expreſsly bore, that it was drawn, as the price of an article uncontroverted.

** The wife had beſides originally conſented to the legacy, by ſubſcribing the teſtament.

*** It was preſumed, that the diſcharge taken in the principal's name was obtained by his money, tho' not ſo mentioned in the diſcharge; but the creditor was allowed to prove, that the money was really the cautioner's.

[n] See below § 15. 2. *h. t.* IV. 49. 29. II. 11. 24. [o] See above I. 9. 8. 6.

that ſiſter, but regiſtrating, after majority, *a contract by which, during his minority, he had confirmed his ſiſter's bond, tho'* without charge or execution, was found to infer homologation, *June* 28. 1671, *Hume contra Rentoun**. Neither did the confirming of a ſum as moveable, *by one who was both heir and executor*, hinder the confirmer to *retain* it as heritable *againſt a legatee or co-executor*, *June* 28. 1672, *Kilgour contra Menzies*; *December* 23. 1673, *Mitchel contra Mitchel*. Neither doth the granting of a precept of ſaſine in obedience *to a precept from the Chancery*, import acknowledgment of right, or exclude reduction and improbation, *December* 20. 1662, *Mochrum contra Airiolland*. Neither was a decreet found homologated by taking diſcharge and giving a bond without abatement, (which might import tranſaction,) the granter being in the meſſenger's hands, under caption, *July* 3. 1668, *Rew contra Houſtoun*; *and July* 24. 1661, *Jack contra Fiddes*. Neither was homologation of the truth of a debt, inferred by granting bond by a party in priſon *at London*, for not finding caution *judicatum ſolvi*, *February* 18. 1680, *Burnet contra Ewing* [p]. Neither did allowance to a tenant in his rent, of annualrent paid by him *to the creditor*, exclude reduction of the bond *on* minority, tho' the allowance was after majority, *December* 14. 1675, *Moodie contra M'Intoſh*. Neither *did the* accepting a bond *from a common debtor* jointly with another *creditor*, homologate the *former ground of debt* of that other *creditor*, *February* 1. 1676, *Veitch contra Ker*.

Conſent may be adhibited by ſigns, as the borrowing of a watch by a ſign made by the borrower's hand, was found to oblige him to reſtore, tho' another inſtantly borrowed it that ſame way from him; nor was the firſt lender's ſilence in an act ſo ſubite, interpreted a conſent to the ſecond loan, *July* 3. 1662, *Lord Cowper contra Lord Pitſligo*. But a dumb man ſubſcribing a diſcharge, was not found to infer his conſent, in favour of his ſiſter, ſeeing he knew not what it imported, *July* 9. 1663, *Hamilton contra Eſdell*. Neither was conſent to a march inferred *againſt a ſingular ſucceſſor*, by the one heritor's building a dyke, and another's ſilence for a time *tho' preſent*, *January* 8. 1663, *Nicol contra Sir Alexander Hope***. Neither was the knowledge and ſilence of *an intended* huſband found to infer his conſent, to his future ſpouſe's renouncing a part of her jointure after proclamation, *tho' he went* on in the marriage, *January* 5. 1666, *Lady Bute and her huſband contra Sheriff of Bute*. And albeit conſent to the contents of a writ, is not always inferred from ſubſcribing as a witneſs; yet in ſome caſes it is, when the conſent relates not to the tenor, but to the time of ſubſcribing, as an heir's ſubſcribing as a witneſs to a writ on death-bed, *June* 25. 1663, *Stuart contra Stuart*. But the conſent of a party to a decreet, was not found probable by the decreet, without a warrant under the conſenter's hand; ſeeing it appeared that the minute of the decreet on the judicial conſent, was not inſtantly written, but long after, and it was no ordinary point in proceſs conſented to, but a tranſaction of a ſpecial nature, *July* 24. 1661, *Buchanan contra Oſburn*: but *a* party having offered implement by inſtrument inſtructed by the *oaths of* the witneſſes inſert, *of a decreet to which he had conſented*, was not ſuffered to quarrel his conſent as not under his hand, *February* 4. 1671, *Lowrie contra Gibſon*. But conſent *by a creditor to a right granted by his debtor*, was not found to be inferred by *the creditor*'s ſubſcribing witneſs to the writ, *February* 1. 1676, *Veitch contra Ker*. Yea tho' the writ did bear the witneſs to be cautioner, unleſs it were proved by the witneſſes inſert, that the writ was fully read to that witneſs before he ſubſcribed, *July* 26. 1672, *Gordon contra Menzies*.

XII. All

* The reaſon of the different conſtruction put upon theſe two deeds after majority, See in *Voet. tit. minor.* § 44. Whatever is done after majority in implement of a valid deed, tho' reducible, will not infer homologation; the minor has four years to determine whether or not he will uſe his privilege, and, in the mean time, may ſafely perform whatever he might be forced to do; voluntary deeds, to which the minor could not have been compelled, admit of a different conſtruction.

** The Court was in this caſe of opinion, that the ſilence of the laſt proprietor ought to oblige his ſingular ſucceſſor to allow the materials to be removed, or to pay *in quantum lucratus*.

[p] See above I. 9. 8. 7.

XII. All pactions and contracts being now equally efficacious, may, according to their ſubject matter, be taken up thus: They are either merely gratuitous, as he who obliges himſelf to beſtow a horſe is thereby bound, but there is no obligation on the other; but if the donation be perfected by a preſent tradition of the thing gifted, there is no obligation contracted on either hand; or next, the obligation is gratuitous on the one part as loan, which is either by the free lending of things conſiſting in number, meaſure and weight, which the law regardeth as a quantity, without regard to the individual body or thing (ſuch being commonly of equal value, according to their quantities, and are called fungibles, as money, corn, wine), *and in which* the loan is expreſsly, or implicitly, for the re-delivery of the like quantities, tho' not the ſame very thing [pp]. Or otherwiſe, it is the lending the uſe of a particular thing, to be delivered again the ſame in ſubſtance: the former is called *mutuum*, the latter *commodatum*; in both if the thing lent be not delivered, this *contract* will be effectual to cauſe it be delivered, tho' it be gratuitous, if it be in the lender's power [q]: but on the part of the borrower it is onerous; for he is obliged either to reſtore the ſame body or the ſame quantity. Such alſo is *commiſſion or mandate*, whereby the mandator doth freely undertake, and is obliged *ſuſceptum perficere munus* [r], and that freely *(without hire:)* but he is onerouſly obliged to reſtore what by the mandate he hath from the mandator, as the mandator is obliged to refound him his intereſt and expences. Such alſo is the contract of *cuſtody or depoſitum*, which is a kind of commiſſion, whereby the depoſitar undertakes the cuſtody of the thing depoſited. *Pledge* is alſo a kind of commiſſion, *tho' in ſome meaſure onerous on both parts*, whereby the thing impledged is given to a creditor for his ſecurity, that he may detain, and in caſe of not payment, ſell it, and pay himſelf by the *Roman* law, but he can only detain it for ſecurity, till he poind it, by our cuſtom. The other contracts are ſuch as are onerous on both parts and obligatory on both parts, and in them there is alſo always *quid pro quo*, according to the nature and intent of theſe contracts, obſerving in them an equality of the deeds or things to be done or given on either part, as not being of their nature or of the direct purpoſe of the parties, gratuitous or donative.

For uptaking of theſe we muſt conſider, that all that can come in *to* theſe obligations, is either ſomething to be Given, or the Uſe or Fruit of ſomething, or the Labour, Work, or Deeds of perſons; and among Things, ſpecial conſideration is had of money which is the common token of exchange; and therefore there are ſpecial contracts in relation to it, different from the exchange of other things. So then all theſe permutative contracts are either, *firſt*, of things for things, as are permutation, excambion, barter, *&c.* Or of things for numbered money, and that is ſale; or money for money, as by bills of exchange. Or, *ſecondly*, profit, uſe, fruit, or work, may be either exchanged with things, and this hath no proper name, but is called in law, *facio ut des*; or otherwiſe may be exchanged for the like uſe, profit, or work, neither hath this a proper name, but is called *facio ut facias:* but if the uſe and profit of things, deeds, or induſtry of perſons be exchanged for money or other fungibles, it is called *location* and *conduction* [s]. Or, *laſtly*, if the contract be not to exchange totally things, uſe, or work for the like, but to communicate them together, where there is an exchange in part, there ariſes the contract of ſociety, in which ſometimes money or things are communicated, and the property conſtituted in the ſociety without diviſion, or ſometimes the uſe of things, or money, are by the ſociety communicated on the one part, and the ſubſtance of money on the other; ſo that the property of the one's money remains his own, and the profit becomes common, *and the ſtock of the other's money, which is but equivalent to the profit on the ſtock of the firſt, becomes common*; or there may be communication of work with money, or work with work: and

[pp] *Pr. inſt. quib. modis re contr. oblig.* [q] § 2. *eod.* [r] § 11. 13. *inſt. de mand. L* 17. § 3 *ff. commod.* [s] *L.* 5. § 1. 2. *ff. De præſc. Virb.*

tho' theſe be the moſt ordinary contracts among men, yet there be as many varieties *of them* as the *variety of* conjunction of theſe things, in the various uſes or humours of men, can make up; as the contract of inſurance, where money or things are given, for the hazard of any thing that is in danger, whether it be goods or perſons.

We ſhall only then touch the common requiſites, *firſt*, of all contracts, and *next*, the ſpecialities of ſuch prime ones, to which law or cuſtom hath given a ſpecial nature, that by the very naming of the contract and agreement, all the obligations intereſts and conſequences thence ariſing, are commonly known and preſumed, and are as effectual as if they were all expreſſed, without neceſſity to diſpute preciſely what reaſon and equity will conclude, from the nature of what is done or ſaid. This ſeems to be the only profitable diſtinction betwixt contracts nominate and innominate; for in all contracts, not only that which is expreſſed muſt be performed, but that which is neceſſarily conſequent and implied; but in nominate contracts, law hath determined theſe implications. We ſhall therefore ſpeak ſpecially of the contracts of Loan, Commiſſion, Cuſtody, Pledge, Excambion, Sale, Location, and Contracts uſurary and Society. Tranſaction may well be numbered amongſt mutual onerous contracts, for thereby either party quiteth a part of what he claims, for ſhunning the hazard and expences of law; of which hereafter [ss].

XIII. For the common requiſites and properties of contracts, *Firſt*, They muſt be deeds of the rational appetite or will, which, as we have ſaid, can only conſtitute rights; therefore the conſent of infants can work nothing, becauſe they have not the uſe of reaſon, and tho' equity keepeth not one time for the attainment of reaſon, but takes it as ſoon as truly it is, which in ſome is much ſooner and in *others* much later; yet poſitive law, following that which is moſt ordinary for ſtability's ſake, fixes it at the end of pupillarity, which in men is fourteen and in women twelve years of age; ſo neither infants, *nor* idiots or furious perſons, except in their lucid intervals, can contract: and this is to be cognoſced by an inqueſt upon a brief out of the Chancellary, called the brief of idiotry, which is mainly for appointing the neareſt agnat to be tutor to ſuch: and the deeds of idiots are not only void after this inqueſt, but after their idiotry or furioſity whenever it began, which therefore muſt be cognoſced [t]; yet reduction *may be ſuſtained* without a brief, at the furious perſon's inſtance convaleſcing, *Feb.* 21. 1632, *Alexander contra Kinnier*; and at the inſtance of the furious perſon's heir, *July* 26. 1638, *Loch contra Dyke* [tt]. But it was not found competent by exception, *Spotiſ. idiots*, *Crawfurd*. Furioſity *preventeth* the eſcheat of thoſe who are ſelf-murderers, being then furious not knowing what they did, *Hope*, *horning*, *Reidpeth contra Wauchop*.

Secondly, Thoſe alſo *who* thro' fear or drunkenneſs or diſeaſe, have not for a time the uſe of reaſon, do not legally contract.

Thirdly, Theſe who err in the ſubſtantials of what is done, contract not [u]. *Neither thoſe who are deceived, if deceit gives cauſe to the contract.* We ſhall not here debate of the effect of extortion, error, or circumvention, what influence they have upon contracts, of which in the former title. Thoſe who are deaf or dumb may contract, if they have the uſe of reaſon, and if it appear they underſtood what was done, and expreſſed their conſent, by their ordinary known ſigns. And, *laſtly*, Poſitive law for utility's ſake hath diſabled minors having curators, to contract without their conſent [w]. *And that the contracts of minors tho' not having curators, or having them being with their conſent, are reſtorable upon enorm hurt, proceeds partly from the nature of contracts, wherein equality is to be obſerved, but chiefly from poſitive law, for ſecurity of ſuch as are weak.* Like unto

[ss] See below, I. 17. 2. [t] *P.* 1475, *c.* 66. [tt] See above I. 3. 42. [u] *L.* 9. *ff. De contract. empt.* [w] *L.* 3. *C. De in integr. reſt.*

unto theſe are perſons interdicted [x], of which before [y]. This much, in the firſt place, as to the requiſites in the perſons contracting.

Secondly, In the act of contracting, it muſt be of purpoſe to oblige, either really or preſumptively, and ſo muſt be ſerious, ſo that what is expreſſed in jeſt or ſcorn, makes no contract.

Thirdly, In the matter of contracts it is requiſite, that it be of things in our power in their kind; and ſo contracts of *abſolute* impoſſibilities are void [z]. And contracts in things unlawful are alſo void [a]. But tho' the particular thing be not in our power, and *yet* be not manifeſtly impoſſible, the contract is obligatory; and albeit it cannot obtain its effect upon that thing, it is effectual for the equivalent, as damage and intereſt. Contracts may interveen where there intercedes a natural and obediential obligation, where it hath this uſe, to declare and expreſs the natural obligation to avoid debate thereupon: The proper matter of contracts, are things free, and the declaration or acknowledgement of neceſſary duties may be free, tho' the duty itſelf be neceſſary; yet where obediential and conventional obligations are concurring, they are both obligatory.

XIV. It is the property of permutative contracts, that the purpoſe of the contracters is to keep an equality, in the worth and value of the things fruit or works interchanged, the value whereof is regulated according to the common eſteem and cuſtom of men in every place, and it is liquidated or known by money or ſome fungible like unto money, as ſugar and tobacco in the *American* iſlands; for money being the common token of exchange, and therefore having virtually in it all t hings, they are accounted better or worſe or equal, according *as*, *by* the common rate of the place, they are worth in money for the time; the prime grounds of this common eſtimate are Neceſſity Utility and Delectation, whether it be real or imaginary, as *Pliny* [b] *Margaritis pretium luxuria fecit*, ſuch is the value of portraits tulips or other flowers, upon which, in ſome places, a far greater rate hath been put, than any uſefulneſs thereof would allow; hence it is that the rate of things do frequently change, as the neceſſity or eſteem of them changeth, and the more they abound, the eaſier is their rate.

But the queſtion is here, Whether in theſe contracts there be a moral neceſſity to keep an exact equality, *and* that whoſoever *ex poſt facto*, ſhall be found to have made an unequal bargain, the gainer ought to repair the loſer. In this the *Romans* did not notice every inequality, but that which was enorm, above the half of the juſt value; which our cuſtom alloweth not, *June* 23. 1669, *Farie contra Inglis* [bb]. The opinion of *Grotius* [c] is for the affirmative, upon this ground chiefly, that the purpoſe of the contracters is to give one thing for another of equal value, without purpoſe to gift on either hand. Yet the contrary opinion is more probable in ſome caſes, wherein, tho' it be the purpoſe of the parties to interchange things of equal value without donation, yet that equality hath no determinate or certain rule, but their own opinions: for, as is ſaid before, the ſpecial affection and opinion of the owner, is a piece of his intereſt and enjoyment; and if the thing be taken from him unwarrantably, and cannot be reſtored, the reparation is not according to the common rate, but *ſecundum pretium affectionis*, according to the value the owner had of it; and if that owner ſell it for the rate he thought it worth, it would be thought no leſs than cozenage, for the buyer to offer *(afterwards)* but what others thought it worth: If then the particular value or eſteem be the firſt rule in ſuch contracts, when both parties being free, do agree upon ſuch a rate, there is here no donation, but a particular eſtimation, *wherewith* either party ought to reſt ſatisfied. It is true, where there is no rate agreed upon, the common rate muſt be the rule, but it cannot always be a rule, ſeeing the public rate doth but ariſe from the private rate, (except where by public authority they are determined, which is but ſeldom) otherwiſe rates would never

[x] L. 40. *De R. juris.* [y] See above I. 6. 37. *et ſeq.* [z] § 11. *inſt. De inut. ſtip.* [a] *Arg.* L. 15. *ff. De cond. inſtitut.* [b] *Lib.* 9. *c.* 35. [bb] See above I. 9. 11. [c] *De j. belli, lib.* 2. *c.* 12. § 11.

ver change; but ordinarily the change of rates begins at particular perſons, and the ſecond contracters uſe for a pattern the firſt; and the fuller the example be, the ſtronger it is until it becomes common; and therefore it is ſafeſt to conclude with the law [d], which ſaith, "This *is* the ſubſtance of buying and ſelling, that "the buyer having a purpoſe to buy cheap, and the ſeller to ſell dear, they come "to this contract, and after many debates, the ſeller by little and little diminiſh- "ing what he ſought, and the buyer adding to what he offered, at laſt they agree to a certain price," or as *Seneca* ſays [e], "It is no matter what the rate be, ſeeing "it is agreed between the ſeller and the buyer; for he that buys well, owes "nothing to the ſeller." Therefore, the equality required in theſe contracts, cannot be in any other rate than the parties agree on; but in other things this equality ought to be obſerved, as in any Penalty adjected, or Clauſes irritant, which therefore ought to be and are reduced to juſt intereſt, whatever the parties agreement be.

XV. So then, ſeeing promiſes and contracts are morally binding, permutative contracts muſt alſo be ſo *(without regard to an exact equality)* elſe they would not bind by virtue of the conſent, but by reaſon of the matter; but in them, as in all others, if any party hath diſadvantage by fraud or guile, it ought to be repaired; but not by virtue of the contract, but from the obligation ariſing from that delinquence: and ſo "unjuſt balances are an abomination to the Lord," becauſe of the deceit thence ariſing: as alſo falſe money, and inſufficient ware by any latent inſufficiency or defect which was not obvious and eaſily perceiveable by the acquirer, *otherwiſe if it was perceivable* [f], there can be no preſumption of fraud, "his eye is his merchant [ff]." But in other *caſes*, according to the ſentence of *Ambroſe*; "In contracts," ſaith he, "even the defects of the things which are "ſold ought to be laid open, and unleſs the ſeller intimate the ſame, there is "competent to the buyer an action of fraud." So alſo, if the buyer take advantage of the ignorance and ſimplicity of the ſeller, and where there is no alteration of the common rate, nor ground thereof, aſketh or taketh more *(for his money)* if it be not deceit, at leaſt it is againſt charity and honeſty: ſo it is when ware is kept up till pinching neceſſity, which raiſeth extreme dearth, or when ſome ſpecial neceſſity of an acquirer puts him ſo upon the mercy of the diſponer, that he may take a price, even above that which himſelf accounts the thing worth; in ſuch caſes, there is the violation of the natural obligation of charity, whereby men are bound in ſome caſes, to gift freely to the neceſſity of others, but frequently we are obliged to exchange what our neceſſity may ſpare, to ſupply others neceſſity, for the like which they may ſpare, and ſo without injury, in caſe of neceſſity, men may be compelled to ſell that which is their own *for a juſt price*.

This agreeth with our cuſtom, by which only a latent inſufficiency of the goods and ware, at the time of the ſale and delivery, is ſufficient to abate or take down the price [g], but not, unleſs when the inſufficiency appeared, the thing bought be offered to be reſtored (if it be not carried abroad before the inſufficiency appear) after which, retention is accounted an acquieſcence in, and homologation of the contract [gg]: ſo no other than the latent inſufficiency of wines, as being mixed with peary, *&c. was found* relevant to liberate from a bond granted for the price thereof. But the inſufficiency of a horſe was not *found* ſufficient to liberate from the price, he not being offered back when that appeared, *January* 9. 1629, *Brown contra Nicolſon*. And the inſufficiency of ſkins received upon truſt, was found only probable by the oath of the ſeller, after the buyer had ſold them again, *ſeeing he had never offered them back, nor intimate to the ſeller, that there was any loſs upon the cargo for two years, until he was charged for the price*, *July* 7. 1675, *Patan contra Lockhart*.

XVI. Before

[d] *L.* 8. *C. De reſcind. vend.* [e] *De beneficiis, lib.* 6. *c.* 15. [f] *F. In which caſe.* [ff] *L.* 1. § 6. *ff. De Ædilit. edict.* [g] See above, I. 9. 11. [gg] I. 10. 11. 4.

XVI. Before we come to the ſpecial contracts, this queſtion, which is of much importance in practice, would be reſolved; whether in mutual or reciprocal contracts, a party contracter, or his aſſigny, can obtain implement of the articles of the contract in his favour, till he fulfil or cauſe to be fulfilled the other part. Our deciſions have been exceeding various in this matter, for clearing whereof, ſeveral caſes muſt be diſtinguiſhed:

Firſt, In the caſe of the contracters themſelves; and in that caſe, Either the mutual obligements are conceived conditionally, that the one part being performed, or upon the performance thereof, the other part ſhall be performed: *(Or at leaſt)* the obligements *(tho')* not conceived conditionally, yet they are properly mutual cauſes each of other; as in Sale, the obligement to deliver the ware and to pay the price, in Permutation, the things exchanged and mutual obligements for delivery thereof, are mutual cauſes each of other; in Location, the uſe of that which is ſet for hire and the hire, are mutual cauſes, *and* ſo are the obligations *hinc inde*: Or the obligements are not the proper cauſes each of other, but either wholly different matters, which are frequently accumulated in the ſame contracts, or the one is but the occaſion and motive, and not the proper cauſe of the other. *(Secondly,)* The caſe of aſſignies muſt be conſidered in all theſe. For the *Firſt*, The civil law is for the negative, that in reciprocal contracts, neither party can have effectual action, except he perform the whole contract on his part [k]. As to the firſt member of the firſt caſe; there is no queſtion, *that* when the mutual obligements are conceived conditionally, he that demands the one part, muſt perform the other. As to the other member; when the obligements are mutual cauſes each of other expreſsly, as when the contract bears, "for the which cauſes," or when by the nature of the thing it appears ſo to be; it is moſt conſonant to reaſon, to the civil law, and *to* our practice, that neither party ſhould obtain implement of the obligements to him, till he fulfil the obligements by him. *In contracts where the obligements are not the proper cauſes each of other, the one part hath effect before the other be fulfilled, and the ſame is only reſerved or declared not to be prejudged by way of action or charge, July* 17. 1542.

As to the *ſecond* caſe; Whether an aſſigny charging or purſuing upon a mutual contract, be in any better caſe than the cedent, or can crave implement, till the cedent's part be performed, the difficulty is here, that if aſſignies be clogged with the obligements of the cedent, it will marr commerce, and render ſuch contracts ineffectual, as to ſummary execution, and ſo obligements therein for liquid ſums of money, might not be poinded or appriſed for, nor any execution valid thereupon, (but this will not follow, for tho' theſe executions be ſummarily uſed, they will ſtand valid, only the effect will be ſuſpended, till the other part be performed). *But on the other part, the common rule of law is more rational, that the aſſigny* utitur jure auctoris, *and is in no better caſe than the cedent, unleſs it be in the matter of probation, that the cedent's oath will not prove againſt him* niſi in jure litigioſa, *and therefore* in perſonalibus *all exceptions againſt the cedent are competent againſt the aſſigny, even compenſation itſelf.* But the aſſigny having no title whereby to compel his cedent to perform his part; therefore the other contracter muſt either be decerned to aſſign his part of the contract to the aſſigny, that thereupon he may inſiſt for performance, and before *that*, the extract of his decreet or rather execution may be ſiſted (except *as* to adjudication for his ſecurity) till he procure implement of his cedent's part; or otherwiſe, that he find caution, that the other contracter uſing diligence againſt his cedent for performance, the aſſigny ſhall make up what ſhall be wanting as was done in the caſe *Cunningham contra Roſs*, *Feb.* 15. 1627, where an aſſigny upon a contract for the price of lands (by which contract his cedent was obliged to cauſe the tenants pay certain bygone farms), was ordained to find caution for ſatisfying of theſe farms *for* the cedent, *Hope*, *contracts*, *L. Renton*. And tho' a donatar was found to have right to the price of lands due by a contract, tho' the rebel had not performed his part of the contract, *Hope*, *declarators*, *Balfour*,

[k] *L.* 13 § 8. *De act. emp.*

where there was nothing alledged of the inſolvency of the cedent: *and in a like caſe, July* 20. 1622, *Davidſon*; *but theſe were in favour of the fiſk, and ſo not to be drawn in example.* Yet a donatar purſuing for the price of feus, the feuers were aſſoilzied from the declarator, till the donatar obtained the feus to be perfected; but here it was known, the donatar was in truſt for the rebel, who was in power to perform, *Jan.* 28. 1673, *Lord Lyon.* But there can be no reaſon that the one part of the mutual cauſe ſhould be effectual without the other, for if the cedent's backbond apart would affect the aſſigny, much more when it is in the ſame contract; yea, tho' the matter proceed not by way of contract but by bonds apart; if thereby it appear, that theſe bonds are mutual cauſes one of another, the effect ſhould be the ſame, and tho' there be no more to prove that they are mutual cauſes, but that they are of the ſame date, and before the ſame witneſſes, the Lords will readily examine the witneſſes inſert, *ex officio*, whether they be mutual cauſes each of other [1]; and therefore, where a bond apart did bear, that the creditor ſhould ratify a diſpoſition of the ſame date, at his majority, under a great penalty; *a* bond granted to that party of the ſame date, *with the bond apart and diſpoſition* being aſſigned, the aſſigny was found to have no power to uplift the principal ſum, till the cedent either ratified at his majority, or *was* paſt his *anni utiles*, without reduction, *Nov.* 14. 1628, *Cumming.* In this caſe the bond aſſigned did expreſsly bear *to be* the price of the land, to which the other bond of the ſame date *and diſpoſition were* relative. The like was found, as to writs of the ſame date with a contract anent the ſame matter, tho' not mentioned in the contract, *Hope, contract, Duncrub*; *and Dec.* 23. 1635, *Keith.* But if in contracts or mutual bonds, the mutual obligements have different terms of performance, a purſuit upon the one part will not be ſtopped by not performance of the other part, while the term agreed for the performance is not come, *July* 17. 1542, *L. Kerſe*; *Nov.* 28. 1676, *Carmichael*; this was between the parties contracters; [but when a prior bond of borrowed money is given with mention of the cauſe, the meaning of contracters muſt be, that there ſhould be no effect thereupon as to ſingular ſucceſſors; yea even as to contracters, when there is no backbond or condition, but a ſimple bond of borrowed money, which imports acceptilation or innovation of the former mutual obligement; for in both the former caſes, the cauſe was expreſſed not to be borrowed money.] *

TITLE XI.

Loan, or *Mutuum & Commodatum*, where, of Bills of Exchange.

I. *Loan comprehendeth*, mutuum *and* commodatum.
II. In mutuo transfertur dominium. *Requiſites common to* mutuum *with other contracts.*
III. Senatus conſultum Macedonianum, et Velleianum.
IV. Mutuum *can only be in fungibles and quantities.*
V. *Specialities* in mutuo.
VI. Mutuum *is* ſtricti juris.
VII. *Bills of Exchange.*
VIII. Commodatum *deſcribed.*
IX. *Borrowers diligence.*
X. Precarium.
XI. Commodatum, *how ended.*
XII. *Actions ariſing from* commodatum.

HAVING thus treated of contracts in general in the preceeding title, we come now to particular contracts, according to the order propoſed, *loan* comprehendeth both the contracts in the law called *mutuum* and *commodatum*; by the former

* What is incloſed within the parentheſis appears almoſt unintelligible. This paſſage is found in none of the MSS nor in the edition 1681. The author, ſo far as can be gathered, intended here to lay down two diſtinct propoſitions; *Firſt*, That when a bond of borrowed money mentions the cauſe of granting, this mutual cauſe will be effectual even againſt ſingular ſucceſſors: on the other hand, when a contract, containing mutual obligements

[1] See Sir *James Stewart*'s anſwer, *p.* 215. *voce* "obligements correſpective," who differs.

former, " a thing fungible is freely given, for the like to be reſtored in the ſame " kind and quantity, tho' not the ſame individual." A fungible is that which is eſtimated according to the quantity, and is not eaſily decernible nor noticed in the individual or particular body, but only in the like quantity of the ſame kind; the chief of which is money, where ordinarily the extrinſic value and common rate is regarded, without reſpect to the matter, and ſo what is borrowed in gold may be paid in ſilver, according to the *current* rate of the place, unleſs it be otherwiſe contracted: ſuch alſo are wine, oil, and grain, wherein the quantity *(alone)* is ever reſpected in the ſame kind, as in the loan of wine, payment muſt be *made* not only by the wine of the ſame country, but if there be any difference, by the wine of the ſame place of the country, and ſo of all the reſt; for it is never accounted a quantity *of the ſame kind*, where there can be *any difference* remarked.

II. Theſe fungibles have no fruit or uſe, if they be retained, and therefore the end of the contract, and purpoſe of the contracter is, that the property thereof ſhall paſs from the lender *to the borrower*, and may be by him alienated, and thence it is named *mutuum*, for *mutuum eſt quaſi de meo tuum* [n]. *Salmaſius* alone denies this, holding that the intent of this contract, *non eſt transferre dominium*, but to give the uſe, and that the alienation falls of accident, becauſe *the* law makes no difference *betwixt* quantities of the ſame kind; ſo that if *loſt* money be found, reſtitution without any contract *may be made*, not *only* in the ſame money, but in the like, wherein there is no conſent, and ſo can be no alienation. Yet the common opinion holds, that the purpoſe of the contracters is to alienate, becauſe they know *that* without it there can be no uſe: and if a fungible be not lent to that purpoſe, but only to be detained, as in ſome caſes it may, as money to make a ſhow with, to appear rich, or to make a ſimulate conſignation, there the borrower without injury, cannot alienate, neither is there *mutuum* in that caſe, but *commodatum*; and he who findeth unwarrantably alienateth his neighbour's money, and may be compelled, not only to render the like in current money, but to render the ſame ſpecies and pieces of money. So he who hath the cuſtody of money, if he meddle with it, commits theft by the law. Hence it follows, that *in mutuo* the whole peril of the thing lent, after delivery, is the borrower's, *et ejus eſt periculum cujus eſt dominium*; ſo that money, or any other fungible thing lent, tho' it were immediately taken away by force, or deſtroyed by accident, the borrower is obliged to pay it: ſo that the tranſmiſſion of the property of things lent *in mutuo*, is ſo neceſſary, that without it, it cannot conſiſt; and if a paction or condition be adjected, with interpoſition of a ſtipulation, that the thing lent ſhall not be alienable, it deſtroys the contract, and changes it into *commodatum*.

It is not here neceſſary to repeat the general requiſites of *mutuum* common to other contracts, as that it muſt be done by an act of the will with underſtanding, and ſo is impeded by error in the ſubſtance of the contract, and cannot be effectuated by infants, *idiots or* furious perſons; nor by the civil law could it be done by prodigals, which we notice not, unleſs they be interdicted: neither by minors having curators, without their conſent. Nor can they who have not the right of property lend (except by commiſſion), becauſe they cannot tranſmit more than they have; but *mutuum* may be conſtitute by ſuch as can contract effectually, having all the former requiſites of the lender.

III. The civil law had this exception further, *per ſenatus conſultum Macedonianum*, prohibiting and annulling all lending to ſons in the family, which our cuſtom owneth *not*, and looketh upon ſons at moſt, as *having* the privilege of minors, if within

ments, is entered into and finiſhed; if one of the parties ſhall afterwards grant a ſimple bond of borrowed money, in implement of his part of the mutual contract, and action is brought for payment of that bond, even at the inſtance of the party-contracter, no exception will be competent upon account of the mutual cauſe; becauſe " he has conſented to an acceptilation or innovation of the former mutual obligement;" and however he may be intitled to a ſeparate action for implement of the counterpart, he muſt ſtill, in the firſt place, make payment of the bond.

[n] *L.* 2. § 2. *De reb. cred.*

within age; and if they contract without their father's conſent, who is their lawful adminiſtrator, their deed is annullable, unleſs it be of ſmall importance, or be in ſuch matters wherein they uſe to negotiate.

Our cuſtom inſtead of the *ſenatus conſultum Velleianum*, in favours of women, whereby they could not interpoſe as cautioners, or any ways be ſurety for others, hath indulged the favour to wives, that while they are married, they cannot *borrow* effectually, *or* oblige themſelves otherwiſe than in reference to their lands, of which formerly [o].

IV. Becauſe of the matter, things cannot fall under *mutuum*, which cannot be alienated, and which are not *like* money, corn, wine, oil, properly fungible. *But* I doubt not *that* oxen, kine *or* ſheep, are mutuable, as is ordinary in ſteel-bow goods, which are delivered to the tenant with the land, for the like number and kind at his removal.

V. As to the ſpecialities of *mutuum*. *Firſt*, It is not contracted without delivery of the thing lent, and it hath very little, either by the civil law, or our cuſtoms, as a nominate contract, but what is competent by the obligation of reſtitution, or recompence; and therefore, *promutuum*, *per indebitum ſolutum*, where there is no contract, is equiparate to *mutuum*, for the like, not only in kind, but in value, muſt be repaid, tho' nothing be expreſſed thereof; as he who lent ſo much wine, is not obliged to accept the ſame kind of wine, *unleſs it be of* the ſame value; as if he lent old wine, he is not obliged to take new, which is accounted worſe [p], and this is rather by that equivalence, due in recompence, than by any tacite paction, underſtood to be implied in this contract. And it were more convenient for commerce that there ſhould be underſtood a contrary paction, that being repaid in the ſame kind, there ſhould be no debate of the equivalent value, which leaves a perpetual incertitude in all ſuch contracts, raiſing ever a quarrel, that the re-payment is not as good as the thing lent, according as there is difference (*for example*) of the goodneſs of wines, in the ſame country, yea, in the ſame field. Likewiſe there is difference in kinds of money, ſilver or gold, and in the intrinſick and extrinſick value; wherein the common opinion is, that not only the extrinſick, but intrinſick value is to be reſpected, that the ſame weight and ſpecies of money may be repaid. But none make difference of gold or ſilver, not allayed; and all reject copper or layed money. Our cuſtom was to have the re-payment of the ſame intrinſick value, as appears, *Parl.* 1451. *cap.* 3. *Parl.* 1456. *cap.* 58. *Parl.* 1467. *cap.* 19. *Parl.* 1555. *cap.* 37. But that was well altered by a poſterior cuſtom, allowing the current coin for the time, by the extrinſick value to be ſufficient, in all redemptions, much more in perſonal contracts; which is *in re* convenient, ſeeing money is regarded as the token of exchange, and as a fungible, not as a body [q]. And it is not to be ſuppoſed, that if the lender had keeped his money from the preſent borrower, that he would have loſt the profit of it, in order *to have* kept *it* up till the extrinſick value might change to his advantage, or that the borrower was to keep it by him, but to make preſent uſe of it; for which cauſe we notice not the intrinſick value, even as it was at the term of payment.

VI. The civil law gives ſo little to *mutuum*, by the nature of the contract, that it is amongſt the contracts *ſtricti juris*, where nothing is underſtood but what is expreſſed, or neceſſarily conſequent therefrom: and therefore there is *no* annualrent *nor* profit due in *mutuo*; yea, tho' it be expreſſed by paction, it will not ſuffice by the civil law, unleſs it be by ſtipulation. So we allow no profit *in mutuo*, unleſs it be ſo agreed upon, which may be by paction, even *ex intervallo*; in which caſe it retains the name of *mutuum*, tho' it be rather location of the uſe of the fungible, for the annual, as a competent hire, and ſo we ſhall ſpeak to annualrents not here, but in location.

The law did allow to *mutuum*, that any thing might be tranſchanged into a fungible, as the price thereof, and that fungible conſtitute *in mutuum*, which ceaſes equivalent,

[o] See above, I. 4. 16. [p] *L.* 3. *ff. De reb. creditis.* [q] *L.* 1. *pr. ff. de contract. emp.*

equivalent, as if the fungible had been really delivered [r]. And any contract is eaſily changed *in mutuum per fictionem brevis manus*, as if all theſe alterations had been actually made [s]. But *tho' it were* [t] acknowledged, *per chyrographum*, " that " money was delivered," the exception *de non numerata pecunia* was competent. With us the tranſmiſſion from any other cauſe *is* ſufficient, and the acknowledgement of the receipt of money proves, unleſs the contrary be proved by writ, or oath of party. *This is alſo ſingular* in mutuo, *that tho' by the civil law contracts cannot be made* per tertium, *yet delivery by the lender's debtor to his creditor was holden ſufficient* [u].

VII. The ordinary way of *mutuum* amongſt merchants is by bills of exchange, or letters of credit, which have ſeveral ſpecialities, which ariſe from the nature of theſe acts, and from cuſtom, eſpecially theſe common cuſtoms of merchants, obſerved in cities of greateſt trade in the neighbouring nations. The nature and ordinary tenor of theſe bills of exchange is, " That the drawer of the bill " orders ſuch a merchant his correſpondent, to pay the ſum contained in the " bill upon ſight, or at ſuch a certain time, or at ſuch uſance, and that for " value received;" wherein there is implied a mandate to the correſpondent, and an obligement upon the drawer of the bill, to make that mandate effectual, wherein *mutuum* is implied, if the value received by him be numerate money, or *if* any other cauſe, ſuch as delivery of ware, and there be in it *fictio brevis manus*, as if the ware were ſold to the drawer of the bill, and the ſum in the bill were the price received *by the ſeller*, and delivered again in loan.

There uſeth two or three bills to be drawn for the ſame ſum, which do bear to be the *firſt*, *ſecond* and *third Bill*, and the payment of any one ſatisfies all. The fixed form by cuſtom of making uſe of bills, is by preſenting them to him upon whom they are drawn, and if he accept the bill, he writes thereupon, *Accepts*, which if it be *done* ſimply, he becomes liable in the terms, and at the time mentioned in the bill; but ſometimes the accepter doth qualify his acceptance, which the creditor by the bill may refuſe, and require either ſimple acceptance, or may proteſt for non-acceptance; but if he ſuffer the acceptance to be qualified, it imports his conſent, and he cannot proteſt for non-acceptance, as if the acceptance be to a longer day than that which is contained in the bill, or if it bear acceptance, " if proviſions come betwixt and the day;" or, " if ware " or bills in hand do raiſe the ſum." At or after the day, the bill is again preſented, and if payment be not then made, the creditor in the bill proteſts for not-payment *, and both theſe proteſtations muſt be by inſtrument of a notary, either for non-acceptance or not payment: which inſtruments with the bill, make ſufficient probation, both againſt the drawer of the bill, and againſt him upon whom it was drawn; and neither witneſſes, nor the oath of party will be ſufficient to ſupply the proteſt: ſo that the inſtrument or proteſt, is not only a proof, but a ſolemnity requiſite. Theſe proteſts may be taken againſt him upon whom the *bill was* drawn, either perſonally, or at his dwelling-houſe, which was ſuſtained, tho' before preſenting of the bill, (*for payment*) the party upon whom it was drawn was dead, *July* 8. 1664. *Kennedy*.

Upon bills ſo proteſted, the creditor in the bill hath action, both againſt him upon whom the bills are drawn, if thro' his fault, he hath either refuſed to accept, or to pay; and ſo if he had proviſions in his hand, he will be decerned to pay; and if without proviſions he accept and pay, the drawer of the bill becomes his debtor, *ex mutuo*, or *ex mandato*. The creditor *in* the bill may alſo return upon the drawer of the bill, who will be decerned to pay the ſum, with the damage the creditor hath ſuſtained thro' its being proteſted; wherein will be comprehended the expences of the purſuit againſt the correſpondent, and the

* It is now conſidered as eſtabliſhed law, that in order to intitle to recourſe againſt the drawer, proteſts for not payment, muſt be taken by the porteurs of bills, upon the laſt of the three days of grace; or if that day happen to be Sunday, on the Saturday preceeding.

[r] *L.* 11. *ff. De reb. cred.* [s] *L.* 9. § 9. *eod.* [t] F. *But if it were but.* [u] *L.* 15. *ff. De reb. cred.*

profit the creditor in the bill might have made, if according to it he had received his money, which will differ in ſeveral perſons and caſes; as if the creditor in the bill be not a merchant, the ordinary damage will be the exchange, that is, "the rate ordinarily given at that time, for anſwering money from the "place at which the bill was drawn, to the place to which it was directed;" but if the creditor in the bill was a merchant, and was to trade with the ſum in the place to which the bill was direct, he hath alſo no more but exchange; [but if he was to trade in any other place, before he returned to the place where the bill was drawn, he will not only get exchange, but re-exchange, as being damnified in the profit of his ware that he was to buy at the place to which he was bound, from that place to which the bill was direct, for the ware he was to buy there, and for the loſs of his profit of the ware he was to buy at the ſecond port: but tho' there might be further progreſs in his traffick, his damage is no further extended than to exchange and re-exchange; he hath alſo re-exchange, if wanting credit at that place, he be neceſſitated to return empty, or buy on truſt: and in all the oath of the creditor in the bill, concerning his deſign with the bill, muſt be ſufficient probation, and is taxable, as all oaths *in litem* are when they appear exorbitant **.]

If the bill of exchange be unſatisfied by an interveening accident, which the drawer could not prevent, the damage will be modified, or taken off, as in the former caſe, *July* 8. 1664, *Kennedy*, the correſpondent upon whom the bill was drawn dying before the day of payment, the creditor in the bill having proteſted at his dwelling-houſe, and not inſiſting againſt his ſucceſſors, but returning againſt the drawer, he got no exchange, or re-exchange; yet certainly the drawer of the bill *having become* obliged to deliver the money at the place to which the bill was directed, it had been no ſtretch to give exchange.

But if the correſpondent, upon whom the bill is drawn, break, or become inſolvent, full damage will be due by the drawer, whoſe part it was to have his money in ſecure hands; unleſs the correſpondent's inſolvency be by the delay, or fault of the creditor in the bill: for tho' there be no determinate time, at which he is obliged to preſent it, yet conveniency and ordinary diligence is implied; but if the delay fall out by an accident, tho' the correſpondent break before the bill be preſented or paid, the drawer of the bill will be liable for the value received, but for no damage, *July* 1. 1676, Doctor *Wallace*.

Theſe bills of exchange are probative, tho' they neither have witneſſes, nor be holograph, by the cuſtom of merchants, becauſe of the exuberant truſt among them, and becauſe they do not ly over as other ſecurities, but come quickly to be queſtioned, if they be not ſatisfied. Yea, a bill of exchange by a drover, neither having ſubſcription of his name, nor initial letters thereof, but a mark, at which the writer of the bill wrote, "This is the mark of the drawer "of the bill," the writer and ſeveral witneſſes being examined, *ex officio*, and deponing, that it was the *drover's* cuſtom to mark bills thus, which he readily paid, tho' of greater ſums than this, which was an hundred pounds *Sterling*, and one witneſs deponing, that he ſaw him ſet to his mark to this bill, the bill was ſuſtained, *Feb.* 26. 1662, *Brown*.

Bills of exchange are alſo tranſmitted without any formal aſſignation, or intimation by a note upon the bill itſelf, ordering it to be paid to ſuch another: and bills of exchange have now ſummary execution, by horning, as if they did contain a clauſe of regiſtration, by the act 20. *Parl.* 3. *Charles* II. which was very fit

** What is contained within the parentheſis, is very indiſtinct. None of the MSS have any thing relating to bills of exchange, and the 1ſt edit. does not differ in this place from the edit 1693, except that it wants twenty words.——The doctrine of *recourſe*, is thus explained by other writers. Exchange and intereſt are always due for not payment. Re-exchange is due, if the creditor in the bill was obliged to raiſe money by bills drawn on the place of the firſt draught, for which he paid higher exchange. Damage (which too is due, only when incurred) is the commiſſion-money paid for procuring the new bill, expence of proteſting the old, and poſtages: but re-exchange, is by no means double exchange; it is only the difference between the exchange paid for the firſt bill, and that paid for the ſecond. See *Forbes* on bills, p. 198. and the authors there quoted.

fit for the expediting of commerce *. The first order carries the right of the sum in the bill, without necessity of intimation, yet payment made *bona fide* by a posterior order, secures the payer [uu].

Bills or precepts not being amongst merchants, or *in re mercatoria*, import only warrandice upon the drawer, and give action against the person upon whom they are drawn, but neither require the solemnities, nor have the privilege or effects of bills of exchange, but have only the effect of assignations from the drawer upon him *on* whom they are drawn. Yea a bill of exchange amongst merchants, not bearing value received, was found only as an assignation, without a cause onerous, but not as a mere factory, which the drawer might recal, and by a posterior bill exclude the former, *July* 24. 1691, *Hume* **.

Letters of credit among merchants, are equiparate to bills of exchange in some cases, but in others they are but cautionary for those in whose favour they are granted; and therefore a merchant's letters of credit, to honour another merchant's bills, was only found effectual as to such bills as were accepted and paid and whereof re-payment was not made, and advertisement given to the writer of the letters, of the particular bills not paid in due time, before the other merchant became insolvent, *Jan.* 7. 1681, *Ewing* [w].

VIII. The other kind of loan is called *commodatum*, *quasi commodo datum*, and it is "a contract whereby the use of any thing is freely given to be restored the same "without Deterioration;" if it be not freely lent, but for a hire, it is Location; if the like *may* be restored, it is *mutuum* [x]; but if it be lost thro' the commodatar's fault, or otherwise deteriorate, the value must be restored, either as it was estimate by the parties before hand, which changeth not its nature [y]; or if there be no Estimation, then the estimation is to be according to the rate of the thing lent, at the time and place appointed in the contract [z]; or as it was worth the time of the sentence. But restitution must be made without deterioration, except such as necessarily follows the use for which it was lent; as cloaths lent *must* be worn, and cattle lent *must* become older [a]; or if a horse be lent for a long journey, and therefore become leaner, without the borrower's fault, he is not obliged to make up the same [b]: but all other deteriorations must be made up; and it must be lent for use, that it may differ from Depositation, which admits of no use, but *only of* custody, and so is not for the benefit of the depositar, but of the deponant, or him who depositeth.

This contract may be celebrated amongst all that have the common requisites of contracting; yea, if the lender have the possession, he may lend, tho' he have no property [c]; and servitudes and habitation may be lent [d]. And tho' the lender have neither right nor lawful possession, the law saith, that this contract hath effect [e]; which is only to be understood, that the action *commodati* is competent, but not as to all effects; for the borrower cannot effectually detain the thing lent to his day, or any fruit thereof, seeing the lender had no title; but his having or detaining is not theft nor robbery; as when a depositar lendeth the thing depositate.

All things may be lent that can have any use without consumption of their substance, and so fungibles cannot be lent, unless they be given *ad pompam*, as money lent to seem rich, or to make a simulate offer or consignation [f].

IX. As

* By this act 20. *P.* 1681, foreign *bills of exchange* protested *either* for *not acceptance*, *or* for *not payment*, are declared intitled to summary diligence, as bonds, containing a clause of registration; and are registrable for that purpose within six months, of the date in the *first* case, against the drawer and indorsers, and of the term of payment, in the *second* case, against the accepters: but if such protests are not registrated within six months, this privilege falls.—Summary diligence is only allowed for the sum in the bill; the creditor in the bill can recover exchange, re-exchange, damage, interest and expences, no otherwise than by an action at common law; but in a suspension he may cik these to the charge.—By the same statute bills are declared to bear annualrent *ex lege*, from the *date*, if not accepted, and from the *term of payment*, if accepted and not paid.

By *act* 36. *P.* 1696, the above statute 1681, is declared to extend to *inland bills* and *precepts*, in all points.

** This decision not found.

[uu] See below III. 1. 12. [w] *Marius* on bills. *Lex mercatoria.* [x] § 2. *Inst. quib. mod. re contrah. oblig.* L. 1. § 3. & 4. *ff. De oblig. et act.* [y] L. 5. § 3. *ff. commodati.* See below § 9. *h. t.* [z] L. 5. *pr. ff. commod.* [a] L. 5. § 4 *ff. eod.* [b] L. 23. *ff. eod.* [c] L. 15. *ff. eod.* [d] L. 1. § 1 *fin. ff. eod.* [e] L. 14. *ff. eod.* [f] L. 3. § *fin.* L. 4. *ff. eod.*

IX. As to the diligence due by the borrower, the caſe muſt be diſtinguiſhed; for ſometimes things *are* lent only for the behoof of the lender, as he who lends cloaths, or inſtruments to his ſervants for his own uſe and honour; ſometimes to both the lender and borrower's uſe, and oftеſt to the borrower's uſe alone: *in the firſt caſe, the borrower is only holden for the groſſeſt faults and negligence; in the ſecond, for ordinary faults,* culpa levi; *in the laſt, for the lighteſt fault, and is obliged for ſuch diligence, as the moſt prudent uſe in their affairs* [ff]. *But* in all caſes, the borrower is obliged *de dolo:* yea, no paction can be valid in the contrary, as being againſt good manners [fff]; in no caſe is the borrower obliged for any accident, as death, naufrage *or* burning, unleſs he hath undertaken that hazard, either expreſsly, or tacitely as *in commodato æſtimato*, which imports, that if the thing periſh, it is loſt to the borrower, and he muſt pay the price [g]. (For as *in dote æſtimata*, ſo *in commodato æſtimato*, it is in the debtor's option, whether to reſtore the thing itſelf entire, or the price to which it is eſtimated; but if the eſtimation be only in the caſe of the deterioration, or loſs, it doth no more but ſave queſtions as to the value, and is not *commodatum æſtimatum*, as was found, *Nov.* 17. 1668, betwixt the towns of *Arbroth* and *Montroſs):* or that the borrower hath applied the loan to another uſe than it was lent for; in which caſe it periſheth to him, yea, he committeth theft in that miſapplication [h]: ſo if a fault *precede* occaſioning the accident, as if money lent for ſhow, being carried abroad, be taken by robbers [i].

X. *Precarium* is a kind of *commodatum*, differing *from it* in this, that *commodatum* hath a determinate time, either expreſsly *or tacitely*, when the uſe of a thing is given to ſuch a day, or ſuch an uſe, which importeth a time, as lending a book to copy, muſt infer ſo much time as may do it; and lending a horſe to ride a journey, muſt import a competent time. But *precarium* is expreſsly lent, to be recalled at the lender's pleaſure [k]; and if nothing be expreſſed, *commodatum* is preſumed in law, during the uſe granted, unleſs there be no ſpecial uſe expreſſed, and then it is eſteemed *precarium*, becauſe there can be no time conſequent upon general uſe [l].

XI. *Commodatum* is ended by the ending of the ſpecial uſe, for which it is granted, or the time prefixed [m]; or by revocation, *if* it be precarious, or by *the* periſhing of the matter lent; but *precarium* is not finiſhed by the death of the lender, till his heir recal it: but it is finiſhed by the death of the borrower, unleſs it be otherwiſe agreed.

XII. From *commodatum* ariſes two actions, the direct, whereby the lender may call for the thing lent [n]; and the contrary, whereby the borrower may call for his expences, wared out neceſſarily, or profitably on the thing lent, more than is neceſſary to preſerve it in the caſe it was lent, which he may uſe by way of exception, to have retention till the ſame be ſatisfied [o]. *He may alſo purſue for his damage, if wittingly the lender lent an inſufficient thing, not being ſhown to the borrower, but if the lender knew not, he is excuſed, becauſe he lends freely* [p].

TIT.

[ff] *L.* 5. § 2. & 10. *eod.* See below I. 15. 5, [fff] *L.* 17. *pr. ff. eod. L.* 23. *ff. De Reg. juris.* [g] *L.* 5. § 3. *ff. eod.* above § 8. *h. t.* [h] *L.* 5. § 8. *ff. eod.* [i] *L.* 5. § 4. *ff. eod. L.* 1. § 4. *ff. De ob. et act.* [k] *L.* 1. *L.* 2. § 2. *ff. De precario.* [l] *L.* 2. § 3. *De precario.* [m] *L.* 17. § 3. *commod.* [n] *L.* 17. § 3. *eod.* [o] *L.* 18. § 2. *eod. L.* 15. § 2. *L.* 59. *ff. De furtis.* [p] *L.* 18. § 3. *commod.*

TITLE XII.

Mandate or Commiſſion, where, of Truſt, *&c.*

I. Mandatum, *or commiſſion.*
II. *The terms of mandates.*
III. *Acceptance of the mandatar.*
IV. *Mandates in things lawful only effectual.*
V. *Acceptance muſt be free and gratuitous.*
VI. *Mandates are perſonal.*
VII. *How far mandatars may intruſt others.*
VIII. *Mandates are ambulatory, and revokable by the mandant.*
IX. *Mandatar's obligation is to perform,* in forma ſpecifica.
X. *Mandatar's diligence. Mandant's obligation.*
XI. *Kinds of mandates.*
XII. *Tacite mandates.*
XIII. *More mandatars, how far they may act ſeverally.*
XIV. *Whether joint mandatars are liable* in ſolidum.
XV. *Nature of general mandates. To what extended.*
XVI. *Offices are to be reckoned amongſt mandates. Mandatars may contract in their own name, or in name of their conſtituents.*
XVII. Truſt *is a ſpecies of mandate.*
XVIII. *Obligations of exercitors.*
XIX. *Obligations of inſtitors.*

COMMISSION is called in law *mandatum*, either becauſe it uſeth to be expreſſed by way of command or precept, (tho' this be ſpecial in a precept, that moſt mandates are free, and may be refuſed, but *a* precept may not, when the party upon whom *it is* drawn, hath proviſion from the drawer); or otherwiſe it is called *mandatum, quaſi de manu datum*, becauſe it is given out of the hand, or the management of the mandant into the truſt of the mandatar.

The requiſites of this contract, muſt be *firſt*, a Deſire, Warrant, or Order, upon the part of the mandant to the mandatar, to do ſome affair, to the behoof of the mandant only; or *to the behoof* of the mandant and mandatar, as to manage that which they have in common; or to the behoof of *a* third party only; or of a third party and the *mandant or* mandatar; or of the three jointly: *but a mandate* to the behoof of the mandatar only, inferreth no obligation, but rather is a mere counſel, in whatſoever terms it be expreſſed; as if *Mævius* deſire or command *Titius*, not to employ his money upon annualrent, but to buy land therewith, or particularly to buy ſuch land, there ariſeth thence no obligation: it is true, in crimes, ſuch deſires may infer puniſhment [q]; but *(infer)* no obligation in favour of the party deſired. Or when a commiſſion is granted only to the behoof of the receiver, it tranſmits a right to him, and no obligation upon him. So perſonal rights are tranſmitted by aſſignations, which are procuratories, but to the procurator's own behoof [r]; ſuch are alſo precepts for taking ſaſine or poſſeſſion.

II. As to the terms in which mandates or commiſſions are expreſſed, if it be any way to the behoof of the mandant, there is no difference what the expreſſion be, unleſs the words be *mendicatorie*, importing the deſire of a donation; but if it be only to the behoof of the mandatar, or of a third party, or both, without any behoof the mandant, then it muſt be conſidered, whether the words import only a counſel, that the mandatar do ſuch a thing upon his own accompt; in which caſe there is no contract, nor obligation, unleſs it appear that it was upon the mandant's accompt, or by fraud [s].

III. The *ſecond* requiſite is the conſent or acceptance of the mandatar, which compleateth the contract, which is perfected by ſole conſent; *this conſent* may be either *expreſſed by* word or deed, from whence the warrant of the mandant, and acceptance of the mandatar may be inferred, or by any other ſign, as by pointing with the hand, or beckoning with the head: and albeit it *was* free to accept or conſent,

[q] *L.* 11. § 3. *ff. De injuriis. L.* 5. *C. De accuſat.* [r] *Tit. inſt. De mandato, uſque ad* § 8. [s] *L.* 47. *De Reg. jur.*

yet it is obligatory and neceſſary to perform [t], unleſs *re integra* the mandatar renounce, ſo that the mandant be not hindered in obtaining thereafter another mandatar [u].

IV. The *third* requiſite in a mandate is, that it be in relation to a thing lawful *and* to be done; for it cannot reach to what is already done, and being in a matter unlawful, albeit it be accepted, it obliges not the accepter to perform, and if it be performed, it obliges not the mandant to make up the mandatar's damage: but in this, as in other things unlawful, albeit both parties be in the fault, yet *potior eſt conditio poſſidentis*, and he who is actually free of the loſs, hath the advantage [w].

V. The *laſt* requiſite in mandates is, that the acceptance muſt be free, not only in ſo far as the mandatar may freely accept or refuſe (whereby a proper and voluntary mandate, differs from a neceſſary command or precept, which is no proper mandate, becauſe it is not inferred by conſent) but alſo in ſo far as acceptance muſt be gratuitous; *or* otherwiſe the contract thence ariſing is not mandate, but location [x]. Yet honoraries or ſalaries, for performing of things, having no proper price or eſtimation, alter not the nature of this contract; as the ſalaries or honoraries of phyſicians for procuring of health, which hath no price; or of judges or advocates, for giving or procuring of juſtice.

VI. It is implied in the nature of a mandate, that it is perſonal, depending upon the *particular* choice of the mandant, which he hath made of the mandatar's perſon; and therefore it is neither continued in the heir of the mandant, or of the mandatar; but *morte mandatoris perimitur mandatum*, which holdeth alſo upon the death of the mandatar; for this contract ariſing from a ſingular affection or friendſhip betwixt both, the removal of either reſolves that tie *; ſo that in Deligation, which is a mandate by *a* creditor to his debtor, to pay the debt to the creditor of *the mandant*, it was found to ceaſe by the death of the creditor mandant; and that a letter written by him to his debtor to pay his creditor, was no warrant to pay, after the debtor knew that his *own* creditor the mandant was dead, *Feb.* 2. 1628, *Executors of Duffus* **: but here there is an exception, *res non ſit integra*, if the matter of the mandate be not entire, but that the mandatar hath entered upon, and performed a part of his commiſſion; for in that caſe it continueth after the death of either party; it hath alſo the exception *bonæ fidei*, if the mandatar perform the mandate, tho' after the mandant's death, if he knew not that he was dead, albeit the matter was entire at the time of his death [y]. In General, or Complex Mandates, the performance of a part doth not continue all the ſeveral members of different natures of the mandate, but only that particular whereof a part is done.

VII. Here there ariſeth a queſtion, Whether a mandatar may intruſt another perſon, or ſub-commit his mandate? wherein the civil law, and moſt of the Doctors are *for* the affirmative. But the nature of the contract inferreth the contrary, which ought to take place, unleſs law or cuſtom were oppoſite, which is not ſo with us. The reaſons for the negative are pregnant; *Firſt*, becauſe the ſingular and perſonal fitneſs of the mandatar is choſen by the mandant, and ſo cannot without his conſent be altered. *Secondly*, It is a common ground, *that*, that which belongeth not to heirs, belongeth much leſs to aſſignies or ſubſtitutes. *3dly*, It is a common brocard, *delegatus non poteſt delegare*, eſpecially in matters of jurisdiction, which the Doctors acknowledge, but ſay *that* that is introduced by the law

* By *act* 35. *P.* 1693, a particular exception is introduced; procurators of reſignation and precepts of ſaſine are declared to be valid after the death both of the granters and receivers, provided that the titles of thoſe in whoſe favour they are executed be ſet forth in the inſtruments of reſignation and ſaſine.

A precept of poinding iſſued by a Sheriff, tho' executed after the Sheriff was removed from his office, was ſuſtained, *Jan.* 22. 1629. *Maſtertoun contra Robertſon.* See *L.* 49 § 1 *ff. De judiciis.*

** The perſon in whoſe favour the letter was wrote, was ſervant to the mandant; and it does not appear that he was creditor to the mandant, but rather the contrary.

[t] *L.* 17. § 3 *ff. commod.* [u] § 9 & 11. *inſt. De mandato.* [w] *L.* 12. § 11. *ff. mand.* See above I. 12. [x] *L.* 1. § 4. *ff. mand.* [y] § 10. *inſt. De mand.*

law, againſt the nature of this contract; but they ſhould rather ſay, that the power of ſub-committing in extrajudicials is ſo introduced. It is true, the reaſons foreſaid fail in ſome caſes, as if the mandate be of a nature ſo common, that there is no diſtinction of the fitneſs of perſons; as precepts of ſaſine, which are therefore directed blank, that any perſon's name indifferently may be filled up: or if the mandate be ſo general, that it cannot all be performed by one.

VIII. It is alſo conſequent from the nature of this contract, that it is ambulatory and revokable at the pleaſure of the mandant, even tho' it bear a definite term; becauſe that being introduced in favour of the mandant, it cannot hinder him; *nam cuique licet juri pro ſe introducto renunciare*, *June* 30. 1666, *Chalmers*, which holdeth not when the mandate is partly to the mandatar's own behoof; for then the intereſt not being wholly the mandant's, he cannot alter the time agreed upon without conſent of the mandatar: yea, if the mandate be wholly to the behoof of the mandatar, it may *be*, and frequently is irrevokable, and containeth a clauſe *de rato*, as is ordinary in aſſignations, and procuratories of reſignation, and precepts of ſaſine, bearing *them* to be "an irrevokable power and warrant," *June* 30. 1629, *Shaw* *.

IX. The obligation ariſing from mandates is chiefly upon the part of the mandatar, to perform his undertaking, wherein he is obliged to follow the tenor of his commiſſion, *in forma ſpecifica*, in ſo far as it is ſpecial and expreſs, wherein if he tranſgreſs, ſome of the antient lawyers denied him repetition of his expences, not only as to the excreſcence above his commiſſion, but for all; as having received commiſſion to buy ſuch a field, for one thouſand crowns, he had bought it for one thouſand two hundred, he ſhould have repetition of nothing: but *Proculus* [z] thought that he ſhould have action for *the price* in the commiſſion, which, as the more benign opinion, *Juſtinian* followeth [a]. Where the mandate is not ſpecial, it muſt be performed *ſecundum arbitrium boni viri*.

X. As to the diligence whereunto mandatars are obliged, the Doctors are of diverſe opinions. The *civil* law inclineth moſt, that mandatars are obliged *to* the exacteſt diligence, and for the lighteſt fault [b]. But by the nature of the contract, mandatars, ſeeing their undertakings are gratuitous, ought to be but liable for ſuch diligence as they uſe in their own affairs; and the mandant ought to impute it to himſelf, that he made not choice of a more diligent perſon, which our cuſtom follows, but ſtill there muſt be *bona fides* [c]. A commiſſion to receive money abroad, was found to infer no diligence, *July* 17. 1672, *E. Weems*. The like of a commiſſion to a buyer, to infeft the ſeller and himſelf, and to do all other things neceſſary for his ſecurity, *Dec.* 16. 1668, *Fraſer*.

The obligation upon the part of the mandant, is to refound to the mandatar his damage and expence, and to keep him harmleſs; but this extends not unto caſual damages, as if the mandatar were ſpoiled *or robbed* in the way, or ſuffered ſhipwreck in going about the execution of the mandate [d]; but this is to be limited, unleſs the mandate do ſpecially require concomitant hazard, as if a mandatar be ſent thro' a place where there are forces of enemies, robbers, or pyrates, commonly known to haunt the place, by which he muſt paſs.

XI. As to the ſpecial kinds of mandates, they are either expreſs or tacite, to one mandatar or more, general or ſpecial, to be performed in *the name of* the mandatar for the mandant's behoof, or in the name of the mandant. As alſo, amongſt Mandates are comprehended the Commiſſions of inſtitors and exercitors, and all Precepts, Procuratories, Aſſignations and Delegations.

XII. A Tacite Mandate, is that which is inferred by ſigns, and is not expreſſed by words; as he who is preſent and ſuffereth another to manage his affairs without contradiction gives thereby a tacite mandate [e]; for in this, *qui tacet conſentire videtur*.

* See *act* 35. *P.* 1693, quoted above, § 6. *h. t.*

[z] *L.* 3. § *ult.* *L.* 4. *ff. mand.* [a] § 8. *inſt. eod.* [b] *L.* 13. *L.* 21. *C. mand.* [c] *L.* 10. *ff. eod.* [d] *L.* 26. § 6. *ff. eod.* [e] *L.* 18. *L.* 53. *ff. mandati.*

detur. So he who whiſpereth his ſervant in the ear, if he immediately kill or wound any perſon preſent, is preſumed to *(have)* given command to the ſervant ſo to do, if there was capital enmity betwixt him and the perſon before. In like manner, the giving of evidents or writs, yea, which is more, the having of theſe, tho' the giving appear not, is preſumed to conſtitute procurators; as is evident in the having a precept of ſaſine, which is ſufficient, without any other power given to the bailie or atturny. And advocates are preſumed to have warrant from parties for whom they compear, without producing any mandate; not only upon production of the parties evidents, or ſpecial alledgeances in point of fact (which if wanting, the compearance of procurators in inferior courts, is held as without warrant, and the decreet as in abſence) but even without theſe, if advocates do no more but appear, and take a day to produce parties to give their oaths. A wife having her huſband's bond in her hand, impignorating it for an hundred pounds *Scots*, the impignoration was found valid againſt the huſband, the wife's warrant being preſumed by her having the bond, *Feb.* 4. 1665, *Paterſon*. And a ſervant's taking off furniture for his maſter, and giving receipt in name of his maſter, and for his uſe, found not to oblige the ſervant to pay, or inſtruct his warrant, which was preſumed to be known to the merchant, unleſs the ſervant had otherwiſe employed the furniſhing, *Nov.* 17. 1665, *Howiſon* *. And a warrant was inferred, by the preſence of him who had *power to prevent cutting the defender's woods, and was by his commiſſion bound to do diligence, yet* hindered not, *Feb.* 23. 1667, *Rentoun*. And a warrant of a factor or agent, for charging and denouncing a daughter and her huſband upon a bond granted to her mother, was preſumed from having the bond, *Dec.* 23. 1673, *Dalmahoy*.

XIII. Mandates given to more perſons, may be either to each or *to* ſome of them ſeverally, by divers warrants, or to more by the ſame warrant, whereupon theſe queſtions ariſe; *Firſt*, When there are many mandatars jointly, whether they muſt all neceſſarily join before they can act, ſo that if one die, the commiſſion is void? Or whether it be underſtood to the ſurvivers, or to the plurality of them? *Secondly*, Whether mandatars be *all* liable *in ſolidum*, or *only pro rata*.

As to the *firſt* queſtion, If many mandatars be conſtitute ſeverally, or with a *quorum* or plurality expreſſed, there is no *doubt*, but if otherwiſe, the caſe is very doubtful, and there be pregnant reaſons and teſtimonies upon both parts; but this ſeems to prevail as the general rule, that mandates jointly given, can only be jointly executed; *Firſt*, Becauſe *by* the nature *of* this contract the perſonal and ſingular fitneſs and induſtry of mandatars is choſen; and therefore this being a ſpecial truſt, when it is given to many, it is preſumed, that the conſtituent truſts them all jointly, and not a part of them. *Secondly*, A Mandate given to ten, cannot be regularly underſtood *as* given to any leſſer number; or being given to *Titius*, *Seius* and *Mævius*, that it is given to any two of them.

It may be objected, that where there are many executors or tutors, without mention *of* a *quorum*, the death of one makes not the nomination to ceaſe, *Hope*, *executors*, *Stuart*: Nor the death or non-acceptance of ſome of them [f], *ibid. Ruthven*; *ibid. Fauſide*; and therefore, this being the moſt important truſt, the like muſt hold in all other caſes. It is anſwered, that the parity holds not; for the deeds of defuncts in their latter wills are always extended, that the act may ſtand; but in contracts it is contrary, where words are interpreted more ſtrictly; and in this caſe, the difference is clear, that a mandate, *inter vivos*, giving power, it is ſtrictly to be interpreted; becauſe the power failing, returns from the mandatar to the mandant himſelf: but power given by a defunct in contemplation of death, cannot return; and therefore the defunct is preſumed to prefer all the perſons nominate, to any other that may fall by courſe of law [g].

But

* This example is not ſimilar to the others, in all which the mandant would be bound *ex præſumpto mandato*; but here the maſter was not bound by the ſervant's deed, tho' the merchant was found to have no action againſt the ſervant, as being preſumed to have known his warrant.

[f] *L.* 11. § 4. *ff. De teſtament. tut.* See above I. 6. 14. [g] See above I. 6. 36.

But this rule, as it is founded upon the ſingularity of the choice, it faileth, and muſt be limited, where that ground ceaſeth, and is preponderated; as *firſt*, if the deed to be done, be common and ordinary, there, not only the plurality, but any of the mandatars will ſuffice; ſo any of more curators may authorize a minor. *Secondly*, If the thing *to* be done, be to the advantage of the conſtituent, and hath not a conſiderable hazard, or power to infer his diſadvantage; as if a commiſſion be *given* to many, of things which admit no delay, it may be done by any part of the mandatars, and they will have *actionem mandati*, and not *negotiorum geſtorum* only. So ambaſſadors ſent to ſolemnize a marriage, or receive a crown, tho' ſome of them ſhould die, or diſ-aſſent, unqueſtionably the plurality might proceed. But it would not be ſo in a treaty for marriage or peace; much leſs for ſurrendering a kingdom, city, or fort; and therefore it cannot always be thought, that a plurality is underſtood, tho' not expreſſed. *Thirdly*, In caſes neceſſary, where matters may *not* be delayed, plurality is always underſtood, as in commiſſioners for ordinary juriſdictions. *Fourthly*, Where the conſuetude of the place, or of the mandant himſelf, *is* to allow a plurality, there it is underſtood, tho' not expreſſed.

XIV. As to the other queſtion [g], where more mandatars are conſtitute ſeverally, they are no doubt liable *in ſolidum*, becauſe they are conſtitute *in ſolidum*: but when they are conſtitute jointly, or added, the doubt remains. For the affirmative is, *Firſt*, The authority of the civil law [gg]. *Secondly*, Albeit the obligation of many, for payment of a quantity, make them liable but *pro rata*, yet where it is a fact, they are liable *in ſolidum*. And ſo tutors and curators are liable ſeverally *in ſolidum*; (but executors are not, becauſe their duty is to pay *ſecundum vires inventarii*;) and therefore *in rigore juris*, mandatars being malverſant, or groſsly negligent, are liable *in ſolidum*, if they may act ſeverally, eſpecially in acts indiviſible [h].

XV. General mandates do occaſion the moſt debates in this contract; for there is much more clearneſs where the mandate is ſpecial; which uſeth to be diſtinguiſhed; in determinate, when both matter and manner are ſpecial; and indeterminate when the matter is ſpecial, but the manner is not ſpecified; in the former the preciſe tenor of the commiſſion muſt be followed; and yet if any part thereof be, or become unprofitable, and evidently and conſiderably hurtful, the mandatar in the *former* caſe may ſafely, and in the *latter* caſe muſt neceſſarily do what is beſt, *ſecundum arbitrium boni viri*, and muſt do the like in all indeterminate mandates. But the great queſtion is, How far general mandates may be extended; and in what caſes they are not effectual, but there is neceſſarily required ſpecial mandates; wherein we muſt diſtinguiſh betwixt mandates which refer to the pleaſure, choice, or option of the mandatar, as if it have a clauſe *cum libera aut plena adminiſtratione*, or the like; or where that is wanting.

The doctors enumerate multitudes of caſes, whereunto general mandates are not to be extended.

Firſt, In the contracting of marriage no general mandate, albeit *cum libera*, *&c.* is ſufficient, becauſe the affection and choice of the perſon is ſingular, and incommunicable. And albeit *Abraham*'s commiſſion to *Eleazar*, "to take a wife "for his ſon of his kindred," was valid, tho' not ſpecial as to the perſon; yet this caſe was ſingular, there being ſo few families that worſhipped the true God to chuſe upon. *More* recent cuſtoms require *it* to be ſpecial, even as to the perſon, as well as the family. *Secondly*, No general mandate, tho' *cum libera*, can be extended to any thing that may import a fault or crime. *Thirdly*, No general mandate can reach to Donations, or mere liberality, and yet doth not hinder gratifications for ſervices done, or upon the expectation that the receiver may probably be induced thereby to do matters of importance; as the gifts of ambaſſadors, or generals, are not only valid as to the receivers, but as to the mandants,

[g] Below I. 16. 6. [gg] *L.* 60. § 2. *ff. mand.* [h] See below, I. 17. 20.

dants, if there were probable reaſon. *Fourthly*, General mandates extend not to alienation of immoveables; *for* that muſt be ſpecially expreſſed. *Fifthly*, General mandates extend not to ſubmiſſions or tranſactions, nor to inſiſt in any action criminal or famous, or to annul that which is ſpecially done by the conſtituent, or to diſpoſe of that which was ſpecially reſerved before, either by law or deed, as *regalia*, or things peculiarly reſerved to Princes. *Sixthly*, A ſpecial mandate is required, to enter any party heir to his predeceſſor. The civil law numbered *additionem hæreditatis inter actus legitimos*, and ſo excluded even a ſpecial mandate therein; but our cuſtoms allow the ſame: and becauſe heirs are liable *in ſolidum* to all their predeceſſors debts, therefore a ſpecial mandate is neceſſary. *Seventhly*, Where in general mandates ſome things are ſpecially expreſſed, the generality is not extended to caſes of greater importance than theſe *which are* expreſſed.

XVI. Amongſt mandates are all offices, which do ever imply a condition reſolutive upon committing faults; but not ſuch as are light faults, or of negligence, but they muſt be atrocious, *and* at leaſt of knowledge and importance; upon this ground it was, that the town of *Edinburgh* having depoſed their town-clerk from his office which he had *ad vitam*, the ſentence was ſuſtained, the fault *being* found *to have been* of the clerk's knowledge, and of importance, and *that* it was not enough that no hurt followed, and that he was willing to make it up, *Feb.* 14. 1665, town of *Edinburgh*. But the office of a commiſſary-clerk was not found extinct by his being at the horn for a debt, or being ſometimes out of the country; having power of deputation, *Feb.* 6. 1666, Archbiſhop of *Glaſgow*. The office of a commiſſary doth alſo import, as a neceſſary condition, that the commiſſary be qualified to diſcharge the office in his own perſon, tho' he have deputes, ſeeing he muſt anſwer for, and over-rule his deputes, *Feb.* 14. 1666, Archbiſhop of *Glaſgow*. Where it was alſo found, that by the commiſſary's inſtructions they muſt reſide in the place of the commiſſariot under the pain of deprivation, notwithſtanding the common cuſtom in the contrary; which only excuſed from bygone faults.

Mandatars in the *civil* law could not oblige the mandant, or directly acquire to him; but they could only oblige themſelves, and acquire to themſelves, and thereafter tranſmit to the mandants; and that becauſe in moſt contracts the perſon-contracter behoved immediately to act, and no perſon interpoſed; which our cuſtom regardeth not, and therefore mandatars may act in their own names, in which caſe the right whether real or perſonal, ſtandeth in their perſon; as he who by commiſſion acquired lands or goods in his own name, the real right thereof is in his perſon, and there lies an obligation upon him, if he was commiſſionate, to tranſmit them to his conſtituent. But he may alſo acquire, tranſact or contract *immediately* in name of his conſtituent, in which caſe the real right ſtands immediately in the perſon of the mandant, and the obligation conſtitutes him creditor, and there is no obligation betwixt the mandatar and the third party; nor is the mandatar obliged to inſtruct that he had commiſſion, but that is upon his hazard who acted with him, unleſs the contrary be proved by his oath or writ; and therefore a ſervant, tho' by a ticket he acknowledged *that* he had taken off ſuch furniture for his maſter's uſe, was not found obliged to pay or to inſtruct his warrant, eſpecially after his maſter's death; but the warrant was preſumed as known to the merchant, *November* 17. 1665, *Howiſon*.

XVII. Truſt is alſo amongſt mandates or commiſſions, tho' it may be referred to depoſitation, ſeeing the right is in cuſtody of the perſon intruſted [i]. Truſt in the right of lands, ſums or goods, to the behoof of another, doth frequently occur; and becauſe fraud is ordinarily in it, it is not only probable by writ or oath of the truſtee, but ſometimes witneſſes are examined *ex officio*, to find out the truth, *Feb.* 22. 1665, Viſc. *Kingstoun*; *Feb.* 6. 1669, *Rule*; *Feb.* 24. 1669, E. of *Annandale*;

[i] See below IV. 45. 22. I. 13. 7.

Annandale; *June* 19. 1669, *Scot.* Yea truſt has been found probable by preſumptions only, *Jan.* 12. 1666, executors of *Stevenſon*, *Jan.* 22. 1673, *Watſon.* But it was not found proved by a declaration upon death-bed, in prejudice of the heir, *Nov.* 26. 1674, *Paton* *.

A perſon intruſted in a diſpoſition of lands, having compounded for the intruſter's debts, was found to have no intereſt to burden the intruſter with more than what he truly paid out, *Nov.* 15. 1667, *Maxwel.* Neither was a perſon intruſted for payment of the intruſter's creditors, found to have power to prefer them to the more timeous diligence of others, by inhibition or appriſing, tho' only done againſt the intruſter, *July* 24. 1669, *Crawfurd.* And a perſon receiving money to buy goods for another, but having bought and received them in his own name, without mention of the truſter, the property thereof was found to be in the perſon intruſted, and his creditors arreſting were preferred, *Jan.* 24. 1672, *Boylſtoun.* Yet truſt in ſums, or perſonal rights, after the death of the perſon intruſted, was found not neceſſary to be confirmed, as *in bonis defuncti* of the intruſted perſon, but that the truſt might be proved againſt the debtor, and the neareſt of kin of the perſon intruſted, *June* 9. 1669, *Street* **. But truſt in an infeftment of annualrent, found not to make the perſon intruſted liable for omiſſion, but only for intromiſſion, *Dec.* 18. 1666, *Caſs.* The like in an aſſignation in truſt, which was not found to infer an obligement to do diligence, if the aſſigny was not required either to do diligence, or denude; but he having transferred without warrant, was found liable for the ſum, albeit he offered to procure a retroceſſion, *July* 18. 1672, *Watſon.* And an aſſigny in truſt, that the ſum might be included in his appriſing, giving backbond to be comptable in caſe of payment, having diſponed the appriſing without reſervation, was found liable for ſo much of the ſum intruſted as might have been recovered, *Jan.* 5. 1675, E. of *Northeſk.*

Truſt was inferred by a grandfather's delivering a diſpoſition, conceived in favour of his grandchild; the diſponer at the delivery not having expreſſed the terms of the truſt, or his deſign, and having recalled and received back the diſpoſition, and diſponed the half of the lands therein to another; it was thence found, that the diſpoſition was not abſolute and irrevocable, but was intruſted *to* that third party, to be recalled if the diſponer pleaſed; or otherwiſe to be delivered to the oye, *Jan.* 25. 1677, *Ker* [k]. When truſt is referred to a party's oath, whether ſuch a right ſtanding in their perſon be in truſt to the behoof of another, they uſe commonly to depone, that it is to their own behoof; which being found dubious and fallacious, what the meaning of ſuch words were, ſpecial interrogators are allowed to expiſcate the truth, and parties uſe to be re-examined thereupon; as whether the deponent's meaning by theſe words, that the right was to his own behoof, and not to another's, was only, that he gave no promiſe or backbond, to apply the right or benefit thereof, in whole or in part, to another: or whether the true meaning of the deſign was, that the other put him upon acquiring that right, as being a gift of non-entry of lands bought by that other, ſo that the whole benefit ſhould not be applied to the acquirer himſelf; for it was not preſumable that he would put another upon taking the gift of non-entry of the lands he himſelf had bought, to be made uſe of to the full extent; which being ſo acknowledged, the gift was found ſo far to the behoof of the buyer, that the ſeller *of the lands* by the warrandice ſhould pay no more for the non-entry, than the acquirer of the non-entry gave truly for it, ſeeing the buyer *of the land* had communed with the ſuperior, and brought the non-entry to the ſame

* By *act* 25. *P.* 1696. it is declared, "That no action of declarator of truſt ſhall be ſuſtained, as to any deed of truſt made for hereafter, except upon a declaration or backbond of truſt lawfully ſubſcribed by the perſon alledged to be the truſtee; or, unleſs the ſame be referred to the oath of party *ſimpliciter*."

** See upon this ſubject, *L.* 68. *ff. de procurat. L.* 18. § *ult. ff. de dam. infect. L.* 5. *ff. de præt. ſtip. L.* 13. 25. *ff. de act. empti. March* 15. 1707. *Hay contra Hay.*

[k] See below, I. 13. 4.

ſame rate, and then put his couſin-german to acquire it, *Feb.* 2. 1681, Mr. *Balmerino*. Upon the ſame ground a donatar of a liferent eſcheat being examined, whether it was to the behoof of his good-brother, having deponed, that it was to his own behoof, and dying before he was re-examined, his oath was interpreted only, that he had given no backbond, or promiſe in favour of his good-brother; and therefore by pregnant preſumptions the truſt was inferred, as that the brother only was concerned in that liferent; that he managed it, and was at all the expences of the proceſs; that the donatar's ſucceſſors never owned it, nor confirmed the benefit of the gift, *Feb.* 11. 1679, *Forbes* of *Balvenie*.

XVIII. The *civil* law for utility of commerce did, againſt the common rules foreſaid, conſtitute an obligation upon exercitors, by the deed or contract of maſters of ſhips. An exercitor is he to whom the profit of veſſels or ſhips, whether upon the ſea, rivers, or lakes, belongs; whether he be owner of the ſhip, or have only hired the ſame. The maſter of the ſhip is he that hath the command thereof, who therefore may contract and borrow money for reparation of the ſhip, or out-rigging thereof, or for the entertainment *or wages* of the mariners, or any other thing for the uſe of the voyage. And thereby not only the maſter-contracter, but the exercitor who conſtitutes him, is liable. Yea, if the maſter ſubſtitute another maſter, his engagement alſo obliges the exercitor [kk]; ſo that whoſoever contracts with him who for the time officiates as maſter, obliges the exercitor in what was borrowed for the uſe of the ſhip, company or voyage. And there ſeems no neceſſity of ſhowing a commiſſion, but the exerciſing of the office is ſufficient; and thereby the ſhip and out-rigging is hypothecated and affected *. Yea, if there be many exercitors, they are all liable *in ſolidum* [kkk]; and if there be many maſters, the contract of one of them obliges the exercitors, *unleſs it be expreſsly provided, that they ſhall only contract jointly, which muſt appear by their commiſſion* [l]. Neither needs he who contracts with the maſter, inſtruct that the money borrowed was actually employed for the uſe of the ſhip, company or voyage; but this much he muſt make appear, that when he lent the money, there was ſuch need of it; albeit he be not obliged to take notice whether the maſter miſimployed it or not: becauſe the exercitor ſhould have looked whom he truſted [ll]. If the maſter be conſtitute with power to buy ware, and load the ſhip, the exercitor is liable to theſe who contract with him upon that account: but this is not preſumed upon acting as maſter, unleſs his commiſſion appear; and ſo the maſter's extraneous contracts oblige not the exercitors, albeit their faults do by the edict *nautæ, caupones, ſtabularii*; all which is clear from the title, *ff. de exercitoria actione per totum*, and is generally in vigour with us, *in* all admiralities, who are proper judges of theſe matters, in the firſt inſtance [m].

XIX. After the ſimilitude of the exercitory action, the prætor by the perpetual edict, did introduce the inſtitory action, in which *by* the contracts of inſtitors in relation to that wherein they were intruſted, their prepoſitors are obliged; and as exercitors are as to maritime matters, ſo prepoſitors are correſpondent in traffick at land; and inſtitors are thoſe who are intruſted in ſuch affairs, correſponding to the maſters of ſhips; which inſtitors are intruſted with keeping of ſhops, buying or ſelling of ware, keeping of caſh for exchange, ſuch as are ſent abroad to buy ware, and thoſe who are intruſted with the labouring a field, or *with* any other like buſineſs. And it is alike of whatſoever ſex or age they be, tho' even they be pupils who cannot oblige themſelves or minors, who have the benefit of reſtitution, yet both do effectually oblige their prepoſitors: and if there be more prepoſitors, they are liable *in ſolidum*. But ſuch obligations reach no further than *for* what is contracted for the uſe of *that* affair wherein they are intruſted

* The Hypothec only takes place for the ſecurity of the ſum actually expended upon repairing the ſhip, *November* 11. 1711. *Watſon*, but the exercitor is liable for the whole ſum lent.

[kk] *L.* 1. § 5. *ff de exercit. act.* [kkk] *L.* 1. § *ult. eod.* [l] *L.* 1. § 13. 14. *eod.* [ll] *L.* 1. § 7. 8, 9. *L. ult. pr. eod.* [m] See below, I. 13. 3. See alſo *December* 12. 1707. *Coltran.*

truſted. Neither are the prepoſitors obliged, if they have intimated to the party-contracter not to contract with their inſtitors. But if they contract *bona fide*, albeit the inſtitor be limited and prohibited to contract, in ſuch caſes, the creditors contracting *bona fide* with them, are ſecure. All which appears, *tit. De inſtit. actione, ff. per totum.* But our cuſtom hath not ſo fully owned the *Roman* law as to inſtitors, as it has *as* to exercitors.

TITLE XIII.

Cuſtody, or *Depoſitum.* Pledge, or *Pignus.*

I. *The nature of cuſtody, or* depoſitum.
II. *The diligence of depoſitars.*
III. Nautæ, caupones, ſtabularii.
IV. *Depoſitation of writs.*
V. *Sequeſtration.*
VI. *Conſignation.*
VII. *Truſt.*
VIII. *Depoſitation admits no compenſation.*
IX. *But admits retention for expences.*
—Depoſitum tumultus vel naufragii cauſa.
X. *Joint depoſitars, how far liable.*
XI. *The nature of pledge, or* pignus.
XII. *Specialities in pledges.*
XIII. *How pledges may become irredeemable.*
XIV. *Clauſes irritant,* vel legis commiſſoriæ *in pledges.*
XV. *Hypothecation of the crop, or goods for the rent.*
XIV. *Hypothecation of the teinds, for the teind-duty or ſtipend.*

CUSTODY is called in the law *depoſitum* or *commendatum*, to which we have no ſuitable term in our law, but this contract is moſt fitly expreſſed by the duty and obligation thereof, which is "to keep *and* preſerve that which is given in "cuſtody," and it is here ſubjoined to mandate, becauſe indeed it is a kind of it. For the lawyers do not ſo much notice the accuracy of logical diviſions, whereby no member can comprehend another, as the *uſual* terms known in law; and therefore they handle *mandatum, depoſitum & pignus*, ſeverally, tho' all of them be truly mandates, and therefore *depoſitum* alſo may be fitly defined, to be "a mandate or "commiſſion, given and undertaken, to keep and preſerve ſomething belonging "to the mandator, or ſome third party;" and therefore, whatever hath been before ſaid of mandates, muſt be here underſtood of cuſtody, and needs not be repeated, except what is ſpecial in cuſtody.

II. The civil law makes a difference in the diligence of mandatars, and depoſitars; that theſe are liable only for fraud, whereof alone the Prætor's edict makes mention [m], whereby the depoſitar, tho' he loſe the thing depoſitate, without fraud is free, but it *is* extended to *lata culpa*, or the groſſeſt fault, *quæ dolo æquiparatur in jure* [n], where the diligence oppoſite to *the* groſſeſt faults is excellently deſcribed, by ſuch diligence as men ordinarily do, or the depoſitar doth, in his own affairs. But mandatars are liable for the lighteſt fault, yet, as is ſhown before, that is by the conſtitution of the civil law, and not by the nature of the mandate; for ſurely the reaſon and ground of the diligence of both is alike, as being gratuitous, and at the free choice of the conſtituent, who therefore ſhould demand no more in either caſe, but ſuch diligence as the perſon intruſted uſes, or men ordinarily *uſe*, in their own affairs; unleſs it be otherwiſe agreed, or that the depoſitar hath procured the cuſtody when others offered [o]; or that he have any honorary or ſalary therefore; which may be conſiſtent here, *as* in other mandates, when in the meaning of the parties, it is not an equivalent ſatisfaction to the benefit received, which is not *ordinarily* eſteemable; as the ſalaries of phyſicians for the preſervation of health, or life, *or* curing any member; or of judges or lawyers for the doing or procuring of juſtice, *which ſalaries are not accounted an equivalent, as in permutative contracts*; and therefore are called Honoraries, and

[m] *L.* 1. § 1. *L.* 20. *ff. depoſiti. L.* 23. *De Reg. jur.* [n] *L.* 32. *ff. depoſiti.* [o] *L.* 1. § 35. *eod.*

the contract is eſteemed notwithſtanding free: Or as in depoſitations made in caſe of naufrage, fire, tumult, or falling of houſes, where the poſitive law giveth the double in caſe of denial of the thing depoſite, in commiſeration of theſe caſes for the public good [p]; but theſe caſes muſt be evident, and the only cauſes of the contract [q].

Hence it followeth, that depoſitars are not liable for light faults, or *for* the periſhing or deterioration of the thing depoſitate by caſuality or accident; yet it may be queſtioned, if the depoſitar delay, and do not re-deliver, whether in that caſe he is liable to make *it* good, tho' *it* periſh. The ſame queſtion is alſo in mandates, and the law is for the affirmative, in this and all other caſes, unleſs the thing after the delay would have the ſame way periſhed, if it had been reſtored, *L.* 5. *ff. De rebus creditis*, *L.* 12. § 3. *ff. depoſiti*; *where the peril is ſaid to be the depoſitar's, if the thing periſh not being delivered after ſentence or judgement*; the reaſon whereof is rendered by the Doctors; becauſe if the thing had been reſtored, the owner might have ſold it, and ſo tho' it had periſhed, he had been no loſer. Yet this is partly penal, and the adequate ground of it muſt be by the obligation of reparation of the damage ſuſtained by that delinquence, in not reſtoring the thing depoſitate to its owner when required; and therefore it is to be meaſured according to the true intereſt; and tho' poſſibly the owner might have ſold it before it had periſhed, yet unleſs there had been a known occaſion, or offer to have bought or purchaſed it, at the time of the remaining of it after delay, equity would not conclude the making up of what had ſo periſhed. In this we are not bounded with any poſitive law or cuſtom, and therefore equity in it with us may take place; and we are not ſevere in the diligence of mandatars, as appears from the former paragraph; neither yet in Cuſtody; and therefore a perſon having received money in keeping, and *having oft declared to the owner when it was demanded back*, that it was ſent with his own to *Dundee* for ſafety, and that the owner might have it there, for the ſending for; and thereafter, *Dundee* being taken and plundered, he was liberate, giving his oath, that the money he got in keeping was loſt there, *July* 19. 1662, *Fiddes*. And a horſe being put in the park of *Holyroodhouſe* for grazing, tho' he was loſt, the keeper was found free; becauſe there was a placad on the entry of the park, that the horſes to be put there *were* upon their maſter's peril, tho' this horſe was delivered to a ſervant, who ſaid nothing of the placad, *Nov.* 16. 1667, *Whitehead*.

III. In the civil law there is a depoſitation of a ſpecial nature, introduced by the edict, *nautæ caupones ſtabularii*, "quod cujuſque ſalvum fore receperint, niſi "reſtituant, in eos judicium dabo [r]." By this edict, poſitive law for utility's ſake, hath appointed, that the cuſtody of the goods of paſſengers in ſhips, or ſtrangers in inns, or in ſtables, ſhall be far extended beyond the nature of depoſitation, which obliges for fraud *only*, or ſupine negligence, *in* them who have expreſsly contracted for their own fact. But this edict, for public utility's ſake, extends it: *Firſt*, To the reſtitution of the goods of paſſengers and *travellers*, and reparation of any loſs or injury done by the mariners *or ſervants of the ſhip*, or *by the* ſervants of the inn or ſtable [s]. Whereas by the common law, before that edict, in this and other ſuch caſes, there *was* no ſuch obligement; much leſs are perſons now obliged for their hired ſervants fact or fault, except facts wherein they are ſpecially intruſted by them; but becauſe the theft and loſs of goods is very ordinary in ſhips, inns and ſtables, therefore this edict was introduced for the ſecurity of travellers [t]. *Secondly*, The edict extends this obligement, even to the damage ſuſtained by *the fact of* other paſſengers or ſtrangers in the ſhip, inn or ſtable, for the which, the maſter of the ſhip, inn-keeper, or keeper of the ſtable, could be no ways obliged, but by virtue of this edict [u]. *Thirdly*, They were made

[p] *L.* 1. § 1. *ff. depoſiti.* [q] *L.* 1. § 3. *eod.* [r] *L.* 1. *ff. nautæ, caup. ſtab.* See above I. 12. 18. *fin.* [s] *L.* 1. § 8. *eod.* [t] *L.* 1. § 1. *eod.* [u] *L.* 1. *fin. L.* 2. *L.* 3. *pr. eod.*

made liable for the loſs or theft of ſuch things abſolutely, from which they were free by no diligence, but were not liable for accident or force [w]; that is, ſea-hazard muſt always be excepted.

By *nautæ* in this edict are underſtood, not the mariners, but the exercitors or owners of the ſhip, to whom the profit belongs, and ſo *of* the maſter of the inn or ſtable, and by the *edict* they are only liable for that, *quod ſalvum fore receperint*, which they received in cuſtody either by themſelves, or ſuch others as they intruſted, to admit paſſengers or *travellers*, their goods and horſes [x], whether the ſame be ware, cloaths, clog-bags *or* other furniſhing for paſſengers or *travellers*, or the furniture of horſes in ſtables [y], or what other things are brought in: and by the common law, albeit the things brought in were neither known or ſhown to the maſter of the ſhip, inn, or ſtable, they are liable for reſtitution [z]. And if any thing be wanting, the party loſer hath *juramentum in litem*, and is not obliged to ſhow what is in his clog-bag, pockets, *&c.* [zz]. The reaſon of all which is rendered [a]; becauſe it is in the maſter of the ſhip's option, to receive ſuch perſons or not; and conſequently, if he doubt of their truſt, in caſe they *ſhould* alledge any thing wanting, he may refuſe them acceſs, unleſs they ſhow what they have, *and* otherwiſe he is preſumed to truſt their oath, without which this benefit would be uſeleſs: but *L. L. naval. Rhod.* [b] ordains the money to be depoſitate with the ſkipper, otherwiſe he is not liable; and the owner has no more but the ſkipper, ſea-men, and paſſengers oaths for his money. They are alſo by this edict, not only liable for what is received and entered into the ſhip or inn, *or ſtable*; but alſo, if it be expreſsly received for that end elſe-where, as on the ſhore, by thoſe having power, and be loſt before it be entered in the ſhip [c], Neither are theſe perſons liberate, by bidding each man look to his own goods, *and ſaying they will not be anſwerable*; unleſs the paſſengers conſent [d]. But their ſilence will not import their conſent, when they are entered and in their paſſage; yet if it ſhould be ſo expreſſed before or at their entry, when it is free to them to enter or not, ſuch ſilence would ſufficiently infer conſent. Neither are they free, tho' the paſſenger take the key of the chamber or cheſt himſelf, which is but *propter majorem ſecuritatem*, and not to liberate *them of* their obligement, eſpecially ſeeing they may have other keys, which the paſſengers cannot know.

This excellent edict being but Poſitive Law, it will be effectual with us only in ſo far as the common cuſtoms of nations have owned it, eſpecially in maritime matters, betwixt us and other nations, or in ſo far as our own cuſtom hath received it *at* home; but the evident expediency thereof cannot but make it acceptable any where, where the leaſt reſpect is had to the civil law; ſo a chapman depoſitating his pack with a creditor, *who opened it and made uſe of the ware*, had his oath *in litem*, as to the particulars therein contained, reſerving the Lords modification, *Jan.* 3. 1667, *contra Brand.* And lately an inn-keeper in Edinburgh was found liable for a cloak brought into his tavern, without neceſſity of proving either that it was delivered to the maſter or his ſervants, or that they ſtole the cloak, *Feb.* 17. 1687, Maſter of *Forbes*, *Fountainhall**. So a ſkipper was found liable for the damage of ware, by the ſpouting of the pump, altho' the ſhip was tight at the looſing, and that the owner of the ware was on board, and had put the ware near the pump, that it might not be eaſily found out by capers, ſeeing there was no extraordinary accident by ſtreſs of weather, *Nov.* 7. 1677, *Lowrie*. The like was found in the damage of ware by the ſea-water, tho' the ſhip was repaired in the port, and the damage was befallen by a leck, ſtruck up in that ſame road, after the reparation, ſeeing there was no extraordinary ſtreſs of

* This deciſion is alſo obſerved by Sir *Patrick Home*, *Jan.* 1687.

[w] *L.* 3. § 1. *fin. eod.* [x] *L.* 1. § 2. *ff. naut. caup. ſtab.* [y] *L.* 1. § 6. *eod.* [z] *L.* 1. § 8. *eod.* [zz] *Gloſſ. ibid.* [a] *L.* 1. § 1. *eod.* [b] § 14. & 15. [c] *L.* 3. *ff. naut. caup. ſtab.* [d] *L.* 7. *eod.*

of weather, or other accident that could not be prevented, *July* 24. 1680, *Lawmont* *.

IV. Depoſitation of writs falls moſt frequently in queſtion with us, by which the depoſitar is truſted with the keeping of the writs and the delivery thereof, according to the terms of depoſitation, expreſs, or preſumed; the terms preſumed are, that the depoſitar ſhould give back the writ to the deponent, if he require it, and if not, to the perſon in whoſe favour it bears to be granted, as was found in the caſe *Jan.* 25. 1677, *Ker* [dc], where the caſe was a diſpoſition of a tenement, by a grandfather to his oye, merely gratuitous, given to a third party, without expreſſing any terms of depoſitation. But if the terms be expreſſed, they are to be faithfully obſerved by the depoſitar, who is truſted, and which are always probable by his oath, if they be not in writ, ſigned by the deponent; in which caſe, the oath of the depoſitar cannot be received againſt the deponent's writ, or even beſides the ſame; and therefore a depoſitar's oath was not found receivable, to prove that the deponent paſſed from the writ depoſitate, and ordained it to be cancelled, *Feb.* 24. 1675, *Cowan*. *If the writ be in his hands to whom it is granted, the depoſitation thereof is regularly probable only by his oath*, *Had. Jan.* 17. 1611, *Home*; penult. *June* 1625, *Crawfurd*; *Feb.* 22. 1627, *Williamſon*: *and ſo it is not then probable by the alledged depoſitar's oath, ſeeing the writ is in the creditors hands, as is clear in the ſaid laſt caſe*; *and* delivery is preſumed, unleſs the contrary be proved by the writ or oath of him in whoſe favour the writ is conceived, unleſs it be in the hand of him who granted it, *June* 8. 1676, *Irvine*. *Neither doth it infer depoſitation, that the writ was in a third party's hand, who is alledged depoſitar*; *neither by the alledged depoſitar's own oath, the writ being mutual as a minute of contract*, penult. *June* 1625, *Crawfurd*. *But where the writ being mutual was not produced out of the party's hand, but the depoſitar's, the oath of the depoſitar was admitted as to the terms of the depoſitation, July* 5. 1662, *Drummond*: *and in ſingular caſes, where there are adminicles in writ as to the depoſitation, witneſſes inſert will be examined* ex officio, *or the alledged depoſitar's oath will be taken, and the perſon's oath who was alledged unwarrantably to have given up the writ, Dec.* 22. 1627, *Dickſon*. *In like manner*, ex officio *the depoſitar and witneſſes oaths were taken, for clearing the depoſitation, Nov.* 25. 1631, *Douglaſs*; *and in both theſe caſes, the ſame probation was admitted, for clearing the terms of the depoſitation. But when the queſtion is not betwixt debtor and creditor, but betwixt the debtor and a third party, to whom he had only depoſitate it, for recovering of it, and proving that it was depoſitate by the creditor, witneſſes are examined and admitted as in other exhibitions, Had. Jan.* 17. 1611, *Home*; *Feb.* 14. 1629, *Farquhar*. *The depoſitation being acknowledged or proved, the terms whereupon it was made are not only probable by the creditor's oath, but by the depoſitar's, whoſe faith be followed, Jan.* 22. 1624, *Learmont*; *March* 5. 1624, *Hay*; *but not by the witneſſes inſert, as is clear by the laſt caſe* [dd]. If the haver alledge, that tho' the writ be in the name of a third party, yet he made uſe of his name to his own behoof, he muſt inſtruct it by the oath of that third party, or other evidences.

V. Under cuſtody is contained Sequeſtration, whether of conſent whereby anything litigious or contraverted is intruſted in the hand of a third party, till the rights and poſſeſſions of the pretenders be cleared, or by authority of a judge, which is a part of judicial proceſs, of which hereafter [e].

VI. Conſignation is alſo a kind of Cuſtody, whereby the conſigner depoſitates in the conſignatar's hands, the ſum or thing which is refuſed by the creditor, to the creditor's behoof, wherein the conſignatar is but the interpoſed perſon, either by conſent, as it is frequently provided by clauſes of conſignation, or by law; and

* Exercitors found liable *pro rata* only, for the ſkipper's fault, *Gosford, July* 20. 1669, *Learmont*, as in *L.* 1. § 5. *ff. naut. caup. ſtab.*—But found liable *in ſolidum*, *June* 14. 1672, *Sutherland*; *Dec.* 11. 1672, *Carnagie*. The purſuer was not, however, in this laſt caſe, allowed *juramentum in litem* for proving the damage.

[dc] See above I. 12. 17. 3. [dd] MSS *D.* & *G.* [e] See below IV. 41. 7. & IV. 50. 27.

and the contract of cuſtody ſtandeth betwixt the creditor and the conſignatar, by which he is obliged to keep, and reſtore to the creditor; and thereby the debtor orderly conſigning is liberated, and is not obliged to uplift ſums conſigned from the conſignatar, and make them forthcoming to the creditor, *July* 28. 1665, *Scot*, unleſs the conſignation be ſimulate, *and* taken up again by the conſigner. And where the law condeſcends on conſignatars, the conſigner is liberate, and not liable for the conſignatar's ſufficiency, or faithfulneſs; as where conſignations are to be legally in the hands of the clerk of the bills, *Feb.* 15. 1673, *Mowat:* yet if the conſignation hath not been orderly, but by the fault of the conſigner, if the public conſignatar prove inſolvent, the peril is the conſigner's. In conventional *conſignations*, where the choice of the conſignatar is in the conſigner, the conſignation is upon the peril of the conſigner, if the conſignatar *prove* inſolvent; which uſes ordinarily to be expreſſed, but tho' it were not, it is implied. *In other caſes the conſigner is abſolutely liberated, but a charge is granted ſummarily againſt the conſignatar, to exhibite the money, Dec.* 7. 1631, *Grierſon*; *but here the inſtrument of conſignation proves not againſt the conſignatar, but his own oath, tho' it proves againſt the creditor refuſing, and ſo inſtructeth the redemption, Jan.* 14. 1630, *Laurie* [ee].

VII. Truſt is alſo a kind of depoſitation, whereby the thing intruſted is in the cuſtody of the perſon intruſted, to the behoof of the intruſter, and the property of the thing intruſted, be it land or moveables, is in the perſon of the intruſted, elſe it is not proper truſt; ſo if it be tranſmitted to ſingular ſucceſſors, acquiring *bona fide*, they are ſecure, and the truſtee is only liable perſonally upon the truſt; but ſuch truſts being of importance, albeit writ uſeth not to be adhibited in them, they are not ordinarily proved but by writ, or oath of party, yet witneſſes *were* uſed *ex officio*, and the truſt of an aſſignation found proved thereby, *Feb.* 22. 1665, Viſcount *Kingſtoun*. And a bond's being in truſt to another party's behoof, was found proved by preſumptions, *Jan.* 12. 1666, *Executors of Stevenſon* [f]. The reaſon of uſing witneſſes in truſt, is, becauſe writ is ſeldom uſed therein; for if writ be granted by backbond or declaration, it is not properly truſt; but *(only)* where the thing intruſted is alienated, yet ſo as the *truſtee* believes that the *diſponer* deſigns not donation, or alienation, but truſts that on demand, the perſon truſted will denude himſelf.

VIII. This is ſingular in the law of depoſitation, that there is no exception of compenſation competent againſt it [ff], which *Donellus* and moſt interpreters account to be introduced only by *Juſtinian*, and was not ſo before, *neither* by the nature of this contract, nor by equity. But the contrary appeareth, becauſe the very intent and nature of this contract is, that the thing depoſitate muſt be keeped and reſtored whenſoever demanded, yea, tho' it had a term, yet unleſs there were a ſalary, or ſome intereſt in the keeper, it may be demanded whenſoever; becauſe the term is in favour of the deponent, not of the depoſitar, whom it bindeth during that time, and ſo it may be renounced by the deponent at any time, *nam cuique licet juri pro ſe introducto renunciare*; and therefore it is the nature of this contract, that the thing depoſitate ſhould be reſtored upon demand, and his accepting thereof ſo, is a tacite quiting of any objection in the contrary. But the convincing reaſon is, that compenſation is only in things of the ſame nature and liquid; but in depoſitation, the dominion and poſſeſſion of the thing remaineth in the deponent, tho' it be numerate money *and not* obſigned, and to meddle with it is unwarrantable, and accounted in law theft, as being *contractatio rei alienæ*; and therefore, that being a thing cannot be compenſed with *mutuum*, where the property and dominion is in the borrower, and but a perſonal obligation to repay, which cannot be compenſed with a body, the property whereof is not alienated. The like thereof holdeth in money found, or any other way in the detainer's hands, without right to the property of it.

IX. The queſtion is alſo moved here, Whether the thing depoſitate may be detained for the neceſſary and profitable expences wared upon it. Tho' law and moſt in-

[ee] See below I. 18. 4. [f] See above I. 12. 17. [ff] *L. penult. C depoſiti.* See below I. 18. 6. 3.

terpreters favour the negative, upon the ſame ground that compenſation is excluded; yet the affirmative is to be preferred, becauſe as the contrary action is competent for the melioration, ſo much more the exception, it being a part of the ſame contract [g]; and therefore the Lord *Balmerinoch*, having by his own miſſive and backbond, acknowledged that the eſtate of *Jedburgh* was diſponed to him in truſt, to the behoof of Earl *Somerſet*, all the expence on the land, or for *Somerſet* in contemplation of the truſt, was found competent againſt Earl *Bedford*, who had adjudged *Somerſet*'s right, *Feb.* 18. 1662, *inter eoſdem*, where retention was only ſuſtained, if *Balmerinoch* found caution for the ſuperplus. And in all caſes in the law where action is competent, exception is alſo competent *, and ſo with us, if inſtantly verified.

Amongſt the *Romans* there was an edict of the Prætor, *in depoſito*, to this effect, that the depoſitars ſhould be obliged to reſtore or make up the ſingle value; but in things depoſitate thro' the preſent occaſion of tumult, fire, falling of houſes, or ſhipwrack, in the caſe of not due reſtitution, theſe perſons were liable for the double [gg], wherein there is much utility to ſecure perſons depoſitating of neceſſity in theſe deplorable caſes; but as yet it hath not been allowed by our cuſtom.

X. It may be queſtioned, if any thing be depoſitate to more depoſitars, whether they are liable *in ſolidum*; ſo that the deponent may crave reſtitution, or reparation from every one *of them*, for the whole value, or for his ſhare only? The civil law is clear for the affirmative, that all are liable *in ſolidum* [h], and upon good reaſon; becauſe it is fidelity in preſerving one individual *thing* that is undertaken, which therefore *de natura rei*, muſt oblige every perſon to the whole, ſeeing he is not obliged to reſtore a part of the thing depoſitate, but the thing itſelf; and this being conſequent to the nature of depoſitation, will no doubt be followed by us. *In depoſito*, by the *civil* law, the deponent hath *beneficium juramenti in litem*, or to prove the particulars, or quantities wanting, and their value *ſecundum pretium affectionis*, becauſe of the exuberance of truſt in this contract [hh], but not the depoſitar in the contrary action [i], where the reaſon is added, becauſe there is no breach of faith nor truſt there, but damage and reparation in queſtion: the depoſitar alſo detaining, being condemned, becomes infamous [k]. Hence it is from this truſt, that if a cheſt or other continent ſealed, be depoſitate, action is competent for all that was therein ſhown or not [l]; and therefore in ſuch caſes, the deponent's oath *in litem* muſt be taken, or elſe his intereſt periſheth, which is ſuitable to our cuſtom, as before mentioned in the caſe of innkeepers [m]. And there is good reaſon and equity *pro pretio affectionis* alſo, but I have not obſerved it queſtioned or decided. This being a contract of greateſt truſt, reſtitution is to be made *cum omni cauſa*, as fruits and birth, and annualrent *poſt moram* [n]; but annualrent with us is not due *ſine pacto*, but may be made *good* by the Lords their modification of damage and expences.

XI. Pledge either ſignifies the thing impignorated or the contract of impignoration, in the ſame way as pignus in the law is taken; and it is a kind of mandate, whereby the debtor for his creditor's ſecurity, gives him the pawn, or thing impignorated, to detain or keep it for his own ſecurity, or in caſe of not-payment of the debt, to ſell the pledge, and pay himſelf out of the price, and reſtore the reſt, or reſtore the pledge itſelf upon payment of the debt; all which is of the nature of a mandate, and it hath not only cuſtody in it, but *a* power to diſpone in the caſe of not-payment; but if the profit of the pledge be allotted for the profit of the debt, which is called ανθιχρησις, it is a mixt contract, having in it a mandate, and the exchange of the ufufruct, or uſe of the pledge for the uſe of the

* Retention was never allowed in the civil law with regard to a *depoſitum*, *L.* 11. *C. depoſiti*; nor as to a *commodatum*, *L. ult. C. commod* tho' *in commodato* it was allowed by the old law, *L.* 15. § *ult. L.* 59. *ff. de furtis.*

[g] See below I. 18. 6. 3. [gg] *L.* 1. *ff. depoſiti. L.* 1. § 43. *eod.* [h] See below I. 17. 20. [hh] *L.* 1. § 26. *eod.* [i] *L.* 5. *eod.* [k] *L.* 1. *de his qui inf. not.* [l] *L.* 1. § 41. *depoſiti.* [m] See above I. 13. 3. [n] *L.* 2. *C. depoſiti.*

the debt. Our cuſtom allows not the creditor to ſell the pledge, but he may poind it, or aſſign his debt, and cauſe arreſt it in his hand, and purſue to make forthcoming; but there being a real right of the pledge, no other diligence will affect it further, than as to the reverſion of it, on payment of the creditor's debt.

XII. This contract hath this ſpecial in it, that it is not merely to the behoof of the conſtituent, as ordinarily mandates are, but it is to the behoof of the hypothecar for his ſecurity; and ſo ends not with the death of either party, nor is revocable as other mandates, but paſſes to heirs and aſſignies; and therefore requires greater diligence than mandates, *viz.* ſuch diligence as prudent men uſe in their affairs, but obliges not for the lighteſt fault [o]. This is alſo ſingular in wadſets, or impignorations, that thereby there is conſtitute a real right in the pledge, which no deed or alienation of the conſtituent can alter or infringe, which is not ſo in mandates, or things depoſitate, nor in location, whereby there is only a perſonal right; and if the property of the thing be alienated from the conſtituent, the perſonal right hath no effect, as to the thing about which it is conſtitute *, but there is here a real right; of which hereafter amongſt other real rights [p].

XIII. We ſhall not inſiſt on the manner of the ſale of pledges preſcribed by the *Roman* law, and the intimations or denunciations requiſite to be made to the debtor, that being wholly changed by our cuſtoms; for in wadſets of lands the wadſetter hath a diſpoſition of the property, but with a reſervation or paction, to ſell back again to the debtor, upon payment of the debt; and ſo the wadſetter cannot by virtue of the impignoration, ſell the lands and pay himſelf, but all he can do is to affect the wadſet lands by legal diligence, as any other creditor; and if any other prevent him in diligence, they acquire the right of reverſion, and no poſterior diligence of his can take it away, or capacitate him to acquire the full property of the pledge, or to alienate it ſimply to another, *unleſs he ſatisfy the anterior creditor, and that the legal reverſion expire.* The like is in the impignoration of moveables, which cannot be thereby ſold, but the creditor may affect them by his legal diligence, by poinding thereof, as ſaid is.

XIV. In impignoration either of heritable or moveable rights, the *civil* law rejected *pactum legis commiſſoriae* [q], which we call a clauſe irritant, whereby it is provided, "That if the debt be not paid at ſuch a time, the reverſion ſhall be "void." Our cuſtom doth not reject ſuch clauſes, but on the contrary, by act of ſederunt [r], it is declared, "That the Lords would decide in all clauſes irritant, "whether in infeftments, bonds or tacks, according to the expreſs words and "meaning thereof preciſely;" yet *they are ſo far diſallowed, that tho' they bear to take effect ſummarily, without declarator, the clauſe irritant muſt be declared, and* the Lords allow ſuch clauſes to be purged by performance before ſentence, declaring the clauſe irritant committed, or will ſuperſede the extracting of the decreet for a time for that effect, as they ſee cauſe; ſo in ſuch a proceſs, tho' the irritancy was committed long before, yet by payment at the barr it was allowed to be purged, even tho' the party after the irritancy got poſſeſſion, *Hope*, clauſe irritant, *Edgar*; *yea, tho' the wadſetter had obtained a decreet of removing two years after the failzie, againſt which the reverſer was reponed, paying all damage and intereſt, July* 8. 1636. *Cleghorn.* And albeit the money was not ready to purge at the barr, ſo that the failzie was declared, yet it was ſo *declared* ſuperſeding extract for a time, that it might be purged in the mean time, *February* 7. 1628, *Pringle.* **. But where the requiſition was on nineſcore days, there was no time granted

* It is by expreſs ſtatute, and not from the nature of the right, that tacks are with us conſidered as real rights, 1449. *c.* 18.

** The Lords in this caſe, as Dury obſerves, "thought it reaſonable, that if the money, with the annualrent "due, was paid at the *Whitſunday*, the defender ſhould be aſſoilzied, and ſo ordained ſome perſons to deal with "the purſuer to conſent hereto, and the clerk to ſtop extracting."

[o] *L.* 23. *ff de reg. jur.* [p] See below II. 10. [q] *L.* 3. *C. de pact. pign.* [r] *Nov.* 27. 1592. See above I. 10. 7. *fin.* See below II. 10. 6, IV. 18. 3. 4.

granted after the decreet to purge, *July* 19. 1625, *Nairn*. Yet this clauſe is ſo odious, that *in the caſe of a wadſet with a back-tack, and clauſe irritant of the reverſion, if the back-tack duty ſhould be two years unpaid*, it was elided by the wadſetter's poſſeſſion of a part of the lands, and thereby getting a part of his annualrent, *March* 18. 1629, *Barclay*. The like by accepting of payment of annualrent after failzie, *Hope*, clauſe irritant, *Naſmith*. The like by payment of annualrent, or by compenſation therewith, *Barns*, *ibid*. And the reaſon of the law and our cuſtom is, becauſe impignoration is a permutative contract, wherein equality is meant and required; ſo clauſes irritant are redacted to equality, and reſpect is not had to the terms and expreſſions of the contract, but to the thing truly done; and therefore, tho' ſale with a reverſion be expreſſed, yet if there be not a competent equivalent price, and that it be not a real and proper ſale, but only a wadſet under that conception, the clauſe irritant hath no further effect than is before expreſſed; but if it be a true ſale and competent price, the clauſe irritant is not penal, but hath its full effect; whereas otherwiſe it is ſtill purgeable till declarator, which therefore is neceſſary, even tho' the clauſe irritant bear, that the reverſion ſhall be null without declarator, for the remedying of the exorbitancy of ſuch clauſes irritant, which muſt be a proceſs to declare the ſame, that the reverſer may purge at the barr, or loſe the reverſion [rr].

Impignoration is either expreſs by the explicite conſent of parties, or implicite, which is introduced by law, without conſent of parties; of which tacite hypothecations, there have been many in the civil law; as in the ware, for the price, in houſes for expences in preſervation or melioration, or for money lent for that uſe, to a wife in the goods of her huſband for her tocher, to pupils and minors in the goods of their tutors and curators for their duty and adminiſtration, to pupils in the goods of their mother being their tutrix, or in the goods of her ſecond huſband if ſhe did not make an accompt and procure a new tutor before her marriage, to legators in the goods of executors, to the fiſk for their tribute, or their contracts, to cities in the goods of their adminiſtrators. But our cuſtom hath taken away expreſs hypothecations, of all or part of the debtor's goods, without delivery, and of the tacite legal hypothecations hath only allowed a few, allowing ordinarily parties to be preferred according to the priority of their legal diligence, that commerce may be the more ſure, and every one may more eaſily know his condition with whom he contracts: and therefore goods ſold were not found under any hypothecation for the price, *June* 14. 1676, *Cuſhney*, *Nicolſon*, *quæ in fraud. cred. Paterſon*.

XV. Yet with us there remains the tacite hypothecation of the fruits on the ground in the firſt place, and they not ſatisfying *of the* other goods on the ground belonging to the poſſeſſor, for the terms *of* the year's rent when the crop was on the ground, but not for prior or paſt years [rs]; and therefore all maſters of the ground, or their aſſignies, having right to the mails and duties, have intereſt to recover the rents thereof from all intromitters with the fruits, rents, or profits thereof, tho' upon a title, unleſs their title be preferable, or at leaſt have the benefit of a poſſeſſory judgment. This was extended to intromitters, tho' they brought the corns which grew on the ground in publick market at *Yule*, albeit the heritor had *afterwards* pointed a part of the *ſame* crop, for the rent of a prior year, unleſs at the term of payment *Candlemas* there were ſufficient fruits on the ground to ſatisfy the rent, *March* 29. 1639, *Hay*, *Gosford*, *Jan.* 10. 1677, *Commiſſary of St. Andrews*. *Secondly*, It is extended to intromitters with the crop and goods of the ground, tho' lawfully pointed from the tenants for their juſt debts, unleſs they left as much upon the ground as might ſatisfy the rent, beſides the houſhold ſtuff, *July* 25. 1623, and *Feb.* 3. 1624, *Hays*. The like, where the preſent crop was not accompted, but left for the ſubſequent rent, of which the terms were not come, *June* 29. 1642, Lord *Polwart*. *Thirdly*, It is extended, that thereby the maſter of the ground may ſummarily ſtop pointing, unleſs ſufficient goods be left to pay the rent, beſides the pleniſhing of the houſe,

[rr] IV. 18. 3. *& ſeq.* II. 10. 6. [rs] See below IV. 25.

Feb. 3. 1624, *Hays*. *Fourthly*, This is extended againſt the donatar of the tenant's eſcheat, intromitting thereby, who was found liable, tho' no action was moved by the maſter of the ground for ſeven years in the foreſaid caſe, *Feb.* 3. 1624, *Hays*. The like is ſuſtained as to the goods of the poſſeſſors of houſes, tho' *invecta & illata* only, all intromitters therewith being liable for houſe-mails, *Nicolſon*, *location*, *Murray*; and the goods may be ſtopped from poinding for the poſſeſſor's debt, without deforcement, as being *invecta & illata*; but this extends only to one year, or two terms mail, *Dec.* 7. 1630, *Dick*. But the hypothecation of the fruits of the ground is greater than of the tenant's other goods; for the fruits are liable *in the firſt place, and all intromitters therewith are liable* according to the value thereof for the rents, tho' there remain other goods ſufficient to pay the rents on the ground, *if* there remain not ſufficient fruits to pay the ſame, *March ult.* 1624, *Dun*. This hypothecation of the fruits for the rent was extended to a town ſetting their cuſtoms, even againſt the ſub-tackſman, not bound to the town, who were preferred to the tackſman's creditors in a double poinding, *Jan.* 31. 1665, *Anderſon* and *Proven*. It was alſo extended to the ſetter of a fiſhing againſt the donatar of the tackſman's eſcheat, who was found liable to reſtore, *July* 4. 1667, *Cumming* of *Alter*. This hypothecation was found to give the maſter of the ground right, not only to detain, but to bring back the tenant's goods to the ground *de recenti*, *Dec*, 11. 1672, *Crichton:* but not *ex intervallo*, *Feb.* 9. 1676, *Park*. But this hypothecation was not extended *in favour of* an appriſer without diligence or poſſeſſion, *July* 29. 1675, Lord *Panmuir*.

XVI. The like hypothecation is competent to teind-maſters for their teinds [s], even tho' the heritor get *a* rent for the whole profit of the land, ſtock and teind jointly, who is thereby liable as intromitter; which was extended to miniſters for their benefices or ſtipends, whereby they may have acceſs to any intromitter with the teinds out of which the ſtipend is modified, not only for the intromitter's proportion of his lands, but *in ſolidum* for his whole teind, according to the value of his intromiſſion, *July* 6. 1625, *Morton*; which held, tho' the intromitter had a wadſet of ſtock and teind, whereby he had but his annualrent, *March* 21. 1633, *Keith*; and this was found not only in beneficed miniſters, but in ſtipendaries, who may either take them to the tenants, or *to* the maſters intromitting, *Spotiſ. kirkmen*, *Kirk*. The preference of relicts for implement of their contracts of marriage, out of their huſbands moveables, in their hands, to other creditors, is not any hypothecation, but a perſonal privilege, which by a late deciſion, *February* 17. 1688, *Keith*, hath not been ſuſtained, but according to their diligence [ss].

TITLE XIV.

Permutation and Sale, or Emption and Vendition.

I. *Exchange and ſale, wherein they agree and differ.*
II. *What things are liable to ſale, and of buying of pleas by the members of the college of juſtice—No hypothecation for the price.*
III. *The effect of earneſt.*
IV. *Reverſion of things ſold. Other pactions in ſale.*
V. *Clauſes irritant or reſolutive in ſale.*
VI. *Knowledge of acquirers of an anterior incomplete right, how effectual—Clauſes irritant frequent of late, and effectual againſt creditors.*
VII. *After ſale, before delivery, to whom the thing periſheth.*

PERMUTATION, or excambion and Sale, are ſo congeneous contracts, eſpecially in our cuſtoms, that the ſame work will explain both, by holding out in what they do agree, and in what they differ. Permutation or exchange, is a con-

[s] See below II. 8. 1. [ss] See above I. 4. 22.

tract whereby one thing is agreed to be given for another, which, if it be money, as it is current for goods or ware, (under which all things which can be bought *or ſold* are comprehended) then it *is* ſale, or emption and vendition. Sale hath been very antiently and generally diſtinguiſhed from all other permutations of one thing for another, which is called Barter, or excambion; the reaſon whereof is, that [by that mutual obligation of mankind to exchange, what they may ſpare from their own neceſſary uſe, with what others are willing to give in exchange thereof equivalent thereto, and uſeful to the receiver, which is comprehended under the general term of *commerce*, of which in the firſt title; therefore exchange may warrantably be urged and compelled, not only by civil authority between ſubjects of the ſame common-wealth, but alſo between inſubordinate common-wealths *] commerce and free trade is by the law of nations, and cannot be effectual or uſeful by barter only; therefore common tokens of exchange have been invented and allowed over all the civil nations of the world, as comprehending the value of every thing venal, and which were choſen of the moſt durable metals, and neareſt to the intrinſick value of things, ſuch as gold and ſilver: and leſt the currency of commerce might be retarded upon debates of the intrinſick value of theſe metals, they have always been ſtamped by publick authority, that they might be current amongſt the ſubjects of that common-wealth; and in compariſon with the coined money of different common-wealths, regard is had ſo far to the intrinſick value, that the weight and fineneſs of the ſeveral coins is known, and thereby the proportion of current money in the ſeveral common-wealths, and ſo is current in all places that admit other coins than their own: yea, in ſome civil common-wealths other tokens of exchange have been current as well as money, as for a long time tobacco in the *American* iſlands, and copper or tin in ſmaller payments in ſeveral countries amongſt themſelves.

The firſt impreſſions that were upon money were the ſhapes of cattle, and therefore money was thence called *pecunia*, and the firſt and moſt ordinary exchange or barter being of cattle, by this means a great advantage has accrued to mankind; for if men were obliged to exchange what exceeded their uſe, but for other things whereof they had uſe, it might be long ere that caſe occurred: but as the wiſe man ſaith, *Money anſwereth all things*. And becauſe gold and ſilver are durable metals, and continually raiſed out of the ground, by the abundance thereof, the extrinſick value is ſo lowed, that now the ounce of gold or ſilver is not the tenth part of the value that ſometimes it was of; and ſo money becomes bulkiſh and heavy, uneaſy to be tranſported, therefore bills of exchange do ſupply that inconveniency, of which *ſupra* [t].

Theſe contracts of permutation, or barter and ſale, agree in this, that both are perfected according to law and our cuſtom, by ſole conſent, naked pactions being now efficacious; and tho' neither of the things exchanged be delivered, the agreement is valid. But if there be any latent vitioſity, if it impede the uſe of the thing bought, the *Romans* gave *actionem redhibitoriam*, to reſtore and annul the bargain, or *quanti minoris*, for making up the buyer's intereſt; but if the ſeller was ignorant of the vitioſity, or inſufficiency, he is not liable to make it good, unleſs he affirm it to be free of that, or in general, of any other faults; but if he knew the vitioſity, he is liable, if it were not ſhown to the buyer, or of itſelf evident or known, in which caſe the ſeller is not obliged, if he do not expreſsly paction **; as if the ſeller commending his ware, ſay that a ſervant is beautiful

* What is contained within the parentheſis is indiſtinct. None of the MSS. nor the firſt edition, give any aſſiſtance here. The ſenſe would be complete tho' theſe lines were left out altogether. The author ſeems to have intended to introduce his account of the riſe of money by laying it down in the firſt place, that permutation or exchange, from the ſituation of human affairs, is a contract altogether requiſite to the being of ſociety; but that it cannot be carried on to any extent, eſpecially betwixt nation and nation, without ſome common token of exchange.

** The ſeller was ſubjected by the civil law *actioni redhibitoria vel quanti minoris*, if the thing ſold was inſufficient, whether he knew of it or not, *L.* 1. § 2. *ff de aedil. edict.* with this difference only, that if he knew he was further liable for damages, *L.* 1. *C. eod.*

[t] See above I. 11. 17.

beautiful, or a houſe well contrived, he is not liable to make it good; but if he ſay the ſervant is learned, or ſkilful in any art, he muſt make it good [u]. Our cuſtom alloweth the making up of latent inſufficiency, of which before [uu].

But theſe contracts differ, *Firſt*, In the materials, which in ſale muſt be money as ſuch, and as a liquid price, elſe if it be reſpected as a body or indefinite quantity, as uncoined or uncurrent money, or if it be bought by the weight, or intrinſick value, or if money of one country be exchanged with money of another country, having no common ſtandard, here is no ſale but exchange: neither is exchange of money ſale, becauſe it is not as a liquid quantity, as when ſo much *Engliſh* money is given for the *Florence* crown, or gilder, and the remitting thereof. The price muſt be alſo certain, or which may be aſcertained, as *what* ſuch a perſon gave, or as ſhall be had from others by the ſeller for the like goods, or as ſuch a perſon ſhall appoint, which if exorbitant, may be redacted *ad arbitrium boni viri*, which ſeems to conſiſt, even tho' the arbitriment be made the buyers, or the ſellers, to determine the price.

Secondly, Excambion and ſale differ mainly in this, that in ſale, delivery of the goods or things bought, with the obligation of warrandice in caſe of eviction, which is implied in ſale, tho' not expreſſed, is the implement of it on the ſeller's part, and even tho' the buyer know, and make it appear, that it were not the ſeller's, yet he could demand no more but delivery and warrandice; but contrariwiſe, the price muſt be made the ſeller's, and he may refuſe it if he can ſhew another's right, which can rarely occur, ſeeing money is a fungible, and cannot be diſtinguiſhed from other money.

But in excambion delivery muſt be made on either part, and the thing delivered muſt become thereby the receiver's, elſe if it appear to be another's, it may be refuſed before delivery, and if it be evicted thereafter, the contract becomes void, and the other party hath regreſs to what he gave in excambion, which followeth even ſingular ſucceſſors, tho' it be not ſo expreſſed, and tho' the ſingular ſucceſſion was by appriſing, and other legal diligence prior to the eviction, *Nov.* 25. 1623, *Melroſs*. And that without neceſſity to inſtruct, that he who craves regreſs had right when he changed, any further than by the narrative of the excambion, which was of an old date, in a charter from the King, bearing, theſe lands to have been diſponed in excambion for the defender's lands, and that the excamber and his heirs ſhould have regreſs, without mention of aſſignies, albeit the purſuer was aſſigny, *July* 14. 1629, *Wardeſs*; where it was alſo found, that no perſon needed to be cited, to obtain regreſs, but the preſent proprietor of the lands excambed, and the ſucceſſor of the contracter, and no intervenient authors, *July* 2. 1629, *inter eoſdem* [w].

II. Sale may conſiſt in all things which are not prohibited, ſuch as buying of pleas by members of the College of Juſtice, which is prohibited by act of Parliament [x], and which is underſtood of all perſons having employment about the Seſſion, as advocates, clerks, writers, *&c.* agents and their ſervants; wherein by pleas are not underſtood things wherein there may be controverſy, but wherein there is proceſs actually depending, called and not decerned, *July* 6. 1625, *Mowat*; *July* 30. 1635, *Richardſon*. But this prohibition doth not annul the right or hinder proceſs, but is a ground whereupon deprivation may follow by the act, as in the former caſe, *Had. June* 5. 1611, *Cunninghame* [xx].

Sale being perfected, and the thing delivered, the property thereof becomes the buyer's, if it was the ſeller's, and there is no dependence of it, till the price be paid or ſecured, as was in the civil law, neither hypothecation of it for the price, *Hope, de empto, Park*; *Nicolſon, quæ in fraud. credit. Paterſon.*

III. In

[u] *L.* 43. *ff de contr. emp.* c. 220. [uu] See above I. 10. 15. and I. 9. 10. 2. [w] See below, II. 3. 50. [x] *P.* 1594. [xx] See above I. 10. 8.

III. In ſale there may be earneſt interpoſed, or reverſion granted, or the commiſſory paction or clauſe irritant adjected, that if the price be not paid, the ſale ſhall be void; or the ſale may be conditional, if the price be paid by ſuch a day; or if any other offer not a better price in ſuch a time; or with condition not to ſell *again* without conſent; of which in order. As to the *Firſt*, Tho' giving of earneſt be very ordinary in bargains of ſale and others, yet it is no leſs dubious, what the nature and effect thereof is, ſome holding it to be, to the effect the bargain may be evident and certain; for tho' ſale be perfected by ſole conſent, yet it is not always evident to the parties and witneſſes, whether it be a communing or a contract: and therefore, to make it ſure to both, merchants, who may not hazard upon dubious interpretations, do give earneſt as an evidence of the bargain cloſed and perfected: but others think, that the effect and intent of earneſt is, that the giver of the earneſt may reſile from the bargain if he pleaſe to loſe his earneſt, and the taker may reſile if he return the earneſt with as much more. The civil law [y], and many interpreters, ſeem to favour this conſtruction: yet many texts in law adduced by *Weſenbecius*, *Faber* and others, are for the former opinion, and they do interprete the contrary places, not to be of ſale perfected, but of an antecedent promiſe or paction, to buy or ſell. It hath not oft occurred (ſo far as I have obſerved) to be decided with us, which of theſe opinions is to be followed, but the former ſeems preferable, becauſe ordinarily with us earneſt is ſo inconſiderable, that it cannot be thought to be the meaning of the parties to leave the bargain arbitrary, upon the loſing or doubling thereof. To this alſo ſuits the ſenſe that earneſt in the ſcripture *is taken in* for evidence and aſſurance, making the matter fixed and not arbitrary, which at leaſt evinceth, that the word hath been anciently ſo taken, whatever hath been the cuſtom and conſtitution of the *Romans*. Earneſt alſo is reckoned as a part of the price with us, and thereby it ſtands not *in nudis finibus contractus, nec eſt res integra*; ſo that neither party can reſile therefrom.

IV. Reverſion, or the paction of redemption, tho' ordinarily it is uſed in wadſets (which, *tho'* they be under the form of ſale, yet in reality they are not ſuch, there being no equivalent price) yet reverſion may be where there is a true ſale, and this paction is no real quality or condition of the ſale, however it be conceived, but only a perſonal obligement on the buyer, which therefore doth not affect the thing bought, nor a ſingular ſucceſſor. And tho' reverſion of lands and heritable rights, be made real and effectual againſt ſingular ſucceſſors, when it is engroſſed in the bargain or duly regiſtrate, yet that is not by the nature of the thing, but by ſtatute [yy], and takes no place in other caſes, as in reverſion of moveables, which are ſold under reverſion; but if moveables be impignorate, the reverſion is a part of the contract, and is effectual againſt ſingular ſucceſſors.

As to the other pactions adjected to ſale, ſometimes they are ſo conceived and meaned, that thereby the bargain is truly conditional and pendent, and ſo is not a perfect bargain, till the condition be exiſtent; neither doth the property of the thing ſold paſs thereby, tho' poſſeſſion follow, till it be performed; as if the bargain be conditional, only upon payment of the price at ſuch a time, till payment the property paſſeth not to the buyer. But there are many other adjections, which are expreſſed under the name of conditions and proviſions, which are not inherent as eſſential in the bargain, but extrinſick perſonal obligements, the exiſtence whereof doth not annul the ſale, or ſuſpend or annul the property in the buyer, at leaſt in his ſingular ſucceſſors; as hath been ſaid in reverſions, and is frequent in other caſes.

V. In ſale there uſes to be adhibite a clauſe irritant, or reſolutive clauſe, that if ſuch a condition were, or were not, in that caſe the bargain ſhould be null and void, as if it had never been made *nor* granted: whence ariſeth a very ſubtile debate, whether ſuch clauſes, whatſoever their tenor be, are effectual, and follow

[y] *L. 17. C. de fide inſtrum. pr. inſt. de emp. vend.* [yy] *P. 1469, c. 27.* See below II. 1. 42. II. 10. 3.

follow the thing to ſingular ſucceſſors, and do render the bargain and property acquired null in itſelf? Or whether ſuch be perſonal obligations only, which tho' they may annul the property or bargain, if it remain in the hands of the contracter, cannot reach it, if it be in the hands of a third party? This being the queſtion, for clearing thereof, it appeareth,

Firſt, That if ſuch conditions or reſolutive clauſes do ſtop the tranſmiſſion of property, and be ſo meant and expreſſed, then, as is ſaid before, the bargain is pendent, and the property not tranſmitted, and the ſeller remains the proprietar: but if by the contract and clauſe, the buyer become once the proprietar, and the condition is adjected, that he ſhall ceaſe to be proprietar in ſuch a caſe, this is but perſonal; for property or dominion paſſes not by conditions or proviſions, but by tradition, and other ways preſcribed in law; ſo that theſe conditions, however expreſſed, are only the foundation, upon which the property might paſs from the buyer, if the thing bought remained his, unleſs by law or ſtatute it be otherwiſe ordered; as in reverſions of lands, alienation of feudal rights, which become void and return if alienate, and not payment of the feu-duty, whereby the feu-right becomes void; but all theſe are by law and cuſtom, and not by private paction.

Secondly, The doubt remains if ſuch perſonal conditions with ſuch clauſes reſolutive be in the body of the bargain, whether it be effectual againſt ſingular ſucceſſors who cannot but know their author's rights? and therefore are *in dolo et mala fide*, if they acquire ſuch rights in prejudice of the conditions thereof, and ſo *ex dolo*, at leaſt ſuch clauſes will be effectual againſt ſingular ſucceſſors: but *firſt*, This hath no force where the acquiſition is not voluntary but neceſſary for ſatisfaction of debt, by appryſing and other legal diligence; in which ordinarily the acquirer doth not, neither is ſuppoſed to know his author's right. *Secondly*, If the bargain be ſo neceſſary that the purchaſer be a creditor, and hath no other probable way of payment; in which, tho' he ſee his author's right bearing ſuch clauſes, yet he acteth upon neceſſity, for his own ſatisfaction. *Thirdly*, Thoſe who acquire ſuch rights without neceſſity, and ſee therein ſuch conditions in themſelves perſonal, tho' having reſolutive clauſes, do not thereby know that the third party hath the right *jus in re*, but only *jus ad rem*; and therefore, if they acquire ſuch rights, the property is thereby tranſmitted. And tho' there may be *that* fraud in the acquirer, which raiſeth an obligation of reparation to the party damnified by that delinquence, yet that is but perſonal; and another party acquiring *bona fide* or neceſſarily, and not partaking of that fraud, is *in tuto*.

VI. *But for the matter of the fraud itſelf, tho', in equity, private knowledge may be ſufficient to infer reparation, yet, in many caſes, poſitive law, and our cuſtom, reſpects not private knowledge, but ſuch only as is by publick acts, which is ſpecially allowed in the law; and therefore he who knows another to have an imperfect right, doth yet validly acquire in prejudice thereof, as he who knows an aſſignation unintimated, and takes another, is preferred, June* 15. 1624, *Adamſon. Nor doth the private knowledge of an aſſignation ſupply intimation as to the debtor, March* 14. 1626, *Weſtraw*; *Had. Jan.* 10. 1611, *Graham: and he who knows another to have a diſpoſition of lands without public infeftment, if he acquire right, and be firſt publickly infeft, is preferred, Feb.* 24. 1636, *Oliphant. Neither is an executor obliged to call the debtor of a defunct having done no legal diligence, but may ſafely pay to other creditors doing diligence, tho' the executor had paid him a part of the debt, July* 16. 1629, *Telzifer. But legal knowledge*, by intimation, citation, or the like, inducing *malam fidem*, whereby any prior diſpoſition or aſſignation made to another party is certainly known, or at leaſt interruption made in acquiring by arreſtment or citation of the acquirer, ſuch rights acquired, not being of neceſſity to ſatisfy prior engagements, are reducible *ex capite fraudis*, and the acquirer is partaker of the fraud of his author, who thereby becomes a granter of double rights; but this will not hinder legal diligence to proceed and be completed and become effectual, tho' the uſer thereof did certainly know any inchoate or incomplete right of another. But it is more doubtful, and not yet clear by cuſtom, whether a voluntary right taken for

ſatisfaction of a prior debt, by him who certainly knew of a prior diſpoſition or aſſignation, tho' not perfected, would be reduced as fraudulent. So *a poſterior* right *relative* unto another right, without any invalidity thereof expreſſed, was found to infer an acknowledgment of it, *tho' the firſt was not intimated, ſo as to exclude the poſterior right*, *Feb.* 15. 1637, *Lawder*.

Of late the like conditions *or clauſes reſolutive*, have become very ordinary, that thereby property may become inalienable and as a perpetual uſufruct. Yet it ſeems ſuch are neither expedient for commerce nor conſiſtent with the nature of property, whoſe main effect is alienation or diſpoſal of the ſubſtance of the thing, as uſufruct is of the fruits; and therefore, it were ſafeſt upon ſuch clauſes to uſe inhibition; yet they may be effectual againſt lucrative alienations or donations in reſpect that by theſe clauſes, the parties are *at leaſt* perſonal creditors, and ſo alienations gratuitous, to their prejudice, may be annulled by the ſtatute 1621, *cap.* 18. But of late it hath been found, that a clauſe irritant being in a tailzie, and in the ſaſine, both of the firſt heir, and of the laſt, that it did annul the creditor's rights and appryſings, and the next who might have been heir of tailzie, had acceſs to the land without being heir to him, who incurred the clauſe irritant by his debt, *Feb.* 26. 1662, *Lord Stormont*. And now there is a ſpecial ſtatute regulating tailzies and clauſes irritant therein; of which hereafter [y].

VII. Sale being complete, the queſtion is, if the thing *ſold* ſhould periſh by accident before delivery, and not after delay, and without the fault of the ſeller, whether the hazard be the ſeller's or the buyer's? By the civil law the buyer hath the peril [z], and the peril is not the ſeller's, unleſs expreſsly he take the hazard, *altho'* the buyer buy *rem non obſignatam per averſionem* [a]; all which putteth both the peril and profits of the thing *ſold* upon the buyer, *ejus eſt periculum cujus eſt commodum*; and it is far more clear, that the acceſſions, fruits, and profits of things bought, are the buyer's, even before delivery; and by the ſame ground, the peril muſt be his alſo. The ſeller, after the ſale, is debtor for the delivery; and it is a general rule, that the debtor is never obliged for the hazard of accidents, when he is debtor for a certain body; but all agree, that if the ſale were of a fungible, as wine, oil, or grain, not conſidered as a particular body, as the wine in ſuch a cellar, or the grain in ſuch a houſe, but generally ſo much grain or wine, as a mere fungible, in that caſe the peril would be the ſeller's; becauſe the periſhing of any one particular could not be the buyer's, *ſeeing he bought no particular*. Beſide authority, the main reaſon on the contrary is, that every thing periſheth to its owner, and before tradition, the ſeller is proprietar of the thing ſold. *But that rule hath this exception, unleſs by the agreement of parties expreſsly or tacitely, it be otherwiſe provided; but by ſale it is implicitely agreed that the ſeller, tho' for the preſent he be proprietor, yet ſhall deliver, and ſo make the buyer proprietor; and ſo the ſeller becoming debtor, and the intention and tendency of the property being to the buyer, if the ſeller be not* in mora, *the caſe is as if the delivery were made and the property changed, as to the intention and meaning of the parties, which regulates contracts; but the ſeller muſt uſe ſuch diligence as prudent men adhibite in their affairs, otherwiſe he is liable for what is wanting thro' his fault, tho' not for what is loſt without his fault; and he is much more liable than thoſe, who have the cuſtody of that, whereof the property is actually in others, that if it be taken from him by force, and ſo not exiſtent, he is not freed as others are who are liable only for cuſtody, but he muſt recover and deliver what he ſold* *. I have not obſerved it debated or decided with us, if the thing ſold ſhould thereafter periſh, that yet the price is due; and if by common cuſtom, the ſeller had not forborn in that caſe, doubtleſs the buyer would not have paid willingly; which therefore ſeems to be our cuſtom, ſeeing none have obtained the price, who did not deliver, or offer the thing ſold, which is alſo the opinion of

* The ſeller, in the caſe here put, is only obliged, either to recover, by a proceſs in his own name, or *cedere actiones* to the buyer. *L.* 14 *ff. De furtis.*

[y] See below II 3. 58. [z] *L.* 3. § 6. *ff. De contr. emp. L.* 14. *ff. De furtis. L.* 1. *C. De per. et com. rei vend.* [a] *L.* 62. § 2. *ff. De contr. emp.*

of *Cujac* [b]; yet the peril of a houſe ſold, and thereafter burnt, was found to be the buyer's, tho' the diſpoſition bore an obligement to put the buyer in poſſeſſion, *but* the buyer *was infeft before the burning, and did afterwards* voluntarily take poſſeſſion, and re-builded the houſe, *Dec.* 13. 1667, *Hunter.* In ſale, abſolute warrandice is implied, which is not to be extended to moderate ſervitudes, as aquæducts and city-ſervitudes [c]; of which afterwards [d].

TITLE XV.

Location and Conduction, where, of Annualrent and Uſury.

I. *Location deſcribed, and compared with ſale.*
II. *Whether ſterility frees from the penſion.*
III. *The effect of vaſtation.*
IV. *Location is perſonal, and ceaſeth with the conſtituent's right.*
V. *The conductor's obligation.*
VI. *The locator's obligation.*
VII. *Uſury, or annualrent of money. Puniſhment of Uſury. Tacks of wadſet-land after redemption.*
VIII. *Annualrent due by law, without Paction. Annualrent upon annualrent when due. What things fall under location.*

LOCATION and Conduction is a contract, whereby hire is given for the fruits, uſe, or work of perſons or things. This contract keepeth a great proportion with ſale; for as no ſale can be without a price, ſo no location without an hire, and as the price muſt be certain, either being expreſsly named, or indirectly *as* being the price that ſuch another *perſon named*, gave for the like, or that ſuch a perſon ſhould think reaſonable, both which become certain, if the price given by that other party appear, or if that third perſon modify the price, otherwiſe the ſale is void, *or* pendent, and imperfect, till that be performed; ſo in location, the hire muſt be the ſame way aſcertained; for if the price be but made *ex poſt facto*, it is no proper location; as he who gives his cloth to be dyed, and promiſeth to agree for the cloth, as the dye ſhall be in fineneſs, this is no location, but an innominate contract [e].

But it is controverted, whether ſale and location do alſo agree in this, that as the price muſt be in current money, ſo *muſt* alſo the hire. This queſtion was of much moment in the *Roman* law, becauſe location was a nominate contract, perfected by ſole conſent; but other contracts innominate were but naked pactions, till the thing agreed upon was interpoſed; and therefore it is there accurately debated, ſome holding, that money only can make the hire in a proper location, and ſome that any other liquid quantity or fungible is ſufficient, as oil, grain, *&c.* But with us, all agreements being effectual by ſole conſent, we need not much debate; and therefore, ſeeing all the effects and conditions competent, where the hire is money, are alſo competent where it is any other fungible, we agree with that opinion, that ſuch are proper locations.

Sale and Location differ mainly in this, that the intent and effect of ſale, is to alienate the ſubſtance of the thing bought, and ſtate the property thereof in the buyer; but in location, the ordinary intent thereof is, that the ſubſtance and property of the thing is not alienate, but remains in the ſetter, and the taker hath only the fruits and work thereof, which muſt not be already done, and extant, but that which is to be done, *et in ſpe*; as for inſtance, a bargain for the fruits of a field, which are already grown, is no location, but ſale, and ſo of uſe or work already performed; and therefore, in the nature of this contract, there is an hazard and uncertainty in the conductor, of the quantity or value of the fruits, uſe or work, the peril and profits whereof is the conductor's.

II. But

[b] *Ad L.* 33 *ff. Locati. De locat. conduct. L.* 25. *pr. eod.* [c] *L.* 66. *ff. De contr. emp.* [d] See below II. 3. 46. 10. [e] *Pr. et* § 1. *inſt.*

II. But here ariſeth the queſtion, that in the caſe of the ſterility of the ground ſet, or the abſolute ceaſing of the uſe, fruits or work, whether the hire be due or not? The determination whereof will clear the exception of the former rule, concerning the peril and quantity of the uſe, fruits and work locate; and therefore, *Firſt*, where the uſe, fruits and work, doth altogether ceaſe, without the fault of the conductor, there the hire muſt alſo ceaſe, becauſe the one is given as the cauſe of the other, and the peril undertaken is not of the being, but of the quantity and value thereof: for inſtance, if land taken be inundate or ſanded, and ſo have no fruit, it is the common opinion of all, that the hire or cane ceaſeth to be due for that time: or if a horſe, or a ſervant hired die, the hire or fee is but due according to the time of their life; but if they be ſick or unprofitable for a time, yet with hope of recovery and profit, in that caſe there is no abatement.

Secondly, Tho' the opinion of the learned be very diverſe, in the matter of the barrenneſs of the ground, ſome accounting it if the half of the ordinary increaſe fail, ſome if the third, and ſome leaving it to the common eſtimation of the place what is called *barrenneſs*, or to the arbitriment of the judge; yet I think it more rational to determine that caſe with the reſt, upon the former ground, that if there be any profit of the fruit above the expences, or work, the rent or hire ſhould be due [f].

III. The like is in vaſtation by publick calamity, which hath been frequently decided upon occaſion of the late vaſtations. But this will not extend to private accidents befalling the crop after the growing or reaping, even tho' by accident it ſhould be deſtroyed or burnt without the *tenant's* fault, the hazard being his own, becauſe it is not then reſpected as the fruit, but as a body in being, whereof he hath the property and peril: but in publick calamities by war, not only the crop is taken away, but the tenants are diſabled, and hindered to labour, and therefore muſt have abatement [g]. But the plenty of a former year doth not compenſe the ſterility of a latter [h]; neither is there any abatement, where the hire is a proportion of the fruits [i]; yea, it is more agreeable to the nature of this contract, that no reſpect ſhould be had to any prior or poſterior year, becauſe there are as many locations as there are years.

IV. Seeing the intent and effect of location is not to alienate the property of the thing locate, it followeth, that this contract is merely perſonal, and thereby there is no real right in the thing whoſe uſe fruits or work are locate; ſo that if the property of the thing be alienated from the locator, the intereſt of the conductor ceaſeth, and a ſingular ſucceſſor may recover it from the conductor notwithſtanding the location, which reacheth it only by the perſonal contract, as it did belong to the ſetter [ii]; and ſo it would be in our tacks or rentals by their own nature: but it is otherwiſe provided by a ſpecial ſtatute, of which hereafter [k]. Likewiſe we ſhall ſpeak nothing here of feu-farms, which tho' they are locations, yet by the law they become real rights, leaving theſe to their own place [l].

V. From this contract the conductor's obligation is to pay the hire, and after the end of *the* location to reſtore the thing locate, making up all damages; in which the conductor is liable even for light faults, and muſt uſe ſuch diligence as prudent men uſe in their affairs, but is not liable for caſual or accidental periſhing of the thing locate. Some hold him liable *alſo* for the moſt exact diligence and lighteſt fault; but others with better reaſon are for the contrary, it being the common rule in diligence, that in that which is only to the behoof of the keeper he ſhould uſe moſt exact diligence, and is liable for the lighteſt fault, as it is in loan; and theſe who have the cuſtody only for another, are liable but for the groſſeſt fault which is equivalent to fraud; and for ſuch diligence as is commonly accuſtomed by every man; but thoſe who have the cuſtody partly for themſelves and partly for others, are in the middle way obliged for ſuch diligence

[f] *L.* 15. *ff. locati per totam.* [g] *L.* 15. § 4. *ff. eod.* [h] *L.* 8. *C. de locato.* [i] *L.* 25. § 6. *ff. eod.* [ii] *L.* 9. *C. eod.* [k] See below II. 9. 2. [l] See below II. 3. 34. *et ſeq.*

ligence as themſelves, or prudent men uſe in their affairs, *for light faults but not for the lighteſt* [ll].

VI. The obligation on the part of the locator, is to deliver the thing locate, and to continue it during the time of the location, and to refound to the conductor his neceſſary expences employed upon the thing hired, unleſs the cuſtom of the place be otherwiſe; and ſo the reparation and upholding of houſes ſet *in prædiis urbanis* lieth upon the ſetter, if it be not otherwiſe agreed; but in lands or *prædiis ruſticis*, the tenant is obliged to keep the land and houſes in as good condition as he got them, and may not deſtroy moſſes nor rive out meadows, and is liable for the damage tho' there be no ſuch proviſion in his tack, *Feb.* 6. 1633, *Haddo* [m]; *but he hath no* reparation for any building or policy which he maketh, which is accounted as being freely done without expectation of recompence, if it be not otherwiſe agreed, or that the rent be raiſed thereby.

VII. Next, as to ſuch contracts, whereby money, or any fungible is lent for the like in kind again, with ſuch a hire for the uſe thereof. Theſe are called *uſurary contracts*, and they cannot be comprehended under loan, becauſe they are not gratuitous, or under location, becauſe the property and ſubſtance is alienate. Uſurary contracts come neareſt to location; but to repreſs the exorbitance of uſurers, the civil law rejected uſurary contracts, and admitted only of the profit of fungibles in ſome caſes. The judicial law alſo rejected *uſury*, and prohibited *it* to be uſed among the *Jews*, tho' they might uſe it with other nations. So doth the canon law diſapprove it, and moſt nations, where that law is in vigour; yet we, and generally other Proteſtant nations, do allow of the profit *and hire* of money, or other fungibles, being within the proportion allowed in law, which ſometimes was ten for each hundred, till the year 1633, thereafter eight, and now ſix ſince the *act 7th Auguſt* 1649, *c.* 29. And therefore uſurary-contracts with us, are only ſuch, wherein there is unlawful, or exorbitant profits beyond the law. The civil law allowed *uſuras centeſimas*, *viz.* one of a hundred monthly; and their *uſuras beſſes*, *ſemiſſes* and *dodrantes*, in their ſeveral caſes. We have only one meaſure *allowed* for all. *Fænus Nauticum* is where ſo much is given, not only for the profit of the money, but for the hazard and peril of the ware bought thereby, or of other fungibles by ſea; and ſo it is a mixed contract, and in both caſes profit *or* annualrent is lawful, as having no moral countermand, and ſo being free is not only ſubject to our pactions and promiſes, which we are morally obliged to obſerve, but hath alſo in it permutative juſtice, in that money, wine, oil, grain, or the like, have a real uſe profitable to men, by the exchange thereof and increaſe that may accrue thereby, and for which proportionable hire may be lawfully and profitably conſtitute. Theſe uſurary-contracts therefore are to be reduced, not to loan but to location, tho' by accident they have that difference from the reſt, that the property is alienate; becauſe there can be *little* uſe of money or fungibles otherwiſe. There are three kinds of uſurary-contracts, legal, pactional and penal; legal are theſe wherein annualrent is due by law without conſent or fault; pactional are theſe wherein annualrent is promiſed; penal are theſe which are by the modification of judges, as the damage of parties: but in foreign bills of exchange annualrent is now allowed, without paction [mn].

The penalty of exorbitant uſury with us was, that the debtor of ſuch uſury revealing the ſame, ſhould be freed of the contract, and if he did not any other revealing it ſhould have right to the ſum given out upon uſury, and profit thereof [n]; but afterwards [o] all *who take* more annualrent than ten *per cent.* directly or indirectly, as by taking of victual within the ordinary prices, or buying victual for the annualrent with exorbitant prices, in caſe of not-delivery, or by improper wadſets, having greater back-tack duties than effeiring to ten *per cent.* or otherwiſe,

[ll] See above I. 11. 9. [m] See below II. 9. 31. [mn] *P.* 1681. *c.* 20. *P.* 1696. *c.* 36. See above I. 11. 7. 8. [n] *P.* 1594. *c.* 226. [o] *P.* 1597. *c.* 251. *P.* 1621. *c.* 28.

wiſe, do confiſcate their moveables, and the ſums ſo given out; which the party cannot renounce, but the King's Advocate hath intereſt to purſue therefor, without the party's concurrence; and if he concur, he ſhall have reſtitution of what more annual he paid nor ten *per cent.* *. But the annual was retrenched to eight *per cent.* [p], and *afterwards* to ſix *per cent.* [q]. But whether proper wadſets without back-tack, tho' the rent be much more than the ordinary annualrent, be an uſurary contract, and falls under the general clauſe of the ſaid act, tho' it hath ſometimes been eſſayed, yet it hath not been decided. The main reaſon that the parties found on is, on the one part, that there is indirectly more than the ordinary annualrent, and ſo falls under the act 1597. And, on the other part, that improper wadſets are there expreſſed, and proper wadſets ſeem *ex propoſito* omitted; likeas in proper wadſets all hazard lies upon the wadſetter, of ſetting the land, of dead, poor, and waſte. But we ſhall leave this to every man's private judgment, till public judgment caſt the balance; only all proper wadſets before 1661, are reſtricted to the annualrent by the act of Parliament [r]. And if upon offer of ſecurity, the wadſetter will not quit poſſeſſion, he is countable from the offer, as hath been often decided ſince that act.

There uſes alſo in wadſets and reverſions, to be included a condition to ſet the wadſet lands for ſuch a time, to begin after redemption, which if it be far within the true worth is uſury, and is declared ſo, *Parl.* 1449, *cap.* 19. [s] "That *wadſet* lands provided to be ſet *after redemption* for tack, not near the true worth, "the ſame ſhall not be kept." Yet ſuch a tack was ſuſtained, ſeeing the wadſetter, *during* 36 *years of the wadſet*, had not his full annualrent, by reaſon of a liferent reſerved in the wadſet, and the wadſetter was the conſtituent's brother, and ſo it was like to be his portion natural whereof the tack was a part, *Jan.* 21. 1662, *Polwart*; but in other caſes, ſuch a tack was found null by the ſaid act, but not by the act betwixt debtor and creditor, *Feb.* 15. 1666, *Ley*.

VIII. This much for uſury or annualrent by contract or paction. It is alſo due by the law, and by the obligation of recompenſe and reparation; and in the civil law, in all contracts *bona fide*, it is due *ex mora*, by the delay of the debtor, which is underſtood after he ſhall be required for the ſame, or that the term is paſt, *nam dies interpellat pro homine* [ss], and in other contracts by litiſconteſtation [t]: but our cuſtom hath little uſe of that diſtinction, neither followeth that rule, but, 1*mo*, Where annualrent is not agreed upon, ordinarily it is not due till horning be uſed againſt the debtor, and that by a ſpecial ſtatute of Parliament [u]. Yea, tho' the horning was not regiſtrate, and ſo null as to eſcheat, it was found valid as to the annualrent, *Feb.* 11. 1673, *Smith* **. But it was found not competent by way of ſpecial charge in the ſuſpenſion of the principal debt, but by ordinary action, *July* 2. 1629, *Purveyance*, where *Dury*'s opinion is, that if the charger had raiſed horning upon the act of Parliament, it would have been ſuſtained ſummarily, and is now ordinarily ſuſtained ſummarily by a ſpecial charge, when the ſum is charged for or ſuſpended; but it being once due, it not only continues during the life of the perſon denounced, but ſtill thereafter till payment, *July* 8. 1642, *Huntly*. 2*do*, Annualrent provided by a bond for one year, tho' it expreſs not for all years thereafter, yet continues due till payment, *Dec.* 2. 1628, *Zair*. The like where one term was only in the bond, *Spotiſ. uſury*, *Keith*; and where annualrent was promiſed for time bygone, by a letter, it was found ſtill due till payment, *Jan.* 13. 1669, *Home*. 3*tio*, It is due by uſe of payment only, without expreſs paction, *March* 4. 1628, *Forreſter*; *Nov.* 17. 1671, *Hepburn*. 4*to*, Annualrent is ordained to be due to cautioners by their principals, for ſums paid by them as cautioners

* By act 12. *Ann. c.* 16. all uſurious contracts, *&c.* are declared null, and whoever takes uſury by any method or contrivance, forfeits triple the ſum lent, one half of which to the King, the other to thoſe who ſue.

** The denunciation muſt be at the market-croſs of the juriſdiction where the party dwells. Denunciation at the croſs of *Edinburgh*, tho' ſufficient for caption, does not intitle to annualrent, *Jan.* 26. 1665, *Hutchiſon*; *July* 17. 1711, *Gordon*.

[p] *P.* 1633. *c.* 21. [q] *P.* 1649, *c.* 29. revived, *P.* 1661, *c.* 49. [r] *P.* 1661. *c.* 62. [s] See below II. 10. 10. [ss] See above I. 3. 7. below I. 17. 15. [t] *L.* 2. *L.* 15. *ff. De uſuris*. [u] *P.* 1621, *c.* 20.

cautioners by the clauſe of relief, as being damage and intereſt, tho' the bond bear no annualrent, by ſtatute of ſeſſion, *Dec.* 21. 1590*; *Dec.* 4. 1629, *Cockpool*, where the clauſe of relief bore only to relieve the cautioner of his cautionry, and not of all damage. The like tho' there was no further diſtreſs againſt the cautioner, but regiſtration, *Jan.* 24. 1627, *Waughton*; and this was extended to co-principals, having a clauſe of mutual relief of coſt, ſkaith, *&c.* *Nov.* 15. 1627, *Black.* 5*to*, Annualrent is due without paction, by tutors and curators to their pupils, of which formerly [w]. 6*to*, Annualrent was found due without paction, by an heir-male for the portion of the heir-female, tho' not required for many years, and that ſtill from the term of payment, *Had. July* 5. 1610, *Colquhoun.* The like by a huſband, who was *found* obliged to his wife for the annualrent of the tocher payable by the father, tho' the tocher was never paid, *Hope, huſband and wife, Burd.* 7*mo*, Annualrent was found due for the price of lands poſſeſſed by the buyer, without paction, *Hope, uſury, Stirling*; *Spotiſ. uſury, Home.* The like tho' the delay of payment was not the debtor's fault, *Nov.* 14. 1628, *Cuming*; *Feb.* 17. 1624, *Durie.* Annualrent *was* not ſuſtained without paction, for a ſum lent to an old man, on condition, that if he died without heirs, the creditor ſhould become the debtor's heir, and yet he having heirs, annualrent was not found due, *Dec.* 11. 1662, *Logie.* But the Lords do ſometimes allow annualrent, or an equivalent expenſe among merchants. *Annualrent was alſo found due without paction for money expended, according to the cuſtom of Bourdeaux, Dec.* 8. 1677, *Aperon.* And they did ſo determine in a proviſion by a father to his natural daughter, payable at her marriage, which was found ſo favourable not to *haſten* her to marry, that the annualrent was allowed her, ſeeing the condition was in her power, *June* 25. 1664, *Inglis.* The *Romans* allowed annualrent till it equalled the principal, but no further [x]: but our cuſtom hath no ſuch reſtriction. Yet we reſtrict the *Engliſh* double bonds to the ſingle ſums and annualrent thereof, but no further than till it be equivalent to the principal; ſeeing by the tenor of ſuch bonds, it appears to be the meaning of the parties, that no more ſhould be demanded in any caſe, *Jan.* 2. 1679, *Frazer* and *Burnet.*

Annual upon annual is condemned by all when it is comprehended in the firſt paction, but it is ordinary with us by poſterior contracts to accumulate annualrents and make it a principal, and ſo both that which was firſt principal, and that which was once annual, bears annual, which the *Romans* did not allow [y]; ſo alſo annual by virtue of the act of Parliament, if decreet follow thereupon and horning, it will bear annual, ſeeing there is no limitation; but this will not be extended to annuals in time coming, after the horning *(till a new decreet and horning be obtained).* And *laſtly*, Annualrent paid by a cautioner, by the ſaid ſtatute of ſeſſion, will bear annualrent, becauſe to him it is a principal.

But to return to location: All things may fall under location that can have any uſe, fruit or work, but real ſervitudes cannot be ſet ſeverally, but only as acceſſories to the thing which they ſerve. Works which can be locate, 1*mo*, Muſt be lawful. 2*do*, They muſt be performable in that which belongeth to the conductor, or in reference to his perſon; for work employed upon the worker's own matter is no location; as if a goldſmith be employed to work ſuch a piece of work in his own metal, and the ſame to be bought as it is ſo wrought, it is ſale and not location, unleſs there be two diſtinct bargains, one for the metal which is ſale, and the other for the workmanſhip which is location; and if the work is to be employed on that which concerns a third party, it is not location, but mandate.

TIT.

* This act, in two deciſions of *Durie, viz. Jan.* 24. 1627, *Waughton*; and *Nov.* 15. 1627, *Black of Largo*, is mentioned as dated *anno* 1590; but it is not to be found on record of that date; *Spotiſ. voce, cautioners*, has inſerted the whole act as dated *Feb.* 1. 1610; but the books of Sederunt, from *May* 21. 1608, to *Nov.* 1. 1626, are a-miſſing.

[w] See above I. 6. 19. [x] *L.* 10. *L.* 27. § 1. *L.* 29. *C. De uſuris.* [y] *L.* 28. *C. eod.*

TITLE XVI.

Society, where, of Copartnery.

I. *The effect of ſociety.*
II. *The matter of ſociety.*
III. *The nature of ſociety, and the equality therein to be obſerved.*
IV. *The power of the partners in ſociety.*
V. *How ſociety ceaſeth.*
VI. *Partners acting ſeverally, how they bind the reſt or acquire to the ſociety.*
VII. *Diligence of partners.*
VIII. *Kinds of ſociety.*

SOCIETY is not ſo much a permutative, as a commutative contract, whereby the contracters communicate each to other ſome ſtock, work or profit. The effect of ſociety is, that thereby ſomething which before was proper, becometh or is continued to be common to the copartners, and it is either a ſtock, or the profit of a ſtock, or work, labour or induſtry: yet this communication is not effectual to transfer the property in part, or to communicate it, without delivery or poſſeſſion, by which property by poſitive law is conveyed. There is oft-times a communion without ſociety, becauſe it is of accident, as legators, heirs or acquirers of the ſame thing *pro indiviſo*; but if there be interpoſed a contract thereupon, to continue that communion for the common profit of the contracters, it becometh a proper ſociety.

II. The matter of Society are things, fruits, work or induſtry, and that variouſly; for ſometimes the thing or ſtock is only put in by one, and the work and induſtry about it by another; as where a ſtock is given in partnerſhip to a merchant to trade with, here it may be that the merchant's ſkill and pains is balanced with the profit of the ſtock of the other, who doth not nor cannot make that uſe of it. Or land is ſet to huſbandmen to be laboured, and the increaſe to be common. Sometimes each partner bringeth a ſtock to the ſociety, and their work or pains withal, and ſometimes only work, and the profit thereby is made common; and ſometimes the one communicateth the ſtock itſelf, whereby the property thereof becometh common to himſelf, and other partners, and the profit accrueing thereby; and the other bringing in a ſtock, but doth not communicate itſelf, but the profit thereof, in all which the intereſt and ſhares, may either be equal or unequal; but without work or induſtry by the partners, or others, there can be no ſociety, becauſe there can be no profit, or hazard of profit or loſs.

III. The nature of this contract is, to have in it equality of profit and loſs proportionable to the value and worth of the ſtock and work, which is unalterable and indiſpenſible by the nature of this contract; and ſcarcely can any paction or indirect courſe, be effectual in the contrary, becauſe thereby the contract would become uſurary and void; which equality, as to the work and induſtry, is illiquid, and the value thereof is eſteemed according to the common eſtimate; but where there is a ſpecial value ſet upon it, by the private conſent of parties, *that*[z] (as was ſaid before of the private rate of parties[a]), without fraud is ſufficient: ſo ſometimes the value of the work is eſtimated equal to the ſtock or induſtry of the other partners, and ſometimes the half, third, or other proportion of it: but where the matter is clear, or where the ſociety conſiſts of a ſtock in money, the profit muſt neceſſarily be proportionable thereto, and the hazard or loſs accordingly; but if it be agreed, that where the ſtocks are equal, the one ſhould have one third, and the other two thirds of the profit or loſs, or that one ſhould bear the hazard of the ſtock of both, and the profit ſhould be equal, or any other inequality, it is clearly uſurary, unequal and unjuſt[b]. But if the one has only loſs, and the other all the gain, it is called *ſocietas Leonina*[c]. Neither doth it ſubſiſt as a donation, unleſs *it be* ſo ſpecially expreſſed and really meant; for oft-times, to make

[z] F. *which.* [a] L. 10. 14. [b] *L.* 29. *pr. et* §. 1. *ff. pro ſocio.* [c] *L.* 29. § *ult. eod.*

make inconſiſtent contracts ſubſiſt, it is agreed, that the inequality, if any be, ſhall be a donation; but that is a mere colour, and doth work no effect, ſeeing the intent of the contract is truly to communicate like for like, and not to gift, and that addition is but ſimulate or fraudulent. Hence ſociety may be deſcribed "a contract, for communicating the profit or loſs of that which is brought into "the ſociety, proportionably according to the ſhare and intereſt of each partner." It is true, that if there appear no inequality in the ſtock and induſtry of the partners, when no proportion is expreſſed, equal ſhare of profit and loſs is underſtood [d], or if the ſkill or induſtry of ſome of the partners be of great importance, the ſociety may conſiſt in theſe terms, that thoſe perſons ſhall have no ſhare of the loſs, and ſhall have ſuch a ſhare of the profit according to the ſentence of *Sulpitius*; but if ſuch inequality *of induſtry*, *&c.* appear not, the ſentence of *Mucius* rejecting ſuch inequality *of ſhares* is juſt, and there is no contrariety between the opinions of both [e].

IV. It remains to conſider, what are the effects of ſociety while it is, and how it ceaſeth. As to the *Firſt*, The diſpoſal and management of all the affairs of ſocieties is in the whole partners; and each of them (tho' having an unequal ſhare) hath an equal vote, unleſs it be otherwiſe agreed; and the common rule is, *potior eſt conditio prohibentis* [f]. So that every one hath a negative vote, in acts that are not neceſſary for the deſign of the ſociety, unleſs by the cuſtom or paction or deed of the parties it be otherwiſe ordered; as where it *is* the cuſtom of the place, that in ſuch ſocieties there ſhould be a plurality; or when it is agreed, that the minor part ſhould give place to, and is comprehended in the acts of the major part; or when the ſociety hath been accuſtomed to act in ſuch a way, not only the greater part, but even one or more of the partners may continue that way; which is ſtill held to be the mind of the whole, unleſs the contrary be expreſſed; and therefore it was found, where one of more partners in a ſhip, had fraughted her to a dangerous voyage, without the other's conſent, yet he was not found liable for her value, being loſt by accident, where no juſt objection could be made againſt the ſkipper's ſkill, *July* 22. 1673, *Sune*. Yea the proteſting of any of the owners againſt the ſkipper and major part, will not make them liable for the proteſter's part of the ſhip, if ſhe be caſt away, tho' it be the law in maritime caſes in ſome places; becauſe of the ordinary or uſual remedy here, of a roup at the half or major part of the owners againſt the reſt, or a ſet at any of the owners inſtance againſt the whole, either to take his part at ſuch a rate, or quit their parts at the ſame price, or roup his own part when he pleaſes. So letting out of lands, or ſetting out of houſes, employing of monies in a ſociety, may be continued by one or more of the partners, and their actings with extraneous perſons, in name of the ſociety, do conſtitute the whole ſociety debtor or creditor, or doth acquire to them, or diſpone from them [ff]. It is alſo conſiſtent with the nature of this contract, to give a negative vote to one or more of the ſociety, whoſe intereſt in the ſtock, or whoſe ſkill and induſtry is eſteemed the greateſt; but the ſimple nature of the ſociety itſelf is the moſt tender engagement; and ſo if it be not otherwiſe provided, it is always diſſolvable at the option and the choice of any of the ſociety, *which* implies that the management is in the whole partners equally, and that every one hath a negative vote; and therefore, when it is contracted to a time that it may not be parted from, in that caſe the intereſt and end of the ſociety is changed, and if the minor part will not cede to the major part, or to arbitriment, it muſt be decided by the Judge Ordinary which of the parts is moſt conduceable to the ſociety; as in ſhips, as ſaid is; ſo in heritage *actione familiæ Herſciſcundæ* [g]; and in other things, as legacies, *&c.* *actione de communi dividendo* [h]; and with us, when many creditors are concerned in a bankrupt's eſtate, it is divided by roup and ſale, conform to the 17th *act*,

[d] *L.* 29. *pr. ff. pro ſocio*, § 1. *inſt. eod.* [e] § 2. *inſt. eod.* [f] *L.* 28. *ff. comm. divid.* [ff] See *Voet. ad pand. tit. pro ſocio*, § 13. 14. 15. [g] *Lib.* 10. *ff. tit.* 2. *lib.* 3. *C. tit.* 36. [h] *Lib.* 10. *ff. tit.* 3. *lib.* 3. *C. tit.* 37.

Parl. 1681, and which is enlarged by *act* 20. *Parl.* 1690 *, wherein the *Engliſh* are very frequent and exact upon commiſſions of bankrupt. So a wife is kend to the terce of her huſband's lands by a brief out of the chancery, of which *infra* [i]. But this being ſo great a retardment upon the management of the affairs of ſociety, it looſeth the fraternity among the partners, and is ſure to loſe the pleaſure and readily the profit of all; and therefore the *Romans* did upon good grounds annul and diſown all pactions, whereby ſociety did continue beyond the life and pleaſure of any of the partners, except in ſome few caſes [k].

V. Society by conſent then is finiſhed. *Firſt*, When the matter whereupon it is contracted is extinct [l]. *Secondly*, By the death or incapacity of any of the partners to act in the ſociety; for it being one individual contract of the whole, and not as many contracts as partners, it is like a ſheaf of arrows bound together with one tie, out of which, if one be pulled, the reſt will fall out, and the perſonal humour *and induſtry* of the partners is ſo choſen, that it is not ſuppoſed to be communicated to their heirs or aſſignies, unleſs by cuſtom or paction the contrary be provided, which no doubt is conſiſtent with, tho' not conſequent from the nature of ſociety [m]. *Thirdly*, It is moſt conſonant to the nature of ſociety to be diſſolved at the option and pleaſure of any of the partners, it being very contrary thereto, and much impeding of the ends of it, that any ſhould be continued a partner againſt his own will; and therefore ordinarily, not only the expreſs renunciation of the ſociety [n], but any contracting or acting ſeparately in the matter of the ſociety diſſolveth it; yet *propter bonam fidem*, whatſoever is done with, or by the ſociety, before the diſſolution thereof be known, is valid; but this diſſolution at pleaſure may be altered by cuſtom, or conſent of parties [o]. And to ſum up all, in ſociety proportionable equality is eſſential and inſeparable, and all the other ſpecialities are congruous and convenient, and therefore underſtood if by cuſtom or conſent it be not otherwiſe ordered [p].

VI. The ſame queſtion is incident here, that before hath been touched concerning mandates [q], when one or more of the parties act in the matter of the ſociety, whether thereby the whole ſociety be obliged by the obligations of theſe? Whether obligations made to theſe, conſtitute the ſociety creditor? Or whether real right acquired by theſe, are *ipſo facto* common to the ſociety, or if there be but an obligation upon the actors to communicate the property always remaining in the actors, till they effectually communicate? The reſolution of this being the ſame with that in mandates, we refer you thither, and ſay only this in general, that when theſe parties only act in name of the ſociety, and by its expreſs warrant, or by what they have been accuſtomed to do, in ſo far they are not only partners, but mandatars, and it hath the ſame effect as if the ſociety had acted itſelf; but when they act not ſo, there doth only ariſe an obligement upon the partners-actors to communicate, in the mean time the property remaineth in the actors; and if tranſmitted to others before this communication, the ſociety will be thereby excluded, but the actors will remain obliged for reparation of the damage and intereſt of the ſociety; and this will hold, tho' things be bought or acquired by the common money of the ſociety; but all the natural intereſt, birth, fruits, and profit of the ſociety, is of itſelf and inſtantly, common to the ſociety.

VII. Partners are liable each to other, for ſuch diligence as men do ordinarily uſe, or the partners themſelves uſe in their own affairs; for this contract being undergone for the mutual good of the parties, the diligence keepeth the middle way betwixt exact diligence and ſupine negligence: but none of them are liable for what is loſt by force or accident, without their fault [r].

VIII. Society

* Further regulations with regard to the ſale of bankrupt eſtates are introduced by *act* 6. *P.* 1695. *art.* 26. *regul.* 1695. *act of ſed.* 23*d Nov.* 1611.

[i] See below II. 6. 12. *et ſeq.* [k] *L.* 63. *fin. L.* 70. *L.* 14. *et ſeq. ff. pro ſocio. L.* 77. § 20. *de legat.* 2^do^. [l] § 6. *inſt. eod.* [m] § 4. *et ſeq. inſt. eod. L.* 4. § 1. *L.* 59. *L.* 63. § *ult. L.* 65, § 9. *ff. eod.* [n] *L.* 64. *eod.* [o] § 4. *inſt. eod.* [p] § 1. *inſt. eod.* [q] See above I. 12. 13. *et* 14. [r] § *ult. inſt. eod.*

VIII. Society hath as many diviſions, as it hath various and multiform matter in which it may be contracted; but that which is moſt noticed in law is, that ſome ſocieties are common and general, whereby parties communicate all their goods, rights and intereſts, communicable, which the *Greeks* call κοινωνιαν [s]; others are particular of one or more of theſe [t]. Upon the firſt there are many queſtions ariſing, as how far the partners may gift, or educate and provide their children, ſo as that the reſt are obliged, or underſtood to concur: but ſuch ſocieties being altogether unaccuſtomed *with us*, it *will* be vain to debate the properties of them, but proceed to acceſſory obligations.

TITLE XVII.

Acceſſory Obligations, where, of Tranſaction, Caution, Oaths, and other Acceſſories.

I. *Contracts mediate and immediate.*
II. *Tranſaction.*
III. *Kinds of cautioners.*
IV. *Cautioners how far liable.*
V. *Cautioners for executors. Diſcuſſion what?*
VI. *Cautioners for tutors and curators.*
VII. *Cautioners for factors in* Camphire. *Cautioners in ſuſpenſions.*
VIII. *Cautioners for looſing arreſtments.*
IX. *Cautioners how liable by the oath of the principals.*
X. *Cautioners as law will,* judicio ſiſti et judicatum ſolvi.
XI. *In what caſes the cautioners are liable, and the principal not.*
XII. *Cautioners, when liable* in ſolidum.
XIII. *Relief of cautioners.*
XIV. *Effects of promiſſory oaths.*
XV. *Delay.*
XVI. *Intereſt or damage.*
XVII. *Profits, fruits and acceſſions.*
XVIII. *Time of*
XIX. *Place of* } *Performance.*
XX. *Manner of*

THESE being the ſeveral kinds of pactions and contracts ariſing from the matter, there are other diſtinctions of them from their adjuncts or circumſtances, of which this is the chief, that contracts may be celebrated, either immediately, or mediately by the interpoſition of other perſons, as mandatars or commiſſioners; concerning which it hath been ſhown before, that as there is a contract betwixt the mandant and mandatar, ſo oft-times there is a contract engaged betwixt the mandant and a third party, who hath acted with the mandatar according to his warrant; in which caſe ordinarily there is no contract, or obligement betwixt the mandatar and the third party; as he who buys land in name, and to the uſe of another by his warrant, the lands are acquired to him who gave the warrant, and he is obliged to pay the price to the ſeller, but not to his mandatar, ſo the ſeller is obliged to deliver and warrant him, and not the mandatar. But to all manner of promiſes and contracts, tranſactions, caution and oaths may be *acceſſory*.

II. Tranſaction may be interpoſed in the matter of all contracts, and it is a moſt important contract, whereby all pleas and controverſies may be prevented or terminated; for thereby all parties tranſacting, quit ſome part of what they claim, to redeem the vexation and uncertain event of pleas. It is therefore the common intereſt, that tranſactions ſhould be firmly and inviolably obſerved, which both by the *Roman* law and our cuſtoms, hath been held as ſacred and neceſſary for mens quiet and peace.

It muſt therefore be accurately conſidered what a tranſaction is, and what are the neceſſary requiſites thereto. The word *tranſaction* is variouſly taken, ſo the adminiſtration

[s] *Pr. inſt. eod.* [t] *L. 52. § 5. ff. eod.*

adminiſtration of any affair is commonly called *a tranſaction*, and particularly the publick tranſactions; and in other caſes, even where the name of *tranſaction* is uſed, there is no tranſaction in the ſenſe here propoſed; for it is very ordinary in any contract to ſay, It is tranſacted, agreed, and finally contracted; but a proper tranſaction muſt imply the doubtful event of a plea: and therefore, when parties commune, and come to an agreement, by clearing the point of right in their claims on either ſide, tho' either party paſs from much they claimed, there is no tranſaction, albeit thereby the vexation of a plea be ſhunned: for it is more the uncertain event than the trouble of legal proceſs that makes a tranſaction; and therefore when a real tranſaction is meant, it is fitteſt to expreſs it in clear terms, that in the differences among parties in ſuch points that are, or may be controverted, both parties acknowledge that the matter is dubious, and the event is uncertain; and therefore either party remits their claims, and come to a middle agreement, wherein it is not neceſſary that either party remit equally, nor will an inconſiderable abatement infer tranſaction, or the quitting of penalties tho' conſiderable; yet tho' the expreſs terms of tranſaction be not uſed, or the deſcending from mutual claims, there may be a true tranſaction; as when parties during the dependence of proceſſes come to agree, giving and taking leſs than they pleaded, otherwiſe ſuch an agreement is no tranſaction, *Jan.* 10. 1673, *Ramſay*.

And if the matter be the evident ground of a dubious plea, whether it be by the uncertainty how the judges will determine, or the uncertainty what effect the execution may have, and even after decreets *in foro contradictorio*, if there remain doubtfulneſs, and uncertain event, there may be place for tranſaction; as where there is doubtfulneſs of informality or nullity, whereby decreets may be laid open, and all the interlocutors and probations may be altered; or where theſe things that were not competent during that decreet, may come to be competent after, or new matter may occur, without fraud or concealment to make delay [u].

A bond granted for a ſum in a decreet, and caption thereon was found no tranſaction without abatement, and ſo the decreet and bond were found reducable, *July* 3. 1668, *Row*. Nor was giving a bond for accompts without abatement found a tranſaction, *Feb.* 18. 1680, *Burnet* [uu]. And albeit it be much controverted, whether ſolemn and formal decreets can be altered *ex inſtrumentis de novo repertis*, yet it is generally held, that tranſactions are not ranſacted thereby [w]. Neither is tranſaction convelled upon ſuch grounds of force or fear, as would convel other contracts, but ſuch fear as imports imminent hazard of death, or torture [ww], whereunto the doctors add ſome other caſes, as the imminent fear of the ruin of mens fortunes and eſtates, yet it muſt be a fear imminent at the time of the agreement, for no preceeding fear will be relevant if the occaſion of it be paſt. Neither doth fraud or circumvention diſſolve tranſactions, if it be but in the motives inducing the agreement, unleſs it be a deception in the very ſubſtance of the act [x]. Neither will error or miſtake in the matter ranſact tranſactions, if the error be about any circumſtantiate quality, or quantity, and not in the ſubſtance of the matter.

III. Caution or ſurety is the promiſe or contract of any, not for himſelf, but for another; and therefore this being a gratuitous engagement, having no equivalent cauſe onerous as to the cautioner, it required a ſtipulation among the *Romans* to make it effectual, tho' it was ſometimes by mandate or *conſtitution* [y]; but now every promiſe and paction, according to the law of nature, being effectual, it is valid without ſtipulation.

Caution is interpoſed any way, by which the conſent is *freely and* truly given, and it may be either by mandate or commiſſion, when the mandant giveth order

[u] *L.* 32. *C. de tranſact.* [uu] See above I. 7. 9. and I. 9. 8. 7. [w] *L.* 19. *C. de tranſact.* [ww] *L.* 13. *C. eod.* [x] *L.* 22. *C. eod.* [y] *L.* 1. *C. De Conſt. Pecun. L.* 5. § 2. *et* 4. *ff. eod.*

der or warrant to contract with any other party, to that party's behoof; for then that party is the principal debtor, and the mandant is cautioner, or it may be by taking on the debt of another freely. This cautioner in the law is called *ex-promiſſor*, but is more improperly a cautioner, ſeeing himſelf is principal *debtor*, having but an obligation of relief as negotiator. But the moſt proper and ordinary cautioner is he who is obliged with, and for the principal debtor, and is called *ad-promiſſor*, or *fide-juſſor*, becauſe upon his faith or truſt the creditor contracteth. Theſe cautionary promiſes or contracts are of the ſame kind or nature with thoſe, of which we have now ſpoken; yet have they ſomething peculiar, which we ſhall ſhortly touch, and which reſolve in theſe queſtions, *Firſt*, Whether cautioners are liable and conveenable ſimply, or in ſo far as the principal debtor is not *ſolvendo* after diſcuſſing of him? *Secondly*, Whether cautioners are liable *in ſolidum*, or *pro rata*.

IV. As to the firſt, the nature and intent of ſurety is, that the creditor may be ſecure of his debt; and therefore cautioners are not ordinarily decerned to pay till the creditor aſſign the debt, and all ſecurity they have for it from the principal, if they have not a diſtinct intereſt to retain the ſecurity, *Jan.* 10. 1665, *Leſly*, and *July* 10. 1666, Dame *Margaret Hume*, where the Lords refuſed to cauſe the creditor aſſign againſt the co-cautioners, where there was no clauſe of mutual relief, but that was implied, tho' not expreſſed. Cautioners cannot be purſued till the principal debtor be diſcuſt, unleſs it be otherwiſe contracted, or provided by the cuſtom or law of the place. It was contrary by the antient Roman law [z], which was corrected by the authentick conſtitution [a]. With us cautioners are frequently bound for, and with the principal, as full debtors, conjunctly and ſeverally, and thereby *ex pacto*, the queſtion ceaſeth: but otherwiſe the cautioner is underſtood to be obliged for the principal debtor's performance, and ſo is liable only *ſubſidiarie* after the principal is diſcuſt, and eſpecially where the performance is a truſt, or deed proper to the principal *debtor* *.

V. Thus cautioners for executors are only liable after the executors are diſcuſt, at leaſt by horning executed, *Had. June* 27. 1610, *Scrogie*. The like, tho' the executor was alledged to be bankrupt, *July* 24. 1662, *Briſbane*. But a cautioner for an executor was decerned with him, ſuperſeding execution againſt the cautioner, till the executor were firſt diſcuſt, *Dec.* 2. 1662, *Douglas*.

And executors were not holden diſcuſt by horning, till poinding were eſſayed, and ſearch made for his moveables, tho' none *were* condeſcended on, *Feb.* 12. 1623, *Arnot*. The like, that ſearch behoved to be made, both for moveables and lands, and they appriſed, if any were; and that horning and caption ſufficed not, *Hope, executors, Stuart*. But there is no neceſſity *at* diſcuſſing the cautioner to call the executor who was diſcuſt, *Dec.* 5. 1623, *Rochead*. So the diligence for diſcuſſing muſt be according to the eſtate of the principal debtor; if he have moveables, they muſt be poinded; if lands, they muſt be appriſed; if debts, they muſt be arreſted, and made forthcoming; and if there is none of theſe to be found, diſcuſſion by horning and caption is ſufficient, tho' he be not taken by the caption.

VI. Cautioners for curators are not liable till they be diſcuſt; yet they were decerned for conſtituting the debt with this quality, that before execution againſt the cautioners, the curators ſhould be diſcuſt in their perſons, goods and lands, *Nov.* 20. 1627, *Rollock* **.

VII. Cautioners for factors, as for the factors in *Camphire* to the burrows, found not conveenable till the factors were diſcuſt, *July* 8. 1626, *Smith*. And cautioners for theſe factors were not found liable for the goods ſent to a factor, after he was known to the purſuer to be bankrupt, *March* 4. 1630, *Richie*.

* See 9th *Dec.* 1623, *Henderſon*'s bairns, where *Durie* maintains, that cautioners have not the benefit of diſcuſſion, except cautioners for perſons who have undertaken a particular truſt or office.

** It was otherwiſe by the civil law, *L. ult. ff. rem pup. ſalv.*

[z] *L.* 5. *C. de fide-juſſor.* [a] *Nov.* 4. *c.* 1.

Cautioners in ſuſpenſions are only liable after diſcuſſing the ſuſpenders, and becauſe by the tenor of their act or bond they are bound to pay what ſhall be decerned againſt the ſuſpender; if the decreet ſuſpended be turned into a libel, or if the reaſon of ſuſpenſion was relevant and inſtructed, tho' it were elided by an anſwer emergent after the ſuſpenſion, they are free; *Spotiſ. Juſpenſion, Weir**. And becauſe of the tenor of the bond, *and the unfavourableneſs of the matter, it was ſo ſtrictly interpreted, that* if the ſuſpender died before the *Juſpenſion* was diſcuſt, the cautioner was free, ſeeing the bond of caution bore, that the cautioner ſhall pay what ſhall be decerned againſt the ſuſpender. Yet by the act of ſederunt *Jan.* 29. 1650, all cautioners were declared liable, tho' the ſuſpender died, if the charge being transferred againſt his heir or executors, the letters were found orderly proceeded, which is in uſe whenſoever the creditor inſiſts on the ſuſpended decreet, and obtains ſentence by transference. A cautioner in a ſuſpenſion of a real action of poinding the ground, was not found liable to pay the annualrent ſuſpended, but to warrant it, *Feb.* 18. 1623, *Blackburn.* And a cautioner in a ſuſpenſion was found liable, tho' his bond of cautionry contained a clauſe of relief, which was not ſigned by the ſuſpender, ſeeing the bond did not oblige the principal and the cautioner to perform what ſhould be decerned, but only the cautioner to perform, and the principal to relieve him, *Jan.* 6. 1681, *Home.* In which caſe, it was only found neceſſary to diſcuſs the ſuſpender, and not the cautioner, in *a* firſt ſuſpenſion, *Ibidem.*

VIII. Cautioners for looſing of arreſtments, are not cautioners for thoſe in whoſe hands arreſtments are made, but for the debtor, whoſe goods or money are arreſted in lieu of the arreſtment; and yet they are no further liable than in ſo far as was in the hand of the perſon againſt whom the arreſtment was uſed, who therefore muſt be purſued *either* before or with the cautioner, that the debt may be conſtitute, *June* 21. 1626, *Balmerinoch.* And it may be conſtitute againſt the cautioners by the oath of thoſe in whoſe hands arreſtment was made, *Feb.* 2. 1627, *inter eoſdem.*

IX. Cautioners are liable according to the oath of the principal debtor, which is a ſufficient probation againſt them, becauſe their obligation being acceſſory, it is liable to the ſame probation with the principal, as is clear from the caſe laſt inſtanced. But it is more dubious, whether the cautioners run all other hazard with the principal debtor; wherein, tho' the cautioner of an executor was not admitted to propone exhauſting, being proponed by the executor himſelf, and he failing therein, *March* 4. 1623, *Wood*; yet it was found, that where exhauſting was omitted by the executor, it was admitted for the cautioner, being inſtantly verified, *July* 9. 1623, *Arnot.* And likewiſe, tho' the principal intented reduction, *but* was holden as confeſſed by his oath *de calumnia*, yet that was found not to prejudge the cautioner, or to exclude him from inſiſting, in proving that ſame point, *Jan.* 22. 1629, *Fairbairn.* Whence we may conclude, that colluſion or wilful omiſſion or negligence of the principal, hindereth not the cautioner; but if the principal, proponing any reaſon of defence, uſed probation by witneſſes which was not found to prove the ſame, it would not be again admitted to be proved by the cautioner, with *thoſe or* other witneſſes; yet a cautioner was not ſecluded to prove a defence, wherein the principal ſuccumbed, it not being intimated to the cautioner, *Dec.* 11. 1673, *Earl of Kinghorn.* [But this was a defence upon a writ, not by witneſſes, againſt the principal finding caution to be anſwerable to what ſhould be decerned **.]

X. Cau-

* This was altered by act of ſederunt, *Dec.* 27. 1709; by which cautioners are declared to be liable, tho' the decreet be turned into a libel. By the ſame act it is further declared, that cautioners in ſuſpenſions ſhall be taken bound by the Clerk of the bills, not only for the ſum in the charge, but for whatever elſe ſhall be decerned at diſcuſſing; and that atteſters ſhall be liable in their order as fully as cautioners.

** What is contained within the parentheſis is found in none of the MSS nor in the edition 1681. The defence in this caſe omitted by the principal, and allowed to be pleaded by the cautioner was founded on a tack and not on a proof by witneſſes, but what is further mentioned as the ground of the deciſion ſeems unintelligible.

X. Cautioners uſe to be given before the Admiral or other courts, where the defender is attached to be put in priſon till the proceſs be diſcuſſed and the decreet ſatisfied; which is ſometimes only *judicio ſiſti*, that the party ſhall appear at all the diets of proceſs, or *judicatum ſolvi*, or both; to which, caution as law will is equivalent, importing that the defender ſhall do all that law requires in the preſent caſe, *Jan.* 31. 1633, *Stevenſon*; and *Nov.* 16. 1636, *Stuart*. So tho' advocation be obtained, the cautioner, as law will muſt iſt the principal when the advocation *is produced before the inferior court*, who muſt then remain in ward, as he was before caution was found, till the cauſe be diſcuſſed, as was found, *Feb.* 20. 1666, *contra M'Culloch*. The like found, that a cautioner *judicio ſiſti aut judicatum ſolvi*, was liberate by putting the party in priſon, *and proteſting to be free*, tho' not at the calling of the cauſe, *July* 10. 1666, *Thomſon*.

XI. Cautioners may be acceſſory to obligations, tho' the principal debtor be not liable, by any ſtatute or cuſtom giving him a ſpecial privilege; as minors or wives clad with huſbands, *Nov.* 28. 1623, *Shaw*. But where the obligation is in itſelf null, and hath not ſo much as a natural obligation; if the principal be free, the cautioner is alſo free; as if the principal did not at all, or did not validly ſubſcribe, *Hope*, *fidejuſſor*. The like may be ſaid of obligations by pupils, fools or furious perſons, whoſe cautioners are free with themſelves. But a cautioner was found liable for the whole ſum, tho' the principal party ſubſcribed but by one notary, whereby he would be only liable for a hundred pounds, *July* 8. 1680, *Johnſton*. And a cautioner was found liable, tho' the *creditor* having received a diſpoſition of moveables from the principal *debtor* in ſecurity of his ſum, promiſed not to trouble his perſon or goods, reſerving power to diſtreſs the cautioner, *July* 10. 1680, *Leich of Mouſie*; but cautioners are free with the principal, if the obligation were obtained *vi aut fraude*, tho' the cautioner were bound as full debtor, *Jan.* 13. 1692, *Lord Hatton* *; for in ſuch caſes there is *labes realis*, *quæ rei inhæret* [c].

XII. As to the other queſtion, Whether cautioners be liable *in ſolidum*, unleſs they be expreſsly bound conjunctly and ſeverally: If they become cautioners at divers times, without relation one to the other, there is no doubt but as they obliged themſelves, ſo are they all liable *in ſolidum*; but when they *(become)* obliged together, or with relation to one another, the nature of the deed importeth no more than ſurety; ſo that each is liable for what is wanting by the principal, and what is wanting by the other cautioners: but this holds even when parties are bound, not only as cautioners for, but as principals with the debtor, for then they are liable only *pro rata*, unleſs they be bound conjunctly and ſeverally, or when the matter of the obligation is an indiviſible fact [d]. *Yet many perſons becoming bound not conjunctly and ſeverally, but* in cumulo, *for a town's debt, they were found liable not* pro rata *but* in ſolidum, *Feb.* 10. 1631, *Provoſt of Inverneſs* **.

XIII. Cautioners ordinarily have no action againſt the principal debtor, till they be diſtreſſed, unleſs the clauſe or bond of relief bear, "to free, relieve and "ſkaithleſs keep them;" yet where an executor was becoming poor, the cautioner purſuing him to relieve him, or find caution, was thought by the Lords to have intereſt ſo to do, *Jan.* 19. 1627, *Thomſon*. If a cautioner pay, without intimation to the principal debtor in due time before litiſconteſtation, it is on his peril, and the principal is not obliged to relieve him, if he had a competent defence, that would have excluded the creditor, *Dec.* 19. 1632, *Maxwell*.

Cautioners

* This deciſion not found.

** Cautioners are always ſo far liable, that the creditors muſt be ſecure. The nature of their obligation imports this, and it imports no more; upon which footing every cautioner may be ſaid to be liable *in ſolidum*, but *ſubſidiariè* only. The queſtion here treated of is, in what caſes cautioners are intitled to the benefit of diſcuſſion and diviſion, and when not. With regard to the principal debtor, cautioners, bound as ſuch, have always the benefit of diſcuſſion: With regard to each other, they are not intitled to the benefit of diviſion, when they become bound ſeparately, and without relation to one another; But when they become bound all at one time, they have the benefit of diviſion, and are liable only *pro rata*; but this imports no more than a dilatory defence, for they are further liable *in ſolidum*, to make good the ſhares of the other cautioners, if found inſolvent. If they become bound as principals, *i. e. conjunctly*, with the principal, they renounce the benefit of *diſcuſſion*; if they become bound *conjunctly and ſeverally*, they renounce likewiſe the benefit of *diviſion*.

[c] See above I. 9. 8. 7. [d] See below § 20. *h. t.*

Cautioners getting aſſignation from the creditor, whether they inſiſt in the creditor's name, or their own as his aſſigny, are obliged to allow their own part, *July* 8. 1664, *Niſbet*; in this cauſe there was a clauſe of mutual relief amongſt the cautioners. Co-principals bound conjunctly and ſeverally, are mutually as cautioners for their ſhares, liable to relieve each other tho' there were no expreſs clauſe of relief, *June* 28. 1665, *Monteith*, which holds alſo in co-cautioners, tho' there were no clauſe of mutual relief amongſt them, *June* 19. 1662, *Wallace*[e]. Co-cautioners were found liable for relief *ex natura rei*, without an expreſs clauſe of relief, *Jan.* 27. 1675, *Monteith*. Cautioners having paid, if they ſeek their relief from the other cautioners, any eaſe they get on ſpecial favour to themſelves, hinders them *not* to obtain of the reſt their full proportion, *July* 8. 1664, *Niſbet*; *but* if they got eaſe by tranſaction, or upon account of queſtioning the debt, they can aſk no more than what they truly gave out, allowing their own ſhare, as was found in a charge to the cautioner's behoof againſt the co-cautioner, *July* 27. 1672, *Brodie*. A cautioner in a ſuſpenſion of a bond, wherein there were *four* cautioners, being diſtreſſed, and having paid and obtained aſſignation from the creditor, was found to have acceſs againſt the firſt four cautioners, allowing only his own fifth part, *Feb.* 23. 1671, *Arnold of Barncaple*.

XIV. As Caution, ſo Oaths are acceſſory to all Promiſes, Pactions and Contracts; not only theſe Declaratory Oaths, which are ordinary in the diſcuſſing of rights, whereby all perſons are bound to declare the truth upon oath as witneſſes, or as parties againſt themſelves in civil cauſes; but Promiſſory Oaths, whereby they promiſe to obſerve or fulfil any thing *activè*, or *paſſivè* never to quarrel it; concerning which oaths there is no ſmall matter of debate among lawyers, what effect they have. All do agree, that in ſo far as any promiſe can be effectual, a promiſſory oath is valid, and hath this much of advantage, that the creditor is the more ſecure, becauſe he may juſtly expect, the debtor will be more obſervant of his oath than of his ordinary paction, ſeeing the penalty of the violation of an oath deſerves a more atrocious judgment than any other, God being called as a witneſs and a judge; which effect it hath, tho' adhibited to that which by the matter hath an anterior obligation; as obligations betwixt huſband and wife, parents and children, in theſe things in which they are mutually obliged, or where there hath preceded or is conjoined an obligatory contract, which of itſelf is binding without an oath. 2*do*, All do alſo agree, that oaths interpoſed in things unlawful, not only as to the matter, but as to the manner, are not obligatory; ſo no man juſtifieth *Herod*, for taking *John Baptiſt*'s head without a cauſe, upon pretence of his oath. 3*tio*, All do agree, that in matters free and in our own power, as contracts are obligatory, ſo oaths are much more *ſo*.

The queſtion then remains, Whether in acts *civiliter* inefficacious, the interpoſition of an oath can give efficacy? or whether that which is done *indebito modo*, becomes valid by an oath to perform it, or not to impugn it, and if that efficacy will not only extend to the ſwearer, but to his heirs or ſucceſſors. Of this there are multitudes of caſes and examples debated among civilians. As by the civil law naked pactions are not efficacious to ground any action upon; *Quæritur*, Whether, if the paction be with an oath, the creditor may not effectually purſue thereupon? By law likewiſe the deeds of minors, having curators not conſenting, are null; but if the minor ſwear not to quarrel them, *quid juris?* Minors leſed have by law the benefit of reſtitution, but if they do the deed upon oath to perform it, or not to quarrel it, whether, if they purſue to reduce it, will they be excluded by their oath? or if a wife be obliged perſonally for debt, and ſwear to perform it, or never to come in the contrary, whether yet ſhe may defend herſelf with her privilege? or if a woman's land, given her for ſecurity of her tocher *donatione propter nuptias*, being ſold by her huſband with her conſent, which the law declareth null, whether her oath interpoſed will validate it? or if *pactum legis commiſſoriæ in pignoribus* confirmed with an oath will be valid? or if an oath for performance will

[e] See above I. 8. 9.

will exclude the common exceptions of fear, force or fraud? And innumerable ſuch caſes, whereby poſitive law prohibiteth any act to be done, or declareth it void ſimply, or void if it be not done in ſuch a manner, and with ſuch ſolemnities.

For clearing theſe and the like caſes, we are chiefly to conſider, *quæ ſunt partes judicis*, or what is the duty *of the judge* in deciding caſes, wherein oaths are interpoſed, rather than what concerns the parties, and the obligations upon their conſciences by theſe oaths *in foro poli*; and therefore we ſhall take up the matter diſtinctly in theſe enſuing points.

Firſt, If an action be purſued upon a ground ineffectual in law, albeit the defender hath interpoſed an oath never to come in the contrary, yet that *could* not be ſuſtained by the judge (tho' the defender ſhould not appear or object), which is ineffectual of itſelf, *for* in that caſe the interpoſition of an oath hath no effect. As if by the civil law an action were intented upon a promiſe or a naked paction, with an oath interpoſed, the action would not be ſuſtained, albeit the defender ſhould not appear, or appearing ſhould not object, that it were a naked paction. Or, if a declarator ſhould be intented, to declare *pactum legis commiſſoriæ in pignoribus* to be valid and effectual, tho' it were libelled that the other party did ſwear never to come in the contrary, yet the judge could not ſuſtain ſuch an action; nor generally can ſuſtain any action which is unjuſt or irrelevant, albeit it ſhould not be oppoſed, but conſented to ſimply, or with an oath never to quarrel it; becauſe in ſuch caſes *pactis privatorum non derogatur juri communi*. For the conſent or oath of no party can make that juſt which is unjuſt, nor can make that ſufficient or effectual, that is deficient in its eſſentials. As if any party ſhould grant a diſpoſition of lands or annualrents, and declare, that it ſhould be effectual for poinding the ground without infeftment, and ſhould ſwear never to come in the contrary thereof, if thereupon the obtainer ſhould purſue a poinding of the ground, the ſame could not be ſuſtained; becauſe theſe rights are defective in their eſſentials, wanting infeftment; and yet in theſe caſes, if the party ſhould object, or any way hinder the effect of his oath, he contraveens the ſame; but the judge not ſuſtaining the ſame doth no wrong, becauſe his not ſuſtaining proceeds upon a defect of an eſſential requiſite, and not becauſe of any exception or objection of the party. From this ground it is, that if a wife be purſued or charged upon a bond for debt ſubſcribed by her, bearing expreſsly her to be deſigned a wife, tho' it were condeſcended on, that ſhe made faith never to come in the contrary, the Lords would not ſuſtain the purſuit or charge; becauſe by the very action itſelf it appeareth, that the ſummons or charges are irrelevant and contrary to law, which declareth a wife's bond for debt *ipſo jure* null; and therefore, tho' ſhe may be faulty in ſuſpending, or hindering the performance of the engagement of her oath, the Lords do juſtly reject ſuch an irrelevant libel or charge, as they did *in the caſe Birſh*, *Feb.* 18. 1663, where her bond was ſuſpended *ſimpliciter*, as being expreſsly granted by a wife, tho' ſhe judicially made faith never to come in the contrary. Or if the huſband ſhould ſuſpend, and alledge, that ſuch an obligation or oath could not be effectual againſt his goods, or the perſon of his wife in his prejudice, there could be neither wrong on his part, nor on the judge's part, as ſaid is.

Secondly, If either action or exception be founded upon that which is not defective in eſſentials, but in circumſtantials, ordained and commanded by law, the defect thereof may be ſupplied by the other party's conſent, much more by their oaths; and in theſe caſes *quæ fieri non debent*, *facta valent*; for every prohibition of law doth not annul the deed done contrary thereto, but infers the penalty of law upon the doers; as tacks of teinds are prohibited to be ſet by prelates for longer than nineteen years, and by inferior beneficed perſons, for longer than their life, and five years thereafter, under the pain of infamy and deprivation [f]. Yet it was found, that a tack granted for a longer time was not thereby null, *Nov.* 9. 1624, *Hope*. So likewiſe members of the College of Juſtice are prohibited to buy pleas,

[f] *P.* 1617, *c.* 4.

yet the right acquired *contrary* thereto was not found null or proceſs refuſed thereupon, but that it might be a ground of deprivation, *Had. June* 5. 1611, *Cunningham.* In like manner the ſolemnities of marriages are preſcribed in the law, and all perſons are prohibited to proceed any other way; ſo they are appointed to be publickly ſolemnized by a miniſter, and the conſent of parents is required; yet the want of theſe will not annul the marriage, becauſe it is a divine contract which cannot receive its eſſentials from poſitive law or ſtatute; whence it is juſtly ſaid, *Multa impediunt matrimonium contrahendum, quæ non dirimunt contractum*[g].

Some deeds are declared null *ipſo jure*, and others are only annullable *ope exceptionis*, or by way of reſtitution, or at leaſt, where ſomething in fact muſt be alledged and proved, which doth not appear by the right or deed itſelf; and ſo belongeth not to the judge to advert to, but muſt be proponed by the party. In theſe an oath interpoſed doth debar the ſwearer from proponing or making uſe of ſuch exceptions and alledgeances; and therefore, neither may the party juſtly propone the ſame, nor the judge juſtly ſuſtain the ſame; for there be many things of themſelves relevant and competent in law, which yet may be excluded by a perſonal objection, againſt the proponer; for in many caſes, alledgeances competent to parties may be renounced, ſo that tho' they be relevant, that perſonal objection will exclude the proponer, but his oath is much ſtronger than his renunciation, and therefore, ſeeing ſuch points are not *partes judicis*, nor conſiſting in any intrinſic nullity or defect, tho' the law allow or preſcribe them, yet it doth not mention or expreſs, that tho' the party in whoſe favour they are introduced renounce them ſimply, or with an oath, that theſe ſhall be admitted; and therefore they are juſtly to be repelled being *in detrimentum animi* of the proponer. This ground ſolveth moſt of the caſes before proponed; for if a minor purſue reſtitution upon minority and leſion, his oath to perform, or not to quarrel the deed in queſtion, excludes him, both by the civil law and our cuſtom; for by the authentick *ſacramenta puberum ſponte facta, ſuper contractibus rerum ſuarum non retractandis, inviolabiliter cuſtodiantur*[h]; and it was ſo decided in an obligement by a minor, to quit twenty chalders of victual, provided in his contract of marriage, *Jan.* 15. 1634, *Hepburn*, where it was found, that the oath was valid, tho' not judicial. The like was found, that a minor having given a bond for his father's debt, whom he repreſented not, and being ſworn not to come in the contrary, the ſame was not reduced upon minority and leſion, *Feb.* 10. 1672, *Waugh.* Upon this ſame ground, a minor having curators not conſenting, ſwearing to perform his obligation, or never to come in the contrary, his exception of its being thus null (becauſe it conſiſts in fact, and muſt be proved that he was minor, and that he had curators), may juſtly be repelled, and he excluded from proponing thereof, in reſpect of his oath, ſeeing it is not the part of the judge to know or advert thereto; but his curators who have not ſworn, may, yea muſt propone that nullity, becauſe they have not ſworn. But to prevent the inconveniency of inducing minors ſo to ſwear, it is declared by the 19th *act*, *Parl.* 1681, that the elicitor ſhall be infamous and the contract null, and the nullity may be declared at the inſtance of any relation to the minor; but it is the judge's part to advert to the nullity, and therefore, tho' the ſwearer is not allowed to object againſt his oath, yet any friend *may*[hh], if the judge *neglects*[i] it[ii].

On this ground likewiſe, the exception or reaſon of reduction upon force or fear is excluded, if the party have ſworn to perform or not quarrel the deed, which is the ſentence of the Canon law, not only as to wives conſent to the alienation of lands given to them *donatione propter nuptias*, which is both null, and preſumed to be granted *by* her *upon* fear or reverence of her huſband, *C. cum continget*, 28. *De jurejurando*, whereby ſuch conſents and oaths being interpoſed, are declared to be valid; but generally, no deed having an oath interpoſed can be recalled upon an alledgeance of force or fear, *cap.* 8. *De jurejurando*; and albeit the Pope aſſumes to himſelf liberty "to abſolve from ſuch oaths as are done upon fear," yet

[g] See above I. 4. 6. 4. [h] *Auth. C. ſi adverſus vend.* [hh] F. *might.* [i] F. *reſerves.* [ii] See above I. 6. 44. 5.

yet they are declared of themſelves to be valid, *C.* 15. *De jurejurando*, which our cuſtom followeth, and was ſo determined, *Parl.* 1481. *cap.* 83. and was ſo decided by the Lords, *July* 8. 1642, *Grant* [k], where a wife was excluded from the reduction of the alienation of her liferent lands *ſuper vi et metu*, becauſe ſhe had judicially ratified the ſame, and ſworn never to come in the contrary; neither was it reſpected, that the oath as well as the diſpoſition was by force and fear; for this is the great foundation of all publick tranſactions betwixt different nations, where oft-times the one party is induced thro' fear, to that which otherwiſe they would not yield to, and yet both parties acquieſce in the religion of an oath interpoſed; ſo the oath of *Iſrael* to the King of *Babylon* was binding upon them, tho' thereby the people of God ſubjected themſelves to a Heathen King; and therefore they are accuſed by *Jeremiah* for the breach thereof, and likewiſe for breaking the oath to their ſervants, whom they manumitted upon mere neceſſity for their defence.

From this reaſon alſo it is, that the exception or reaſon of reduction upon deception, fraud or circumvention is excluded, if an oath be interpoſed, whereof we have the moſt eminent example of the oath of the people of *Iſrael* to the *Gibeonites*, who purpoſely deceived and circumveened them, feigning themſelves to be a people far off, tho' they were of the *Hivites* whom *Iſrael* was commanded utterly to deſtroy; againſt which judicial precept, they being induced thro' error and deceit to ſwear, the oath was binding on them and their poſterity, and was puniſhed upon *Saul* for breach thereof.

From this inſtance we have occaſion to return to the laſt caſe; whether oaths be only perſonal obliging the ſwearer, and ſo inherent to their perſons that they bind not their heirs? Wherein ſome are for the affirmative, that even heirs are obliged as being *fictione juris eadem perſona cum defuncto*; which is alſo fortified by the puniſhment in the ſucceſſors of *Iſrael* in the days of *Saul*; but I rather incline to the negative, that heirs are not obliged, but only the perſons who ſwear, which is the more common opinion of lawyers, civilians and canoniſts; nor doth the inſtance infer the contrary, becauſe oaths by ſocieties and incorporations, continue not as they are heirs, but becauſe the ſociety dieth not, and is ever the ſame, eſpecially in contracts betwixt nations, where the parties intend not to oblige particular perſons then living, but the nation; neither doth the fiction of law operate in this caſe; for no poſition or fiction of law can either extend or abridge the obligation of an oath, which is *altioris et ſuperioris juris*. Yet in the proceſs between the tutor and curators of *Aberlady*, the oath of the *minor* predeceſſor was found valid againſt his heir excepting upon his predeceſſor's intereſt, being an oath before the act *Parl.* 1681 [1], *Jan.* 1691, *Fletcher* of *Aberlady* *.

There remains yet this objection, that if oaths be ſo effectual, great inconveniencies will follow, a door being opened to force and fraud; for by the ſame facility that parties are induced to act, they will be induced to confirm it by an oath. It is anſwered, *Incommodum non ſolvit argumentum*; which therefore was not regarded in the caſe of *Grant*, *July* 8. 1642; but there may be a remedy by ſevere puniſhment upon parties, who ſhall induce others to ſwear to their own hurt, which the Prince may inflict, and repair the damage of the læſed, and is partly remedied by the ſaid act, *Parl.* 1681. It is true, if the fear be ſuch as ſtupifieth, and takes away the act of reaſon, there is nothing done, becauſe there can no contract in its ſubſtantials conſiſt without the knowledge and reaſon of the party; or if the deceit be *in ſubſtantialibus*, as if a man ſhould by miſtake marry one woman for another, there is nothing done, except when an act of reaſon is exerciſed: but upon motives by fear, error, or miſtake, the deed is in itſelf valid, tho' annullable by fear or fraud, which are excluded by the oath, againſt which they cannot be alledged by the party who hath ſworn, but may be proponed by his heirs, executors, or cautioners, or any other having intereſt.

Having

* This deciſion not found.

[k] See above I. 9. 8. 4. [1] See above I. 6. 36. *fin.*

Having now ſpoken of the ſeveral kinds of obligations, before we go to real rights, it is fit to touch the common conſiderations that fall into all or moſt obligations, as to the implement or performance thereof, *viz.* Delay, Intereſt, Profit, Time, Place, and Manner of performance.

XV. Delay or *mora*, is not that time which by the adjection of a day or condition, or which by law is allowed, to perform; but that time which runs after lawful delay is paſt, and is the debtor's fault in not performing his obligation; ſo that it ſeldom makes any part of the contract whereupon the obligation ariſeth, except penalties be adjected in caſe of delay, or an eſtimation made of the intereſt. Delay is incurred in pure obligations by interpellation or requiſition; for when no term is prefixed, the option of the creditor is the time of performance; and tho' requiſition be moſt clear and ſecure by the inſtrument of a notary, (and therefore verbal requiſition by a merchant to a ſkipper, to looſe after the ſhip was loaded, was not found ſufficient without an inſtrument where the charter-party had no definite term, but to do diligence to tranſport the goods, *Feb.* 14. 1678, *Calderwood.*) Yet in ſome caſes, that is not neceſſary, but being naked emiſſion of words, it will only be probable by the debtor's oath or writ. In obligations to a day, delay is incurred by the paſſing of the term; *nam dies interpellat pro homine* [m]. In obligations conditional, delay cannot be till the condition be purified, and even then either requiſition or a term is requiſite; for it is frequent in obligations conditional to add a term alſo; ſo that the exiſtence of the condition makes the conditional obligation to become pure, and requiſition is to be uſed before delay if no term be expreſſed. But if there be no party who can require or be required, delay is incurred if performance be not made ſo ſoon as it can be; as is in the caſe of reſtitution of things found, or come in the hands of others without contract, which is ſeldom known to the owner. So alſo in obligations due to pupils delay is incurred without requiſition [n]. And in obligations by delinquence; delay is without requiſition, and runneth from the firſt time performance can be made.

Legal execution is not competent ordinarily till delay, becauſe none ſhould be purſued till he have failed; yet in ſome caſes the debtor may be purſued before the term, to pay at the term, as *ſi vergat ad inopiam.* Yea in removing it ſeems very expedient to purſue the party warned even before the term, to remove at the term, otherwiſe the lands cannot be ſafely ſet, the tenant not knowing if others will remove willingly, and may not be uncertain in that point, which is a publick intereſt, for ſetting land and preventing waſte; but upon all obligations which are truly contracted, the legal diligences of arreſtment or inhibition may be uſed even before requiſition or the term of performance [o].

The ordinary effect of delay is, that when the obligation is to give or deliver any thing, if it periſh even without the debtor's fault, it periſheth to the debtor, and muſt be made good to the creditor, unleſs it appear that it would have ſo periſhed with the creditor, which ſeldom can be made appear; becauſe it is ordinarily preſumed, that if the thing had been delivered, the creditor would have diſpoſed of it, and ſo been free of the hazard, eſpecially if it be a thing for ſale not for keeping, and if any occaſion was offered to have diſpoſed thereof [oo].

XVI. The next effect of delay is the Intereſt or Damage of the creditor; for if the obligation be performed within the due time and in due manner, there is no intereſt; if not, after the delay incurred by requiſition or (*the*) term, it is in the creditor's option to purſue for performance, or for damage and intereſt. But in ſome caſes delay may be purged, which is much *in arbitrio judicis*, and is always granted in things penal where the penalty is great, and exceeds the true intereſt, as in non-payment of feu-duties, which infers the loſs of the feu; and in clauſes irritant in wadſets. When delay is purged, the hazard returns upon the creditor, and the debtor is free if the thing to be delivered periſh; but if the creditor

[m] See above I. 15. 8. [n] *L.* 1. § *ult. de uſur.* [o] See above I. 3. 8. 2. Below IV. 20. 29. [oo] See above I. 13. 2. 2.

creditor do again require after the former delay is purged, delay is again incurred by that new requiſition.

This is a general rule *locum facti impreſtabilis ſubit damnum et intereſſe*, yet in ſome caſes if the delay be wilful or fraudulent that the thing might become impreſtable, all perſonal execution by eſcheat and caption will proceed. Intereſt may either be competent for the whole obligation as when it is impreſtable, or when any part or qualification is unperformed for the value thereof. Intereſt doth both comprehend *damnum emergens et lucrum ceſſans*; the firſt is commonly competent, the laſt but in ſome caſes, and that ordinarily for ſuch gain as the creditors uſed to make; and ſo the delay of bills of exchange, gives exchange and re-exchange as the creditor's condition requires [p]; but would give neither, when not drawn for the uſe of a merchant, or him that behoved to obtain the ſum for a merchant, for preſent uſe. In ejections, ſpuilzies, and other atrocious delinquencies, the greateſt profits that might have been made, are allowed as the creditor's intereſt. In obligations which are not *in dando* but *in faciendo*, the common opinion of the doctors is, that there can be no purſuit for performance, but only for intereſt; for before the delay there is no purſuit, and after, the *creditor* cannot purſue for performance, but for intereſt [pp]; but it ſeems more ſuitable to equity, that it ſhould be in the creditor's option even after the delay, either to ſuit for performance or intereſt as he pleaſeth, if both be preſtable.

In obligations *in dando* where there is delay incurred, it will not be purged by offering performance, eſpecially if the thing have a certain definite ſeaſon of its uſe, as grain of ſuch a year if it be not delivered *debito tempore*, the delay will not be purged by offering it after, but the price comes in place of it.

There is a conſtitution of *Juſtinian*, reſtricting intereſt where things certain are in the principal obligation, to the double, and in others, allowing judges to enquire what damage truly is ſuſtained, and to determine accordingly, *l. unic. C. de ſent. quæ pro eo quod intereſt.* wherefore we extend not annuals in the *Engliſh* double bonds beyond the ſtock, becauſe they are penal, and ſhould do the like in any penal annuals, but not in conventional annuals. Thoſe who remove not after warning within burgh are only liable for double the mail they paid, if it were not conſiderably within the juſt rent.

In intereſts, the value thereof may either be that which is agreed by parties which, if high and penal, may be modified, or ordinarily the common rate, and ſometimes *pretium affectionis* in theſe caſes, where the creditor hath *juramentum in litem*. The value was eſtimated by the Romans, in *bonae fidei judiciis* as at the time of ſentence, *in ſtricti juris* as it was worth the time of litiſconteſtation; this diſtinction is not now of much uſe with us, and therefore it is rather in the arbitriment of the judge to ponder all circumſtances, and accordingly modify the value either as at the time of delay or citation, litiſconteſtation or ſentence.

XVII. Profit which comprehends fruits is a part of the creditor's intereſt in ſale; for by the ſpecial nature of that contract all acceſſions and fruits belong to the buyer from the time of the ſale, and ſo it is a part of that contract; but in other contracts it is only due *poſt moram*, and is no part of the contract. The ſentence of the Roman law is in this as in the eſtimation; *in actionibus bonae fidei* and *in arbitrariis* fruits and profits become due from delay, which alſo takes place in legacies; but in theſe which are *ſtricti juris*, if the obligation be to deliver that which was the creditor's before, the fruits and profit follow the property, and are due from delay; but where the property was not the creditor's, the fruits are not due till litiſconteſtation [q].

XVIII. The time of performing obligations, is at or before the term; in obligations not to a day ſo ſoon as requiſition is made; which cannot be underſtood in that inſtant, if the thing require more time to perform it, but ſuch time is allowed, that by ordinary diligence it may be performed [r]; ſo that delay is not underſtood

[p] See above I. 11. 7. 3. *de verb. oblig.* [pp] *L.* 13. *fin. ff. de re jud.* [q] *L.* 3. *L.* 34. *L.* 38. *ff. de uſuris.* [r] *Arg.* § 5. *Inſt.*

derſtood till that be paſt ; as when a party is obliged to do a work, he muſt have ſo much time as the work requires ; or if money be required, if the debtor offer within twenty-four hours, it would not infer delay ; for it is not his part to carry a ſum of money about him, nor to have it ready at each inſtant, *et nec cum ſacco adire debet* [s]. And paſſing an inſtant, the ſtricteſt time law reſpecteth is an artificial day or twenty-four hours ; if the debtor offer before the day the creditor cannot refuſe it, ſeeing the day is in favour of the debtor, and ſo may be renounced by him ; if a term be expreſſed, there needs no requiſition ; *nam dies interpellat pro homine*, as ſaid is.

XIX. The place for performing obligations, if it be expreſſed, is to be obſerved, and another place cannot be obtruded, tho' it may ſeem as convenient for the creditor, unleſs there be not ſafe acceſs to that place, in which caſe the debtor may offer, and the creditor may purſue, as if no place were named ; in which caſe he hath the choice to purſue, either in the place of the contract, if he find the debtor there, or wherever the debtor is conveenable ; and even where the place is expreſſed, the creditor may elſewhere purſue for performance, if he allow the debtor's damage, in not paying at the place appointed ; but if the thing to be performed, be delivery of a certain ſpecies or body, which cannot follow a man, as a horſe or a dog, but an inanimate body, as a coach, coffer, cabinet, or the like, if no place be expreſſed, the place where it is muſt be underſtood ; but if it be a quantity, ſimply, the place of contract, or where the debtor reſides, is underſtood ; for the debtor is not preſumed to follow the creditor's reſidence, if cuſtom or paction be not otherwiſe.

XX. As to the manner of performing obligations, the main queſtion is, when there are *correi debendi*, whether performance muſt be by all *in ſolidum*, or but *pro rata*? [t] For eviting the queſtion, 1°. Debtors uſe to be bound conjunctly and ſeverally, but when that is omitted, the debtors are underſtood to be but bound conjunctly, *et pro rata* ; for *in dubiis potior eſt conditio debitoris* : if the debtors were bound by ſeveral obligations, not relating to others as becoming parts of the ſame obligation, all are bound ſeverally and *in ſolidum* ; but when they are bound together in one bond, and ſo *correi debendi*, by the ancient *Roman* law, they were all liable *in ſolidum*, which was altered by *Juſtinian*'s novel conſtitution, giving the benefit of diviſion *pro rata*, as to theſe who are ſolvent and not far abſent, * *which as more equitable and favourable is followed* [tt], unleſs the matter of the obligation be indiviſible, as the delivery of a man, an horſe, or any thing which law conſiders not as quantity or *genus*, but as *a corpus* ; for oft-times that cannot be divided without deſtruction of the thing, and always it is the creditor's intereſt that it ſhould not be divided. 2°. Obligations *in faciendo*, are ordinarily indiviſible, as was lately found in an obligation by two owners of a ſhip, to carry corns from one port to another, both were found liable *in ſolidum* ; or if the obligation be *in non faciendo*, that ſuch a thing ſhall not be done, but that they ſhall hinder, each is obliged *in ſolidum*, *June* 14. 1672, *Sutherland* and *Grant* [u].

This alſo concerns the manner of performance, that in alternatives *electio eſt debitoris*, whoſe part is more favourable, but the adjection of a penalty or eſtimation, makes not the obligation alternative : but if any of the members of the alternative become not intire, the debtor cannot offer that member, *January* 18. 1675, collector of the *King* and *Lords* taxation.

The manner alſo of performance admits not that the debtor may perform by parts that which he is obliged to by one obligation, if it be not that, which cannot be performed all at once, as the performance of ſome acts, requiring divers ſeaſons ; but otherwiſe it muſt be done without intermiſſion ; for neither can money or grain be all delivered at one inſtant ; but that is underſtood to be performed

* The benefit of diviſion was introduced by the Emperor *Hadrian* ; *Juſtinian*, by *Nov.* 99. *C.* 1. extended it to the caſe where each had expreſsly become bound *in ſolidum*.

[s] *L.* 105. *de ſolut.* [t] See above, § 12. *h.* 1. and I. 13. 10. [tt] *Authen. L.* 2. *C. doub. reis ſtipul.* [u] See above I. 12. 14. and I. 9. 5. *L.* 2. *ff. de verb. oblig. per totam.*

ed together, which is without intermiſſion ; yet the civil law favours the debtor ſo far, that the creditor cannot refuſe to accept a part of the money due *, which our cuſtom allows not.

TITLE XVIII.

Liberation from Obligations.

I. *Obligations ceaſe by contrary conſent expreſſed by diſcharge, declaration, renunciation, or* per pactum de non petendo.
II. *Diſcharge, its effects—Three ſubſequent diſcharges liberate from all preceedings.*
III. *Payment made* bona fide.
IV. *Conſignation.*
V. *Acceptilation.*
VI. *Compenſation.*
VII. *Retention.*
VIII. *Innovation.*
IX. *Confuſion.*

HAVING thus gone thorough the conſtitution and effects of Conventional Obligations, it is requiſite in the next place, to conſider their deſtitution and how they ceaſe, which we have expreſſed in the general term of Liberation, comprehending not only payment, but all the ways by which obligations or bonds are diſſolved or looſed, and debtors liberated. We are not here to ſpeak of the objections competent againſt obligations from their nullities, for ſuch were never truly obligations ; neither of the common exceptions againſt them, and other rights, as preſcription, litiſconteſtation, *res judicata*, circumvention, extortion, *&c.* of which in their proper places ; but only of the proper ways of taking away obligations ; and theſe are either by contrary conſent, or by performance, or the equivalent thereof.

I. *Firſt*, As conſent conſtituteth, ſo contrary conſent deſtituteth or extinguiſheth any obligation, whether it be by declaration, renunciation, diſcharge, or *per pactum de non petendo*, which may be extended, not only to conventional, but to natural obligations, as to any duty omitted or tranſgreſſed which is paſt, tho' not to the diſcharge of the obligation itſelf as to the future ; for love to God or our neighbour, and moſt of the duties betwixt huſbands and wives, parents and children, cannot be diſcharged as to the future ; neither can future fraud or force be effectually diſcharged, for ſuch *cadunt in turpem cauſam.*

II. *If the writ be ſpecial and expreſs, there can be no queſtion, when it concerns a perſonal right, and is granted by the party having power to diſcharge ; and therefore a diſcharge by a father of a power reſerved to him in an annualrent-right, whereupon infeftment followed for a ſum lent by the father, and taken to his ſon in fee, bearing a power to the father during his life to diſpone, was found valid, and that the diſcharge did not require regiſtration as a diſcharge of reverſion, Jan.* 6. 1681, *Bruce. But a diſcharge of an annuity belonging to an office by infeftment, containing a renunciation of that annuity, was not found relevant againſt an appriſer from the heritable officer, December* 9. 1676, *Lord Hattoun.* A diſcharge of a ſum payable to a man and his wife, and the bairns of the marriage, ſubſcribed only by the huſband, excludes *not* the wife from her liferent-right to that ſum, *Jan.* 21. 1680, *Caddel.* Neither was a diſcharge to a cautioner upon payment, found competent to *be pleaded on by* the principal debtor, unleſs the cautioner concur ; for the principal, *notwithſtanding the diſcharge*, may be diſtreſſed by the cautioner, uſing the name of the creditor as his cedent, *without aſſignation*, *July* 13. 1675, *Scrimzeour.* A diſcharge to one of more debtors, *viz.* co-tutors, found not to liberate the reſt, except in ſo far as ſatisfaction was made, or as the other co-tutors would be excluded from *the* relief *due* by the party diſcharged, *Dec.* 19. 1668, *Seatoun.* But payment made by *a* party *purchaſer of a part of* lands affected by inhibition, did liberate

* The *Roman* lawyers do not entirely agree as to this point. *L.* 41. § 1. *De uſuris. L.* 21. *De reb. cred.*

liberate the *purchaſers of the other parts pro tanto*, tho' it bore not in Satisfaction, but *only* to reſtrict the inhibition, *Jan.* 5. 1675, *Ballantine*.

Diſcharges by maſters to tenants for rent, by their ſubſcription, without witneſſes, tho' not being holograph, are ſuſtained even againſt ſingular ſucceſſors, in regard of the cuſtom ſo to diſcharge, *Nov.* 7. 1674, *Boyd*. And by the ſame cuſtom, receipts and diſcharges of merchants and factors, *in re mercatoria*, are ſufficient by the party's ſubſcription, albeit neither holograph, nor with witneſſes[w].

The main queſtion remains, how far general diſcharges are to be extended, which are of two ſorts: one where there are particulars diſcharged with a general clauſe, and then the general is not extended to matters of greater importance than the greateſt of theſe particulars, unleſs both be of one kind, as a greater ſum with leſſer ſums expreſſed, *Feb.* 24. 1636, *Lawſon*. The other is, where the diſcharge is only general without particulars, which uſeth not to be extended to clauſes of warrandice, clauſes of relief, or obligements to infeft, or to purchaſe real rights; and therefore a diſcharge of all debts, ſums of money, bonds, obligations, clags, claims, for whatſoever cauſe, was found not to diſcharge a contract for purchaſing an appryſing of lands, and diſponing the ſame, *Nov.* 19. 1680, *Dalgarno*. Neither was a diſcharge wholly general, extended to an obligation by the party diſcharged as cautioner, unleſs it were proved that the diſcharge was granted upon ſatisfaction of that debt, *Hope*, *payment*, *Ogilvy contra Napier*. But it was extended to contravention, tho' there was a decreet ſuſpended after the diſcharge, *Hope*, *contravention*, *Aitoun*. Yea, a general diſcharge in a decreet-arbitral, was found to liberate the ſubmitter-cautioner, *Hope*, *payment*, *Lady Balmaſtiner* *. Neither was a general diſcharge, found to extend to a ſum aſſigned by the diſcharger before the diſcharge, albeit the aſſignation was not intimated, ſeeing the diſcharger was not preſumed to know the want of the intimation, unleſs it were proved that the ſum was particularly communed upon, or ſatisfied at obtaining the general diſcharge, *Feb.* 3. 1671, *Blair of Bagillo*. Neither was a general diſcharge extended to ſums, whereunto the diſcharger ſucceeded after the diſcharge, *Feb.* 14. 1633, *Halyburtoun*.

Three ſubſequent diſcharges, do preſume that all preceedings are paſt from; as *firſt*, The diſcharges of three immediate ſubſequent years rent, *Had. June* 21. 1610, *Howiſon*. This was ſuſtained, tho' the diſcharges were only granted by a chamberlain, *Hope*, *clauſe irritant*, *Lord Wedderburn*. This was ſuſtained to purge a clauſe irritant, yea, tho' ſome of the diſcharges were granted to the father, and the reſt to the ſon as heir, *Feb.* 17. 1631, *Williamſon*, which was extended to bygones, tho' a bond was granted for them *by the debtor's tutor*, the bond bearing expreſsly for a term, and having lain over very long, and all ſubſequent terms paid, *March* 18. 1634, *Douglas*. But *receipts* of three ſubſequent years *victual*, granted *to the tenants* by merchants who had bought *the maſters* farms, did not liberate *in a queſtion with the maſter* from former years, *March* 26. 1636, *Maſter of Corſtorphin*. Neither where the diſcharges were not in writ, *Feb.* 19. 1631, *Moriſtoun*. Neither where the payment of three terms was acknowledged by the party's oath, which bore not three terms immediately ſubſequent, *Had. March* 26. 1622, *Kennedy*. Nor where there were two years diſcharges, and receipts *nearly* making up the third, *March* 23. 1631, *Roſyth*; and therefore receipts, tho' being joined, they would make up more than three years, yet infer not this preſumption, that all preceeding years are paid; yea, one diſcharge for three conſequent terms or years, would not infer the ſame; for the preſumption is mainly inferred from the reiteration of the diſcharges without reſervation, which no prudent man is preſumed to do.

The preſumption is alſo introduced in favour of debtors, that they be not obliged to preſerve forty years diſcharges; and therefore, if the payment be annual,

* The three deciſions here quoted from *Hope* are very indiſtinct as obſerved by that author, and do not clearly ſupport the doctrine drawn from them.

[w] See below IV. 42. 6.

nual, there muſt be three diſcharges of three years immediately following one another, as in the payment of farms; but if the payment be termly, as in annualrents, or ſilver rents, the ground of the preſumption holds by three ſeveral diſcharges, of three immediate ſubſequent terms, *Hope*, *payment*, *Weyms*. But as to the diſcharges of factors or chamberlains, three ſubſequent diſcharges are only ſufficient againſt the chamberlain, during his commiſſion, and againſt his conſtituent, who gave him power to diſcharge, during that commiſſion *. But the ſtrongeſt of theſe preſumptions admits of contrary probation by the debtor's *(oath)*, that he knows there are preceeding reſts, which his writ will not prove, tho' he ſhould acknowledge in writ, ſo much reſting at ſuch a time; for three ſubſequent diſcharges thereafter, will preſume theſe reſts paid, tho' ſtill his oath may prove it is not paid; ſo that the ſtrongeſt of theſe preſumptions, tho' they be *præſumptiones juris*, yet they are not *præſumptiones juris et de jure*, which admit of no contrary probation, 18th *Feb.* 1669, *Cockburn*.

The more proper way of diſſolving obligations is by performance, by which they attain their effect, and that is either by Payment or Conſignation; the more improper ways are, Acceptilation, Compenſation, Innovation, Confuſion; of which in order.

III. Payment is the moſt proper *way of* looſing obligations, and therefore retaineth the common name of Solution [u]. In many caſes payment made *bona fide*, diſſolveth the obligation, tho' he to whom it was made had no right for the time. So payment made *bona fide* to a procurator was thought ſufficient, albeit the procuratory were thereafter improven, ſeeing there was no viſible ground of ſuſpicion of the falſhood of it, *Feb.* 1. 1665, *Elphingstoun*. *And payment by heritors to their miniſters, who were ſuffered to continue to preach, was ſuſtained, tho' they had not obtained preſentation nor collation in terms of the act of parliament* 1661; *ſeeing no proceſs, civil nor eccleſiaſtical, was intented againſt them or the heritors, before payment*, *Feb.* 10. 1666, *Collectors of the vacant ſtipends*. And payment made to a miniſter, tho' he was depoſed, having continued to preach after the term, before intimation of the depoſition, was ſuſtained, but not for terms after the intimation, *Jan.* 10. 1679, College of *Aberdeen*. So alſo payment made by a debtor to his creditor *bona fide*, was found ſufficient to liberate, againſt an appryſer, who had appriſed the right of that ſum, before payment made, albeit the appryſing as a judicial aſſignation needs no intimation [ww], as was found in the caſe of *Thomſon contra Douglas Lady Longformacus* **. And payment made *bona fide* to a donatar, was found relevant againſt a prior donatar, *Hope*, *horning*, *Wright* ***. And moſt ordinarily payment made *bona fide* by tenants to their old maſter, is found relevant againſt ſingular ſucceſſors, tho' publickly infeft, uſing no diligence to put the tenants *in mala fide*, *Spotiſ. compryſing*, *Lord Lowdoun*. And payment by tenants to their maſter, was ſuſtained againſt the donatar of his eſcheat, not having obtained ſpecial declarator, *Had. Feb.* 10. 1610, *Blackburn*; *Jan.* 31. 1628, *donatar of Cleghorn*. Neither will citations againſt tenants, or arreſtments upon the titles of ſingular ſucceſſors, put them *in mala fide* to pay to their maſter, till the titles of ſingular ſucceſſors be judicially produced againſt the tenants compearing, becauſe tenants are not obliged as purchaſers, to ſearch regiſters to find their maſters rights, or the rights of ſingular ſucceſſors; yea, the arreſtments of their maſters rents, not inſiſted upon and their maſters debts inſtructed, before the term, ſeem not to infer double payment againſt the tenants, paying after their terms are paſt [x]: but payment made before the hand doth not liberate, even againſt a donatar arreſting and doing diligence after payment, before the term, *Feb. ult.* 1628, *Lady Lauchop*; *Feb.* 5. 1667, *Lady Traquair*

* The contrary has been twice determined, and factors diſcharges only found to liberate from the particulars diſcharged, *July* 27. 1667, *Preſton*; *Feb.* 1682, *Earl of Mariſhal*, obſerved by Sir *Patrick Home*.

** This deciſion not found.

*** This deciſion, as obſerved by *Hope*, relates to a caſe entirely different.

[u] L. 49. *et* L. 80. *ff. De ſolut.* [ww] See below III. 1. 13. [x] See below IV. 40. 33. See above I. 9. 29.

quair. But it will not be accounted payment before hand, if by the condition of the tack, the firſt term's payment be made at the entry, and the tenants to be free at the iſh, *Jan.* 7. 1662, *Earl of Lauderdale*. Neither will a diſcharge *ſimulately or* freely granted, without true and real payment, be ſufficient, tho' it bear payment, to obtain the privilege of payment *bona fide*, as was found in the foreſaid caſe, *Thomſon contra Douglas* [xx]. Payment made by tenants *bona fide*, to their maſter of ſtock and teind *promiſcuè*, as they had been accuſtomed, found to liberate from their teind-maſter, who had inhibite and intimate the ſame to the tenants, ſeeing the proportion of the duty they paid for teind was not known, *Dec.* 13. 1627, *Hepburn*; *March* 21, 1628, *Murray* [y]. Yea, payment made of a part of the price of lands to the diſponer's bairns, to whom it was deſtinate, was found relevant, albeit after a reduction depending of that diſpoſition; ſeeing there was no reaſon filled up againſt the bairns intereſt, nor they cited, *July* 19. 1662, *Montgomery*.

Payment of a tocher contracted by a wife was inferred by *theſe* preſumptions, that the wife lived twenty two years, and that the huſband acknowledged in his teſtament, that ſhe had paid the tocher, *Feb.* 16. 1671, *Dods*. Payment is always preſumed by retiring of the principal bonds, *nam chyrographum apud debitorem repertum præſumitur ſolutum*. Miſſives or narratives in other writs, will not inſtruct where the principal writ itſelf is not produced, and therefore is held as retired, *Dec.* 10. 1680, *Wright*; albeit theſe are adminicles to prove the tenor, if the *caſus amiſſionis* be ſo far inſtructed, as to take off the preſumption, that the writ was retired.

Payment made indefinitely by a debtor for ſeveral ſums is generally aſcribed to any of theſe ſums that the debtor pleaſeth to apply it to; becauſe the caſe of the debtor is favourable, and the creditor granting a receipt indefinitely, it is interprete againſt him, the matter remaining entire as it was the time of the receipt: but where the debtor became bankrupt after the indefinite receipt, the ſame was not found applicable *by him after the bankruptcy*, to a ſum having caution, there being another ſum which had no caution, which would have been loſt by that application, *Feb.* 13. 1680, *M'Reith*. But where the debtor makes no application, but his creditor or ſingular ſucceſſor does compt the application, *præſumitur in duriorem ſortem*, as if for one debt there be a bond bearing annualrent, and another debt bearing no annualrent, the indefinite receipt is to be imputed to the bond bearing annualrent; or where the one ſecurity hath a greater penalty, legal or conventional, in caſe of not payment, as appryſing or adjudication, whereof the legal is near to expire.

IV. Conſignation [z], in caſe of the abſence, lurking or refuſal of the creditor, is equivalent to payment, and where it is not otherwiſe agreed with us it is ordinarily done in the hands of the Clerk of the bills, by way of ſuſpenſion, and it ſtops the running of annuals, and all other inconveniencies upon the debtor [zz], and the conſigner is free, tho' that which is conſigned be loſt by the keeper's being bankrupt, or otherwiſe, if it was the creditor's fault who charged for more than was due, as if he charged for the whole penalty, which ought to be modified: *and* there is no neceſſity in that caſe to conſign the penalty, but to offer what ſhall be found due; *but* if the fault be the conſigner's, if the money be loſt, it is loſt to him. It was ſo found, that a ſum conſigned in the hands of the Clerk of the bills, upon obtaining ſuſpenſion, the conſigner having firſt offered by inſtrument the principal ſum and annualrent, and ſo much of the penalty as the charger would depone he had truly deburſed upon oath, the inſtrument being alſo inſtructed by the oath of the witneſſes inſert, the conſigner was declared free, tho' the then Clerk of the bills was become inſolvent, *July* 28. 1665, *Scot*. So that in conſignation of ſums, for which there is a charge of horning, if the charge be for more than what is due, conſignation may be warrantably made, without offer of what is due; *Feb.* 15. 1673, *Mowat*; but otherwiſe, the offer of what is due ſhould precede, elſe the peril is the conſigner's, if the

[xx] See below, § 5. *fin. h. t.* [y] See below II. 8. 23.2. [z] See above I. 13. 6. [zz] *L.* 19. *C. De uſur.*

the ſum conſigned be loſt [a]. But if when the conſignation is *authoritate prætoris* either by deliverance of the Lords, or by the Lord ordinary paſſing bills of ſuſpenſion upon conſignation, it ſtops the courſe of annuals [aa], becauſe there is always a ſeveral reaſon of ſuſpenſion, which ought to be relevant, tho' conſignation would make it paſs without inſtruction; for then conſignation is only for the creditor's ſecurity in place of caution; and ſeeing the creditor may quickly diſcuſs the ſuſpenſion, and will be heard to anſwer ſummarily upon the bill, albeit, at diſcuſſing, the reaſon be not found relevant, or not inſtructed, annual is not decerned after conſignation, being *modica mora*; yet if the ſum were loſt, the peril would be the conſigner's, not having firſt offered all that was due, by inſtrument; and tho' the creditor be uncertain, lurking or out of the country, the Lords upon ſupplication will grant letters of requiſition and offer, to be execute at the market-croſs of *Edinburgh* and pier of *Leith*, where all men are preſumed to have procurators to anſwer for them *tanquam in communi patria*: but if an offer be made of all that is due, and not accepted, it is a relevant reaſon of ſuſpenſion, upon production of the inſtrument, and conſigning the principal and annual, tho' no part of the expences be conſigned, till they be modified. If the conſigner's reaſon be found relevant and inſtructed, the charge will be ſuſpended *ſimpliciter*, and the decreet will contain a warrant to the clerk of the bills, to deliver up the conſigned ſums to the charger, who muſt bear the expences of conſignation; but if the ſuſpender be *in mora aut culpa*, as if he do not conſign the expences modified by the Lords, whereby the charger will be put to a new charge, he muſt bear the expences of conſignation. But if an aſſigny or ſingular ſucceſſor charge for more than is due, the hazard will not be his, who may be ignorant of his cedent's diſcharges, and therefore the ſuſpender ought to produce to him the diſcharges, and offer to him what is due, which if he omit, the hazard will be his, *July* 9. 1675, *Queenſberry*. As to the obligements upon the conſignatar, theſe ſhall more properly come in, with redemption of wadſets, where conſignations are moſt frequent [b].

V. Acceptilation is the ſolution of an obligation, by acceptance of that which is not the direct performance of the obligation in ſatisfaction thereof, either really, or imaginarily by acknowledgement thereof, as if it were truly performed. The *Romans* did only allow acceptilation as a liberation from Stipulations, and therefore, before any other obligation could be diſſolved by acceptilation, it behoved to be innovated by a ſtipulation engaging for the ſame matter, and the acceptilation itſelf could only be by ſtipulation, by the interrogation of the debtor, *quod ex tali ſtipulatione debeo, acceptum fers*, to which the creditor anſwered, *acceptum fero*; whence it had the name of *acceptilatio*, expreſſing an acknowledgement of the receiving and accepting of the performance of the obligation, and of preſent bearing and having the ſame, which was valid and effectual tho' the creditor, neither then nor before, had received any performance of the obligation, and needed no other probation; nor doth it admit of a contrary probation, that nothing was truly received, in reſpect that the ſole will of the creditor may evacuate the obligation, by diſcharge or renunciation; and therefore acceptilation without any performance is ſufficient, and is the more ſolemn and ſecure way of exoneration.

Where there are many co-debtors, the diſcharging one liberates not the reſt, if they be co-principals, unleſs the diſcharge be perſonally conceived, that the thing obliged ſhall not be demanded; or that the renunciation or diſcharge be granted to the principal debtor; for thereby the obligations of the cautioners being acceſſory, are underſtood alſo to be renounced: But acceptilation extinguiſheth the obligation as to all the debtors; becauſe it importeth an acknowledgement of performance.

Acceptilation with us may be of any obligation, and requireth no ſtipulation; but as the acknowledgement of payment liberates all the debtors; ſo the acknowledgement

[a] See below II. 10. 18. [aa] *L. 6. C. eod.* [b] See below II. 10.

ledgement of any ſatisfaction which importeth payment, or any thing accepted as equivalent, hath the ſame effect; and therefore we uſe more the term of Satisfaction than Acceptilation; which ſatisfaction, if it be upon grounds equivalent to payment or direct performance, it is equiparate thereto in all points, and hath the privilege of payment made *bona fide*, to liberate, tho' the obligation be not performed to the party having the preſent, and better right; but otherwiſe, neither the acknowledgement of payment or of ſatisfaction, or any diſcharge, hath the privilege of payment made *bona fide*, which is mainly founded upon this ground, that *bona fides non patitur ut idem bis exigatur* [d].

VI. Compenſation is a kind of liberation as being equivalent to payment; for thereby two liquid obligations do extinguiſh each other *ipſo jure*, and not *ope exceptionis* only; for albeit compenſation cannot operate if it be not proponed, as neither can payment, yet both *perimunt obligationem ipſo jure*, and therefore are not arbitrary to either party, to propone or not propone, as they pleaſe; but any third party having intereſt may propone the ſame, which they cannot hinder; for inſtance, if a cautioner be diſtreſſed, he can propone payment, or compenſation upon the like liquid debt due to the principal debtor, which the principal cannot hinder; and therefore a liquid clear debt, tho' bearing no annualrent, compenſeth another debt bearing annualrent, not only from the time compenſation is proponed, but from the time that both debts came to be payable, from which time it ſtops the courſe of annualrent, as is clear by many laws, *Digeſt. et Cod. de compenſationibus*; which is conſtantly followed by our cuſtom, wherein poſitive law for utility's ſake hath influence, to ſhun the multiplication of pleas; for otherwiſe, if compenſation were rejected, the creditor would proceeed to execution, and the debtor would be put to a new action, which is very inconvenient; and therefore, when a *perſon* forbeareth to inſiſt for a liquid debt, after the term is paſt, it is preſumed to be on that account, that *he oweth to his debtor* [e] the like, or a greater ſum, *et fruſtra petit quod mox eſt reſtituturus*. But otherwiſe compenſation is neither payment formally nor materially; for when a creditor borroweth from his debtor a ſum, and expreſsly obligeth him to pay the ſame, it is ſo far from being done for payment of a ſum, formerly due to the debtor, that there is an expreſs obligement to pay the ſame in numerate money, at a day, and yet if that poſterior debt be inſiſted on, it may be compenſed with the prior.

If compenſation be renounced it will be excluded by that perſonal objection, which will take no place againſt other parties intereſt; for thereupon compenſation would be admitted for a cautioner, for a debt due to the principal, tho' the principal ſhould renounce compenſation; or if the compenſation be indirectly renounced, by giving a bond blank in the creditor's name, which is underſtood as done of intention, that the bond may paſs to ſingular ſucceſſors without a formal aſſignation or intimation, but by filling up the party's name who gets the bond, who charging thereupon will not be compenſed by any debt of the party, to whom it was firſt granted *, *Nicol, Nov.* 14. 1621, *Finlayſon, Feb.* 27. 1668, *Henderſon* [f]. And on the ſame ground, a bond of corroboration, bearing a general excluſion of ſuſpenſion, was found to exclude compenſation, tho' the bond was granted under caption, without any tranſaction or abatement, *June* 28. 1672, *Murray*.

Compenſation is deſcribed by *Modeſtinus, debiti et crediti contributio* [ff]; which deſcription is neither clear nor full: it is not clear whether the contribution be by concourſe of two debts, or by proponing of the compenſation: neither is it full by expreſſing what kind of debts are compenſeable, for they muſt be commenſurable, and liquid, being conſidered as fungibles, indecernable, in the value, or in the individuals, as money, wine, oil, grain, &c. Or

* Blank writs are now diſcharged, *P.* 1696. *c.* 25.

[d] See above, § 3. *h. t.* [dd] *L.* 57. *ff. de Reg. jur.* [e] F. that the creditor oweth him. [f] See below III. 3. 5. 2. [ff] *L.* 1. *ff. de compenſat.*

Or if both obligations be in general, as if either party be obliged to deliver a houſe, a ſword, *&c.* for then no ſpeciality being expreſſed, the obligations are commenſurate, and ſo compenſable. But obligations of a particular body are not compenſable by money; and therefore money depoſitate being demanded, cannot be compenſed by a debt due to the depoſitar, becauſe the money depoſitate was not delivered as a fungible to be reſtored in the ſame kind, but in the ſame individual; and likewiſe acceptance of depoſitation, imports ſo much truſt for ready delivery, that compenſation is underſtood thereby to be renounced [g].

Upon the ſame ground, compenſation is not relevant upon ſums ſecured by an heritable infeftment, whereby lands or annualrents are diſponed for theſe ſums; for tho' impignoration be intended, yet the contract being in the form of vendition with a reverſion, the ſum lent becomes the debtor's, as the price of the land or annualrent, and is no more the creditor's, unleſs there be a clauſe of requiſition, that he may return to his money, or paſs from his infeftment, or a clauſe to repay upon a ſimple charge; and therefore, till the requiſition or charge, there can be no compenſation, except upon the bygone annualrents, due by the infeftment, which remain ſtill moveable and compenſable, *January* 2. 1667, *Oliphant*. But compenſation was ſuſtained upon liquid ſums, tho' appriſing was led thereupon, unleſs it were clad with poſſeſſion and expired, *June* 18. 1675, *Lyes*. The like was found as to a ſum appriſed for: but not upon a wadſet, requiring requiſition, unleſs requiſition were made, *November* 12. 1675, *Home*. The reaſon of the difference is, becauſe appriſings or adjudications during the legal, are extinct in any way that the ſums whereon they were led become extinct, and need no re-inveſtiture of the debtor as wadſets do. But by a liquid debt, is not underſtood a debt, for which there is a decreet, or *quae habet paratam executionem*, but it is ſufficient that the debt itſelf is liquid of the ſame kind with the charge; and therefore, compenſation is competent againſt ſums due by regiſtrate bonds, upon ſums due by bonds, tho' not regiſtrate, yea, tho' not regiſtrable.

Compenſation is alſo competent upon debts which are not liquid, ſo ſoon as they become liquid, either by a liquidation of conſent, or by a decreet, which was ſuſtained, tho' the decreet was after the charge, *Dec.* 23. 1635, *Keith*. Yea, a decreet of liquidation againſt a principal, was found ſufficient to infer compenſation againſt the cautioner, or his aſſigny, tho' not called to the decreet, it being without colluſion, *June* 24. 1665, *Irving* [h]. And compenſation was ſuſtained againſt an aſſigny, upon a debt due by the cedent, tho' liquidate after the aſſignation, in reſpect the aſſignation was gratuitous, *Jan.* 18. 1676, *Crokat*: but compenſation ought no further to be drawn back than to the liquidation; and ſo farms being liquidate will ſtop the courſe of annualrent, from the time of the liquidation, but not from the time the farms were due, unleſs it were money-rent; but farms or ſervices only from the liquidation, *Dec.* 4. 1675, *Watſon*.

Compenſation is relevant, not only upon a debt of the creditor's own, but if he be creditor by aſſignation, the debt is compenſable by a liquid debt, due by the cedent, before he was denuded by aſſignation and intimation, becauſe the compenſation was effectual *ipſo jure*, from the concourſe of the two liquid debts *inter eaſdem partes*, *Feb.* 14. 1633, *Keith*; *March* 16. 1639, *Forſyth* [hh]. Compenſation by our common conſuetude, is alſo relevant upon a debt aſſigned to the compenſer, albeit the debtor purſued or charged, do ſeek out and acquire a debt of the charger's, even after the charge, which is a further benefit introduced by cuſtom, tho' it hath this inconveniency, that a creditor can hardly recover any debt, if he be due debt to others himſelf; but if an aſſigny charge for a debt, the debtor will not have compenſation upon a debt of the cedent's, aſſigned to him after the intimation of the charger's aſſignation; for theſe two debts never concurred *inter eaſdem partes*; for tho' the debtor may always compenſe the aſſigny upon the cedent's debt before the aſſignation, if it was originally due to the debt-

[g] See above I. 13. 8. *et* 9. *L. penult. C. depoſiti.* [h] See above I. 17. 9. [hh] See below III. 1. 20.

or himſelf, *yet* [i] after the cedent is denuded by intimation, the debtor cannot acquire a debt due by the cedent to another, therewith to exclude the aſſigny; *for* [k] theſe debts do never concur betwixt the ſame debtor and creditor, *Jan.* 22. 1663, *Wallace*; *July* 4. 1676, *Rollo* *. The reaſon is, becauſe, after a charger's cedent is denuded by his aſſignation to the charger, he is no more creditor to the perſon charged; and therefore that perſon taking aſſignation to the debt due by the charger's cedent, could not compenſe the charger, much leſs his aſſigny. But heirs and executors are accounted *eadem perſona cum defuncto*; and therefore, compenſation may be both upon and againſt their debts: ſo compenſation was admitted againſt an heir or executor, upon *a* debt due by the defunct to the defender's father, whom he repreſented, *Nicol, July* 26. 1611, *Pyet*. And compenſation was admitted againſt an executor upon a legacy left to the defender, tho' there was no ſentence thereupon, *Spotiſ.* executors, *Williamſon*. It was alſo admitted for an executor, upon a debt due by the purſuer to the defunct, tho' the executor had not confirmed that debt, but he behoved to eik the ſame, *Had. Dec.* 7. 1609, *Aikman*.

But compenſation is not competent to a *debtor* of a defunct, taking aſſignation to one of the defunct's debts after his death, which is upon account of the privilege of the creditors, who have acceſs to the defunct's eſtate according to their diligence; and therefore the executor cannot prefer one to another, much leſs can a debtor of the defunct, by taking aſſignation to the defunct's debts, prefer that creditor to the reſt of the creditors of the defunct, *Feb.* 8. 1662, *Crawfurd*; *Feb.* 14. 1662, children of *Mouſwall*.

Compenſation was found competent againſt a donatar upon a debt of the rebels before the rebellion, for which the compenſer was cautioner, tho' he paid thereafter, *Feb.* 3. 1635, *Innes*; *Jan.* 23. 1669, *Drummond*. Compenſation is competent againſt factors, procurators or commiſſioners, upon their conſtituent's liquid debt, but not upon their own debt; for they are not creditors as to their conſtituent's ſums. Yea, a factor being charged by his conſtituent for his intromiſſion with his rents, was not admitted to compenſe the ſame with a debt due by his conſtituent, whereunto the factor took aſſignation; neither was a chamberlain accounted a debtor to his conſtituent, as by a liquid debt, but that his conſtituent's rents were in the property of his maſter, and only in the factor's cuſtody as a ſervant, *Nov.* 9. 1672, *Pearſon*.

Compenſation takes no place in the provinces of *France*, which acknowledge not the *Roman* law, but a conſuetudinary law, without a privilege from the King, as is obſerved by *Gregorius Tholoſanus* upon compenſation. And it ſeems not to have been competent by the law of *Scotland*, before the act of *Parl.* 1592, *cap.* 143. whereby it is ſtatute, "That any debt *de liquido in liquidum*, inſtantly ve-
"rified by writ, or oath of party, before giving of decreet, be admitted by all
"judges within the realm, by way of exception; but not after the giving there-
"of, in the ſuſpenſion, or in the reduction of the ſame decreet:" So that if the charge or purſuit be inſtantly verified by writ, the defender will not get a term to prove compenſation; but if a term be aſſigned to the purſuer, the ſame would be aſſigned to the defender, to inſtruct any debt wherewith he would compenſe by writ or oath, yea by witneſſes, if the probation can be cloſed as ſoon as the purſuer's probation; for the ſtatute bears, "compenſation to be in liquid debts in-
"ſtantly verified before the decreet," altho' it mention not probation by witneſſes, it doth not exclude the ſame; but it excludes compenſation after the decreet, either by ſuſpenſion or reduction, which ſeems to import more than the rejection of compenſation, becauſe it was competent and omitted, which hath been always a common objection againſt any reaſon of ſuſpenſion or reduction; but that compenſation

* By the two deciſions here quoted it appears, that not only the debt to be uſed in compenſation muſt be acquired by the debtor before the creditor is denuded by aſſignation intimated, but the acquiſition muſt be intimated to the creditor before that time.

[i] F. but. [k] F. otherwiſe.

penſation ſhould not be admitted after decreet, tho' the decreet were in abſence, unleſs it were reduced upon improbation of the executions, or other nullity, or by purging the contumacy in not compearing; ſo compenſation was not ſuſtained againſt a ſheriff's decreet, tho' in abſence, *July* 25. 1676, *Wright*. And the taking aſſignation to the debts of the *creditor* after decreet, ſhould not found a compenſation, as being againſt the letter of the ſtatute; for tho' it ſeem an emergent reaſon, which would be ſufficient againſt competent and omitted, yet not againſt the ſpeciality of this ſtatute, excluding all compenſation after decreet. But this ſtatute is to be underſtood only of decreets proceeding upon citation, and not decreets of regiſtration, which are ſummary and of conſent, by the clauſe of regiſtration.

Compenſation is ſometimes elided by re-compenſation, which doth but ſeldom occur, and hath not been diſtinctly determined as to the ſeveral caſes in which it may occur. There may be ſeveral debts due by, and to the ſame perſons, and they may inſiſt by purſuit or charge for ſome of them, and not for others, if there be more debts on either hand, they muſt be determined by an accompt of debit and credit; but if the purſuer be creditor in two liquid debts due by the defender, and the defender be creditor to him in one liquid debt, three caſes may occur; for either the defender's debt is anterior to both the purſuer's debts, or poſterior to both, or is betwixt the two debts of the purſuer or charger.

The ground for reſolution of theſe caſes, is that which hath been ſaid, that liquid debts due by and to the ſame perſons, concurring at the ſame time, extinguiſh each other ſo far as they are equal: ſo then if a creditor, having two debts due to him by the ſame debtor, and if the debtor be creditor to him in a debt prior to both, the firſt debt of the two being purſued for, the defender hath compenſation on his debt prior to both, becauſe theſe two debts, ſo ſoon as they concurred, did extinguiſh each other, but the purſuer cannot recompenſe with his ſecond debt, becauſe there was no extinction betwixt it and the defender's debt, but only between the purſuer's firſt debt, and the defender's anterior debt; but if the purſuer inſiſt for his ſecond debt, the defender proponing compenſation upon that debt, the purſuer hath re-compenſation upon his firſt debt.

If the defender's debt be poſterior to both the purſuer's debts, the concourſe and extinction is only between the purſuer's ſecond debt and the defender's debt, yet compenſation being equivalent to indefinite payment, wherein the favour of defenders gives the option to aſcribe the indefinite payment to either of the debts he pleaſeth; therefore, whether the purſuer inſiſt on his ſecond or firſt debt, he cannot recompenſe with the other: this doth alſo agree with that ordinary preſumption, that a creditor would not give bond to his debtor, but would only give him diſcharge and allowance in what he was before owing to him, and ſo in that caſe there is no re-compenſation*.

The third caſe is, if the defender's or ſuſpender's debt be in the middle, between a prior debt of the purſuer's, and a poſterior, then a middle debt concurring with the prior debt, there is mutual extinction; and therefore, if the purſuer inſiſt on his prior debt, and the defender crave compenſation on his middle debt, the purſuer cannot have re-compenſation on his poſterior debt; but if the purſuer inſiſt on his poſterior debt, if the defender compenſe *on* his middle debt, the purſuer may recompenſe with his prior debt.

VII. Retention is not an abſolute extinction of the obligation of re-payment, or reſtitution, but rather a ſuſpenſion thereof, till ſatisfaction be made to the retainer; and therefore it is rather a dilatory than a peremptory exception, tho' ſometimes, when that which is due to the retainer, is equivalent to the value of what is demanded, if either become liquid, it may turn into a compenſation. Such is the right of mandatars, impledgers, and the like, who have intereſt to retain

* This ſentence is obſcure. The preſumption, that a creditor would not give bond to his debtor, ſtrikes here againſt both the debts in the purſuer's perſon; and altho' this preſumption has not force enough to deſtroy theſe debts, *March* 16. 1639, *Forſyth*, yet it affords an additional ground in equity for allowing the defender the option to uſe compenſation againſt either of the debts, and to prevent the purſuer from uſing re-compenſation.

retain the things poſſeſſed by them, until the neceſſary and profitable expences wared out by them thereupon be ſatisfied.

VIII. Innovation is the turning of one obligation into another; and if it be a third perſon becoming debtor for relief of the former debtor, it is called *Delegation*. Innovation is not preſumed by granting of a new obligation, either by the debtor or another; but it is rather held to be as caution or corroboration of the former obligation, conſiſtent therewith; and in the civil law it is never eſteemed innovation, unleſs it be ſo expreſſed [m]: but with us, tho' it be not named, yet, if it appear to have been the meaning of the parties, not to corroborate, but to take away the former obligation, it is a valid innovation: ſo it is ordinarily inferred, when a poſterior ſecurity bears, "in ſatisfaction of the former obligati-"on," tho' it did not renounce or diſcharge it, nor expreſsly innovate it, *Dec.* 6. 1632, *Chiſholm*. The like where the poſterior bond bears, "in full ſatisfaction of "the ſum, for which the former was granted," tho' it made no mention of the former ſecurity, *July* 23. 1633, *Lawſon*.

IX. Confuſion of obligations is, when the creditor and debtor become one perſon, as when the one ſucceedeth as heir to the other, or becomes ſingular ſucceſſor in the debt; for thereby the obligation is ineffectual, ſeeing none can be creditor or debtor to himſelf, which was extended ſo far, that an heir-portioner being debtor, by meddling with the defunct's *moveables*, and thereafter her huſband taking aſſignation to a debt, and purſuing another repreſenting the defunct thereupon, the exception of confuſion was found relevant, becauſe he was creditor as aſſigny, and debtor as the intromitter's huſband, *Spotiſ.* aſſignation, *Muir*. But where an apparent heir gave a bond, whereupon adjudication was uſed of his predeceſſor's eſtate, his taking aſſignation to that adjudication was not found to extinguiſh the debt by confuſion, *Jan.* 22. 1662, *Glendinning*. Tho' rights ſo taken will not free the aſſigny of behaving as heir, if *he* [n] intromit; whereupon there was an act of ſederunt made *Feb.* 28. 1662, as to all caſes thereafter. But if by different ſucceſſions, the debtor and creditor ſhould become diſtinct, the obligations would revive, as in many caſes may occur; and ſo confuſion is not an abſolute extinction, but rather a ſuſpenſion of obligations *.

Confuſion doth not always take place, where the ſame perſon who is debtor ſucceeds to, or takes aſſignation *from the creditor*, as is evident in cautioners taking aſſignation to bonds wherein they are debtors as cautioners, yet may purſue the principal, or co-cautioners as aſſignies, and will not be excluded upon alledgeance of confuſion, which is only relevant when that debtor who hath no relief, becomes alſo creditor by ſucceſſion or aſſignation **. And ſo an executor taking aſſignation to an heritable debt, may thereupon purſue the heir for relief: or any heir-male of tailzie or proviſion, taking aſſignation to his predeceſſor's debt, may, as aſſigny, have recourſe againſt the heir of line, of conqueſt, or executor. Yea, if any perſon take aſſignation to a debt, due by his predeceſſor, to whom he is heir-male, (*in favour of himſelf and his heirs-male*) if there be no heir of line or executor, tho' during his life the aſſignation can have no effect, yet after his death, his heir-male will ſucceed to him in that aſſignation, and may thereupon purſue his heir of line, or executor for payment; for the taking of an aſſignation, and not a diſcharge, did clear the mind of the defunct, that the debit and credit ſhould divide after his death, and that his heir-male ſhould ſucceed to him *in credito*, and his heir of line *in debito*.

The End of the Firſt Book.

THE

* See an example, *Dec.* 21. 1680, *Cuninghame*.
** See an example, *L.* 71. *ff. de fidejuſſoribus*.
[m] *L. ult. C. de novationibus.* [n] F. his aſſigny. See below III. 6. 14.

THE INSTITUTIONS OF THE LAW of SCOTLAND.

BOOK II. TIT. I.

Rights real or Dominion; where, of Community, Poſſeſſion, and Property.

I. *The original dominion of man over the creatures.*
II. *What rights are heritable and what moveable.*
III. *Moveable and heritable bonds.*
IV. *How heritable obligations become moveable, and return to be heritable.*
V. *What remains yet common to mankind.*
VI. *Implied obligation on proprietors to exchange, and in caſes of neceſſity to give.*
VII. *Graſs and fruits on highways are publick not common.*
VIII. *Poſſeſſion more* facti *than* juris.
IX. *Poſſeſſion deſcribed.*
X. *Poſſeſſion natural and civil.*
XI. *Poſſeſſion of moveables.*
XII. *Poſſeſſion of the ground.*
XIII. *Poſſeſſion by limits and bounds.*
XIV. *Poſſeſſion by lifting the profits.*
XV. *Symbolical poſſeſſion.*
XVI. *Poſſeſſion by conjunction of intereſts.*
XVII. *Definition of poſſeſſion.*
XVIII. *Requiſites to begin poſſeſſion.*
XIX. *Requiſites to retain poſſeſſion.*
XX. *How poſſeſſion is troubled, interrupted, or loſt.*
XXI. *Kinds of poſſeſſion.*
XXII. *Lawful poſſeſſion, what right it gives.*
XXIII. Bonæ fidei poſſeſſor, facit fructus conſumptos ſuos.
XXIV. *This not extended to unlawful poſſeſſors, and how extended to others.*
XXV. Poſſeſſor decennalis & triennalis non tenetur docere de titulo.
XXVI. *Quinquennial poſſeſſion of forfeited perſons.*
XXVII. *Poſſeſſion, to what right aſcribable.*
XXVIII. *The nature of property.*
XXIX. *Property acquired by poſſeſſion of things common.*
XXX. *Appropriation by induſtry.*
XXXI. *Firſt property of the ground was of houſes and wells.*
XXXII. *Next of fields and countries.*
XXXIII. Quæ nullius ſunt *how appropriated.*
XXXIV. *Appropriation by acceſſion of birth and fruits.*
XXXV. *Appropriation by alluvion.*
XXXVI. *Appropriation by confuſion.*
XXXVII. *Appropriation by commixtion.*
XXXVIII. *Appropriation by neceſſary conjunction; where,* de tigno juncto.
XXXIX. *Appropriation by contexture.*
XL. Inædificata ſolo cedunt ſolo.
XLI. *Appropriation by ſpecification.*
XLII. *Poſſeſſion of moveables preſumes property.*

HAVING gone through the firſt two branches of private rights, perſonal freedom and obligation, how they are conſtitute and how extinguiſhed, we come now to the third, which is dominion: but becauſe that term is more appropriated to *the power of* men over men, than over the creatures, it is therefore called a right real, or a right of things: for as obligation is a right

perſonal, as being a power of exacting from perſons that which is due; ſo a right real is a power of diſpoſal of things, in their ſubſtance, fruits or uſe.

I. For unfolding this right, and the progreſs thereof, both according to the order of time and nature, advert, *Firſt*, That when God created man, he gave him dominion or lordſhip over all the creatures of the earth, in the air, and in the ſea, *Gen.* i. verſes 28. and 29. with power to man to diſpoſe of the creatures, even to the conſumption thereof; and it is like, that during man's innocency, there was upon the part of the creatures a great ſubjection and ſubſerviency to man, till afterwards, when he revolted from God, the creatures revolted alſo from him. This dominion of the creatures was given by God, when there was yet no man but *Adam* and *Eve* only; whence ſome do infer, that *Adam* was not only governor of this whole inferior world, but that he was proprietar of it, and that all rights of government or property, behoved to be derived from his diſpoſal, or by ſucceſſion to him, and that his monarchy did deſcend by primogeniture of his male race; ſo that if the perſon could be known, that doth by progreſs repreſent *Adam*, he would be the only righteous Monarch of the world; but the text cleareth the contrary: for in the 28th verſe, God ſaith to *Adam* and *Eve*, "Increaſe and multiply, and repleniſh the earth, and ſubdue "or ſubject the ſame, and have dominion over the fiſhes of the ſea, the fowls of "the heaven, and all living things which move upon the earth." This gift therefore could not be to *Adam* and *Eve*, who could neither repleniſh the earth, nor ſubdue it; but it was to mankind, which then was in their perſons only; and it did not import a preſent right of property, but only a right or power to appropriate by poſſeſſion, or *jus ad rem*, not *jus in re*; ſo that what was not ſubdued and poſſeſt, was no man's, and every man had right to ſubdue and poſſeſs, and thereby had right to that which before belonged to none, as well as *Adam*. And in theſe firſt ages, there was no property diſtinct from lawful poſſeſſion, not only of moveables, but even of parts of the earth; for when poſſeſſors removed from theſe parts, they ceaſed to be theirs, and became the next poſſeſſors; and therefore the ſcripture calleth them poſſeſſions, without mention of any other property. *Adam*'s dominion was of his poſterity, as he was their father, and ſo indirectly he might over-rule their poſſeſſions; but they derived no right from him thereto, but to what he gifted, being then in his poſſeſſion, which was common to all other fathers.

It is a falſe and groundleſs opinion which ſome hold, that man by his fall hath loſt his right to the creatures, until by grace he be reſtored, and that the ſole dominion of them belongs to the ſaints, who may take them by force from all others. For by the whole ſtrain of the law of God, he ſtill *alloweth* dominion and property of the creatures in man, without diſtinction, and prohibiteth all force or fraud in the contrary, which ſufficiently cleareth that ſubtility of man's forfeiture; for tho' ſin maketh man obnoxious by way of obligation to puniſhment, by God's exterminating him from the uſe and comfort of the creatures; yet that obligation doth not infer the actual ceaſing of man's right, much leſs the ſtating of the rights of mankind in a ſmall part of them.

This dominion of the creatures being given to man without diſtinct proportions or bounds; it neceſſarily followeth, that by the law of nature, the birth and fruit of both ſea and land were *common to* all mankind, who had equal intereſt therein, and every one might take and make uſe thereof, for his neceſſity, utility and delight: yet *ſo as* the uſe and fruit thereof muſt in ſome caſes, and might in all caſes become proper, as what any had taken and poſſeſt for his uſe, became thereby proper, and could not without injury be taken from him, much more the things which had received ſpecification from his art or induſtry became proper, and all others might be debarred from any profit or uſe thereof; but ſo, that ſome part or uſe thereof might be communicate to others, which being the leſſer, and not reaching the power of the ſubſtance of the thing, is therefore called a ſervitude, whereby that which is proper to one, ſerveth another in part. And when the proprietar giveth not the fruit, nor uſe, but only the holding, or the detention of the thing to another, for his ſecurity of ſome debt, or

or obligation of the proprietar's to him, that right is called a pawn or pledge; ſo that in whole, all real rights are either that Original Community of all men, or the intereſt which Poſſeſſion giveth, or Property, Servitude or Pledge; of which in order. And firſt, Generally as they were of old, common to both things moveable and immoveable; and then ſpecially in relation to things immoveable, and to heritable ground-rights of the earth, and things fixed thereto, which now by the feudal cuſtoms *are* much changed from what *they were*, and yet *are* in moveables.

II. The diſtinction of moveable and heritable, is very neceſſary to be here known, as being the common materials of real rights, and having a general uſe, in the conſtitution and tranſmiſſion of rights, amongſt the living, and from the dead; ſucceſſion being now totally divided, in moveable, and heritable or immoveable rights. Any thing is called moveable, which by its nature and uſe is capable of motion, as things immoveable are the earth, ſea, and things fixed to the earth, not to be removed therefrom, as trees, houſes, *&c.* which tho' they may be poſſibly moved, yet it is not their uſe ſo to be; the ſuperfice of the earth is immoveable, tho' it may be moved from one place to another place of the earth: the ſea alſo is immoveable, tho' it hath its agitation by ebbing and flowing, which is not the uſe man maketh of it. Theſe things with us are called heritable, becauſe they deſcend not to executors to whom only moveables befal, but to heirs: and ſo the diſtinction cometh ordinarily of moveables and heritables; as that which is fixed to, or is a part of the ground, is counted immoveable, as trees and graſs, and all the natural fruits of the earth; yet induſtrial fruits, as corns, are accounted moveable, and belong not to the heirs of defuncts, but to their executors, when they are ſown or growing upon the ground at their death, as well as when they are reaped, and ſo fall under ſingle eſcheat, *Feb.* 2. 1627, *Somervel.*

III. The diſtinction of heritable and moveable is derived to *rights and* obligations, as the matter thereof is heritable or moveable, and ſo all diſpoſitions or obligations for conſtituting any right of the ground, in property, community, or ſervitude, are heritable, altho' they have not yet attained their effect, and become real rights complete; as diſpoſitions of lands, annualrents, paſturages, thirlage, *&c.* which is ſo far extended, that all which is by deſtination to have its accompliſhment by a real right of the ground, is heritable; as bonds bearing a clauſe of annualrent, which becauſe annualrents were uſually by infeftment, therefore the very proviſion of annualrent, tho' but a perſonal obligement to pay it yearly or termly, without mention of infeftment, made the proviſion or bond heritable, and not to deſcend to executors, children, or wives, but to heirs only, till the act of parliament 1641 revived, *Parl.* 1661, *cap.* 32. whereby ſuch bonds as were or ſhould be made after that act 1641, bearing only a clauſe of annualrent, and no obligement to infeft the creditor in an annualrent, were declared to be moveable as to the defunct's children, *and* neareſt of kin, but not as to the wife, or fiſk to fall under ſingle eſcheat; and that becauſe many have their eſtates and ſtocks in money, and take obligement for annualrents, for the profit thereof, without purpoſe to exclude their younger children therefrom. But wives are excluded °, becauſe they are ordinarily provided by their contracts of marriage. But before this act, all ſuch bonds were to all effects heritable; yet ſo, as ſums deſtinate for annualrent, tho' *de facto* they bore none, are heritable *quoad* the party who deſtinate; as when a tocher is conditioned by a wife's father or brother to be paid to her huſband, who is obliged to employ it upon annualrent, this ſum as to the huſband is heritable, and excludes his executors; but as to the debtor who was neither obliged to pay annualrent or employ it, it is moveable, and ſo would affect the debtor's executors and exhauſt his moveables, but would only belong to the creditor's heirs, *Jan.* 19. 1637, *Robiſon contra Seton*, *July* 25. 1662, *Naſmith contra Jaffray*, and lately *Nov.* 19. 1691, *Fleming contra Bell* *. And this was ſo far extended, that when the deſtination was by a diſtinct article or bond, yet the executor might be compelled to aſſign, or repay the ſum to the heir, *Spotiſ.* *juramentum*

* This deciſion not found.
° See above I. 4. 17. 3.

juramentum de calumnia, contra Watſon. Idem de hæredibus, Executors of Seton contra Robiſon *. Bonds alſo become heritable by diſtinct ſuperveening rights, as by a ſeveral diſpoſition of the debtor's whole goods and lands, with an obligement to inſeft, and alſo by ſuperveening appriſings or adjudications.

IV. But even complete heritable rights themſelves, containing perſonal clauſes of requiſition, become moveable by requiſition or charge; which is *pro tempore* a paſſing from the infeftment, and taking the creditor to the perſonal obligement; yet ſo, as whenever he pleaſeth to paſs from the requiſition or charge, it convaleſceth, and is not excluded by interveening rights; and ſo was found moveable by a charge, tho' but againſt one of the cautioners, not only as to him, but as to all the debtors, ſeeing thereby the creditor had taken his option, *Jan.* 24. 1666, Colonel *Montgomery*. But the ſhewing the defunct's mind to require, is not ſufficient to make the ſum moveable, unleſs it be done *habili modo*: ſo a requiſition being diſconform to the clauſe of requiſition, was found not to make the ſum moveable, *Jan.* 18. 1665, *Stuart*. Yea, a charge upon a bond of corroboration, accumulating the principal and annual in a former ſecurity by infeftment, and bearing, "but derogation of the former ſecurity," was found to make the whole ſum moveable, and to belong to the executor, without neceſſity to inſtruct a warrant to give the charge, which was preſumed, albeit the defunct upon death-bed expreſſed, that the ſum belonged to his heir, *June* 25. 1672, *executors of Sir Robert Seton*. But ſums were not found heritable, becauſe a diſpoſition of land did bear, as the condition of the reverſion, that the land ſhould not be redeemed, or the acquirer denuded, till he were ſatisfied of all ſums due to him, or which ſhould be due to him by the diſponer; neither yet when the ſums are in the diſpoſitive clauſe, to be contracted thereafter; but only ſums which are the anterior cauſes of the diſpoſition, for thereby the creditor doth not make ſuch ſums *jura fixa*, nor are they the cauſes of the diſpoſition, *Feb.* 18. 1676, *Wauch* **. Sums are alſo heritable, when the executors are expreſsly excluded; and a charge or decreet for ſuch ſums will not make them moveable, *July* 13. 1676, *Chriſty*, and finally ſo determined, *Dec.* 30. 1690, heirs and executors, *Bonar contra Gray of Innerichty* ***; the reaſon whereof is, becauſe the mind of the creditor, by calling for his money, not to retain it in his hands as moveables: but to make it a fixed right for his heir, ſeeing he excludes his executors. And for the like reaſon, wives charging for their heritable ſums, the ſtock whereof is not in their huſbands power, are not preſumed thereby to make them moveable, and to fall in the power of their huſbands [p]. And if any party in his proceſs or charge, ſhould ſo declare his intent, it would not make the ſum moveable: but requiſition or a charge will make ſums, which were heritable by infeftment or deſtination, moveable; and ſo likewiſe will a decreet for payment, *Dec.* 13. 1676, *Fairholm* ****. Sums conſigned by an order of redemption, do not thereby become moveable till declarator of redemption, or till the creditor accept of conſignation, and inſiſt for the conſigned ſums, which if he do not, his executor cannot recover the ſame, but his heir, to whom the wadſet right belongs [q]. For it is not in the power of the debtor to alter the condition of his creditor's ſum, and to make it either heritable or moveable, without conſent of the creditor, or the authority of a judge; but the conſigner may take up his ſum conſigned, and paſs from his order *re integra*, *Jan.* 21. 1673, *Nicol*; *June* 18. 1675, *Leys*.

The requiſition or charge may not only be paſt from expreſsly, but tacitly, by taking annualrent *after the charge*, if it be for terms thereafter, *Spotiſ. aſſignation*, *Donaldſon*. Requiſition or a charge, makes bonds heritable even after the act 1641, moveable as to the relict. The like is when they become otherwiſe ſimply moveable: but ſums only heritable by deſtination for annualrent, are moveable

* Theſe deciſions not found.

** By act 5. P. 1696. infeftments for ſecurity of debts to be contracted, are declared to afford no ſecurity to the creditor for ſums afterwards advanced.

*** This deciſion not found. See *Harcus, executry, Bannantyn contra Bonar's* relict, N° 447.

**** The point here mentioned did not receive an expreſs determination by the deciſion quoted. It was ſo determined *Feb.* 23. 1628. *Naiſmith*. The contrary was afterwards found, *Feb.* 27. 1712, *Scot*.

[p] See above I. 4. 17. 10. [q] See below II. 10. 22.

moveable till the firſt term of payment of the annualrent be paſt, and tho' the term of payment of the principal be not come, yet if the firſt term of payment of annualrent be paſt, the ſum is heritable, *July* 31. 1666, *Gordon*. And if the debtor die before that time, ſuch ſums affect his executors, *July* 30. 1630, *Carnouſie*; or by the creditor's death before the firſt term of the annualrent, they fall to his executors and wife, *Dec.* 21. 1626, *Brown*; *Feb.* 12. 1623, *Wallace*; *June* 29. 1624, *Smith*. And generally all rights and obligements, having a tract of future time, are heritable as to the executors, who are thereby excluded, tho' they no way relate to infeftments of lands, as penſions, tacks, *&c.* [r] But as to the fiſk, where the diſtinction is betwixt moveables, liferent-rights and heritable rights, the firſt is carried by ſingle eſcheat, the next by liferent eſcheat *, and the whole by forfeiture. All rights relating to infeftment by deſtination, *or otherwiſe*, are heritable or moveable in the ſame manner as betwixt heirs and executors: but rights having a tract of time, but not for a liferent, are moveable, and fall under ſingle eſcheat [s]; *and* the bygones of annualrent by infeftment, are ſtill moveable [ss]: but as to both effects, aſſignations to liferent tacks, make them moveable, and to fall under ſingle eſcheat, *Hope*, horning, *Ker contra Ker*. Clauſes alſo of relief in heritable bonds are moveable, *July* 10. 1628, *Cant*; and the *jus mariti* of huſbands, tho' they carry the profit of the wives heritable rights or rights of liferent, fall under the huſband's ſingle eſcheat.

V. To return to the ſeveral kinds of real rights, the firſt is that of commonty, which all men have of things, which cannot be appropriated. As *firſt*, The air is common to all men, becauſe it can have no limits or bounds, and becauſe all men every where muſt neceſſarily breathe it. *Secondly*, Running waters are common to all men, becauſe they can have no bounds; but water ſtanding, and capable of bounds, is appropriated. *Thirdly*, The vaſt ocean is common to all mankind as to navigation and fiſhing, which are the only uſes thereof, becauſe it is not capable of bounds, but where the ſea is encloſed, in bays creeks, or otherwiſe is capable of any bounds or meiths, as within the points of ſuch lands, or within the view of ſuch ſhores, there it may become proper, but with the reſervation of paſſage for commerce, as in the land; ſo fiſhing without theſe bounds is common to all, and within them alſo, except as to certain kinds of fiſhes, ſuch as herrings, *&c.* *Fourthly*, All the wild and free creatures, which are in the property of none, are in ſome ſort common to all, as fiſhes, fowls, bees, *&c.* *But in reſpect that property hath taken hold of all that is appropriable, theſe are rather ſaid to belong to none, as being by common conſent declared void by all, that property thereof may be inferred by occupation and poſſeſſion, without reſpect to the perſon's neceſſity or uſe, as was in the ancient community, but that ſimply whoſoever poſſeſſeth that which belongeth to none, doth thereby acquire the property thereof*; which yet is reſtricted as to ſome kinds, as hawks and ſwans in ſome countries, and whales, extraordinary great fiſhes, ſalmon and herring-fiſhings, *&c.* which are *inter regalia*, or are excluded from the property of the commons. Such alſo is the right of appropriation by poſſeſſion of gems and precious ſtones on the ſhore, or things relinquiſhed by the proper owners, except where there is a national community, that people or their authority do poſſeſs in common, not only ſome reſerved rights of the earth, but alſo the rights of precious things, or things relinquiſhed, or loſt by ſhipwrack, or otherwiſe; whereby the imaginary poſſeſſion of having ſuch within their territories, is ſufficient by the cuſtom of nations to appropriate them, and to exclude other nations, or ſingle perſons of that ſame nation from them. So with us, treaſures hid in the earth, whoſe proper owners cannot be known, are not his in whoſe ground they are found, nor the finder's, but belong to the King: and things ſtrayed, or waith, whoſe owners cannot appear, are publick [t]; *ſhipwreck alſo* [u], *which is only to be underſtood when all living things periſh which were*

* Thus by act 15. P. 1617, liferent tacks are declared not to fall under ſingle but under liferent eſcheat.

[r] See below III. 5. 6. [s] See below III. 3. 15. [ss] See below II. 5. 14. III. 1. 28. II. 4. 10.

[t] See above I. 7. 3. [u] See below III. 3. 27.

in the ſhip, but where an ox eſcaped alive out of the ſhip to land, the goods were not found eſcheatable as ſhipwreckt, Dec. 12. 1622, Hamilton; But ſhipwreck is not to be made uſe of by the King in *Scotland*, in prejudice of the owners of ſuch countries, as uſe not that law themſelves, but they ſhall have the ſame favour here, as they keep to ſhips of this country broken and ſhipwrackt with them [w]. *Fifthly*, Of things appropriated there remains ſtill the common uſe of ways and paſſages, which is like a ſervitude on property, for this is neceſſarily required for the uſe of man: and therefore underſtood as an uſe reſerved, both in their tacit conſent to appropriation, and in their cuſtom [ww]. So all nations have free paſſage by navigation through the ocean, in bays and navigable rivers; and have alſo the benefit of ſtations, or roads and harbours in the ſea or rivers; and have the common uſe of the ſhores for caſting anchors, diſloading of goods, taking in of ballaſt, or water riſing in fountains there, drying of nets, erecting of tents, and the like [x]. Yet doth the ſhore remain proper, not only as to juriſdiction, but as to houſes, or works built thereupon; and as to minerals, coals, or the like found therein, and ſo is not in whole common, but ſome uſes thereof only. Nor doth it follow, that theſe uſes are not common to all men, becauſe they are denied to enemies; for, as for theſe, as we may take away that which is in their power, in ſome caſes; ſo much more may we detain from them that which is our own; and as we purſue their perſons and goods in their own bounds, much more in ours. The ſhore in the civil law is defined to be ſo far as the greateſt winter tides do run [xx], which muſt be underſtood of ordinary tides, and not of extraordinary ſpring tides. But the uſe of the banks of the ſea or rivers, to caſt anchors or lay goods thereon, or to tie cables to trees growing thereon, or the uſe of ports, which are induſtrial, or ſtations made by art, or fortified for ſecurity, are not common to all men, but publick to their own people, or allowed freely to others for commerce, or in ſome caſes are granted for a reaſonable ſatisfaction of anchorage, portage, or ſhore-dues, which oft-times belong to private perſons, by their proper right, or by cuſtom, or by publick grant; but ſtations in theſe rivers, by caſting of anchor remain common, and ought not to be burdened. So alſo ways or paſſages in the land are common to all, and may not be juſtly refuſed by one nation to another; and being refuſed, have always been accounted lawful *to be* forced: as *Plutarch* relates of *Cimon*, who going to *Lacedæmon*, forced his paſſage through *Corinth*; and *Ageſilaus* returning from *Aſia*, craved paſſage through *Macedon*, and while they craved time to conſult of an anſwer, he conceiving delay to be a denial, ſaid, Conſult you, but I will paſs. But to take away all queſtions, whether theſe were by might or right, we have a divine example of *Moſes*, *Numb.* xx. *verſes* 17 and 19. where *Iſrael* in their way to *Canaan*, craved paſſage of *Edom*, by the highways, and offered payment even for their water, which was to be underſtood of their ſtanding water, as wells, which were rare and precious there, and did the like with the *Ammonites*; and upon their refuſal, forced it by war.

VI. There is alſo in property implied an obligation of commerce, or exchange, in caſe of neceſſity; for without this, property could not *ſubſiſt*, ſeeing by the diviſion inferred therethrough, every man cannot have actually all neceſſaries without exchange, which being denied in caſes of neceſſity, or where there is no common authority, it may be taken by force; as thoſe who paſs through the territories of others, if by their oppoſition, or otherwiſe, they *become* ſhort of proviſion, they may lawfully take the ſame for money, as is implied in *Moſes*'s offer to *Edom*; yea, there is implied in property, an obligation to give, in caſes of neceſſity, to thoſe who have not wherewith to exchange, and cannot otherwiſe preſerve their life, but with the obligation of recompence when they are able; for human neceſſity doth alſo infer this: but it muſt be a real, and not a pretended and feigned neceſſity: ſo *David* being hungry, eat the ſhew-bread,

[w] *Parl.* 1429, *c.* 124. [ww] *L.* 1. *l.* 2. *ff. de locis et itineribus pub. arg. l. un. ff. de via public. &c. inſt. de rerum diviſ.* [xx] § 3. *inſt. eod.*

bread, tho' appropriated to God: and the diſciples being hungry, eat the ears of corn; and this is the ground of the obligation, to aliment the poor, which tho' it alſo floweth from the obligation of charity, yet, as hath been *ſhown* before, that obligation hath no determinate bounds, but is left to the diſcretion of the giver, not of the demander, and ſo can be no warrant for taking by force, and without the proprietar's conſent.

VII. The commonty that is of graſs and fruits growing upon the high-ways, followeth the commonty of the ways themſelves: but the common uſe of natural fruits brought forth without induſtry, even in proper fields, as of nuts, berries, or the like, or the promiſcuous uſe of paſturage in the winter time, accuſtomed in many places of *Scotland*, are no part of this commonty, but are *merely* permitted as of little moment, or diſadvantage; and therefore may be denied without injury. And ſo by act 11. *Parl.* 1686, all perſons are ordained to herd their horſe or nolt all winter in the day, and houſe them in the night, and half a merk is appointed for every beaſt taken by any perſon on their own graſs, before the beaſt be re-delivered *.

VIII. The ſecond ſtep of real right is Poſſeſſion, which, as it is the way to property, and in ſome caſes doth fully accompliſh it, ſo it hath in it a diſtinct leſſer right than property, which hath no other name than Poſſeſſion, tho' it be more *facti* than *juris*: and ſeeing poſſeſſion is a common precognite to the moſt of real rights, it fitly falleth in here to be conſidered, both as it is a fact, and as it is a right; for as it is a fact, it is not only requiſite to conſtitute real rights, but is alſo an effect thereof, when conſtitute.

IX. Poſſeſſion hath its name from its ſpecial kind, for it is as much as *poſitio ſedium, or poſitio ſeſſionis*, expreſſing the way of poſſeſſing the earth, at firſt common, by nations, *families*, or perſons, in fixing or ſettling their ſeats or habitations there, evidencing their affection or purpoſe to appropriate theſe ſeats, which therefore was not underſtood by their paſſing through it, but by fixing in it; and therefore territories of old were called poſſeſſions. That we may then take up aright the nature of poſſeſſion, wherein it doth conſiſt, and how it is begun, continued, interrupted, and loſt, we muſt *firſt* diſtinguiſh the ſeveral kinds of poſſeſſion: and *ſecondly*, collect the common nature wherein they agree: and *thirdly*, the point of right thence ariſing. As to the *Firſt*, The reaſon why the kinds and diſtinctions of poſſeſſion are ſo much multiplied, is, becauſe by poſitive law, and the cuſtom of nations, property and ſervitude cannot be conſtitute without poſſeſſion, tho' it be not natural, or neceſſary to theſe rights, but by the will and inſtitution of men; therefore it receives diverſification at their pleaſure. So what men think fit to call or eſteem poſſeſſion, is enough to conſtitute property, ſeeing without any ſuch thing it may be conſtitute, as afterward it will appear.

X. Hence ariſeth the diſtinction of poſſeſſion, in natural and civil; the former being that which is, and the latter that which is holden or repute ſuch; *in* which there are degrees, as it cometh nearer to the natural poſſeſſion. We ſhall proceed in order from the more plenary and plain poſſeſſion, to theſe which are leſs clear.

XI. *Firſt* then, The cleareſt poſſeſſion is of moveables, and it is the firſt poſſeſſion that was amongſt men, for ſo did the fruits of things *common* become proper; and thereafter ornaments, cloaths, inſtruments, and cattle became proper, the poſſeſſion whereof is ſimple and plain; holding and detaining them for our proper uſe, and debarring others from them, either by detaining them in our hands, or upon our bodies, or keeping them under our view or power, and making uſe of them, or having them in faſt places, to which others *have* no eaſy acceſs. This poſſeſſion of moveables was ſo begun and continued, and by contrary acts interrupted and loſt, when others exerciſed the ſame acts, either without

* Rights of common property are different from the commonty treated of above. They admit of diviſion and appropriation, which is regulated by act 38. P. 1695; and the diviſion of run-rig lands is regulated by act 23. P. 1695.

out the poſſeſſor's conſent, or by their tolerance or tradition and delivery, or by forſaking or relinquiſhing them, ſo that in the matter of poſſeſſion of moveables there can be little controverſy.

XII. *Secondly*, Poſſeſſion of the ground is alſo clear in many caſes; as *Firſt*, In habitations, whether in caves, tents, or proper houſes. Next in gardens, incloſures and plantations. *Thirdly*, In fields by paſturage or tillage, in ſo far as theſe acts extend, for *all* theſe are moſt natural poſſeſſions. But after that moſt antient ſimplicity, rights and the ways of acquiring thereof were multiplied; and therefore poſſeſſion could not be entire, but behoved to be divided amongſt the ſeveral intereſts; then did the difficulties ariſe, as when one had the property, a ſecond the fruits, a third the uſe, a fourth the ſervitudes in ſome part, a fifth the detention for ſecurity, a ſixth the cuſtody or location; and all theſe exerciſed, either by the parties themſelves, their ſervants or children in their power, *or* their procurators in their name: yea, and by oppoſite and interrupting acts, many at once pretended *right* to the ſame kinds and parts of poſſeſſion, all which occaſion much difficulty in the matter of poſſeſſion.

XIII. So then the third kind of poſſeſſion was, when the earth began to be divided by limits and bounds, and to have common denominations, then the poſſeſſion of the whole was attained by exerciſing poſſeſſory acts upon a part; as he who poſſeſſeth a field, needs not go about it all, or touch every turf of it, by himſelf or his cattle, but by poſſeſſing a part, *poſſeſſeth the whole*, unleſs there were contrary poſſeſſory acts. So poſſeſſion of the greater part of lands, contained in one tenement, was found ſufficient to validate a baſe infeftment as to the whole, and to exclude a poſterior publick infeftment, *from* removing the tenants *of* a part of the tenement, tho' the baſe infeftment had poſſeſſion ſeveral years, and had attained or purſued for no poſſeſſion of theſe tenements, *Spotiſ. removing*, *Hunter*, obſerved by *Dury*, *Jan.* 14. 1630 [x]. The like of poſſeſſion of a part of teinds in a tack, found ſufficient to validate the tack as to the whole, *Spotiſ. de poſſeſſione*, *Merchiſtoun*. *By which it is clear, that poſſeſſion of a part is ſufficient for the whole, not only of lands lying contigue under one ſingle denomination, but of tenements comprehending divers rooms of ſeveral denominations; yea of lands united in one barony, tho' in divers ſhires, and partly holding of the King, and partly holding of the Prince, June* 22. *and July* 28. 1637, *Blairquhan*. *But if the other partial poſſeſſion, not having ſo extenſive a right, was anterior, it would exclude and reſtrict the other rights by union.*

XIV. *Fourthly*, Poſſeſſion civil is extended to uplifting of mails and duties, which is ſufficient to introduce and preſerve property, tho' the paſturage and tillage, and all other natural deeds of poſſeſſion be in others, who are properly called poſſeſſors; who hold and poſſeſs for themſelves in ſo far as concerns the excreſce of the profits above the rent, as to which (*laſt*) they poſſeſs in the name of their maſters; and therefore this poſſeſſion is partly natural to the maſters of the ground *immediately*, and partly civil by their tenants.

XV. *Fifthly*, Poſſeſſion is attained ſymbolically, where there is not uſe of the whole or a part, but only of a ſymbol or token, and this is when the thing to be poſſeſt is preſent; as the civil poſſeſſion by infeftment by delivery of earth and ſtone upon the ground of the lands, or a penny for an annualrent, or by delivery of a parcel of corns for a ſtack or field of corn, or ſome of a herd or flock for the whole flock, being preſent; in which the ſymbols being alſo parts of the thing to be poſſeſt, have ſome affinity to natural poſſeſſion.

Sixthly, Civil poſſeſſion is by a token or ſymbol, which is no part of the thing to be poſſeſt, but is a token only to repreſent it, as either having ſome reſemblance with it, as the delivery of a copy or ſcroll for an office, or otherwiſe hath no reſemblance, but is a token merely ſuppoſititious to repreſent it; as delivery of a baton in reſignation, or delivery of a thing bought or ſold, by a wiſp of ſtraw which ordinarily is in abſence of the thing to be poſſeſſed.

XVI. *Seventhly*

[x] See below II. 3. 27. 7.

XVI. *Seventhly,* Poſſeſſion is attained or retained without ſymbol, and without interpoſition of any perſon in our power, or procurator, but only by conjunction of intereſt: ſo when the property of land is granted to one, and the uſufruct or liferent to another, or when the liferent is reſerved, the poſſeſſion of the liferenter is held to be the poſſeſſion of the fiar, as to all other third parties and rights. And a huſband's poſſeſſion of lands by himſelf, or any deriving right from him, is held to be the wife's poſſeſſion, either by her liferent, or conjunct fee infeftment [xx].

XVII. The ſeveral kinds and degrees of poſſeſſion being thus laid open, it will be more eaſy to take up the common notion and nature of it, and it may be thus deſcribed. Poſſeſſion "is the holding or detaining of any thing by ourſelves, or others for our uſe." It is not every holding or detaining which makes poſſeſſion; for depoſitars do detain, but becauſe it is not for their uſe, they do not poſſeſs. To poſſeſſion there muſt be an act of the body, which is detention and holding; and an act of the mind, which is the inclination or affection to make uſe of the thing detained; which being of the mind, is not ſo eaſily perceivable, as that of the body; but it is preſumed whenſoever the profit of the detainer may be to make uſe of the thing *detained*; but where it may be wrong, or hurtful, it is not preſumed. As he who taketh another man's horſe by the head, or keepeth that which is waith, or taketh in his hands the money or goods of another, which, if it were to make uſe of *them*, it would infer theft, and therefore ſuch detention is not preſumed to be poſſeſſion. He alſo, who detaineth or holdeth a thing not at all for his own uſe, but for another's who doth detain by him, as *a* ſervant or procurator, doth not poſſeſs: but otherwiſe, if he have no warrant from another, but only intended or is obliged that it ſhall be *for* the behoof of another, in that caſe he is poſſeſſor; becauſe the real right is in him, and there is upon him only an obligation to make it forthcoming to another: and they who poſſeſs partly for themſelves and partly for others, as tenants, have poſſeſſion only in part.

XVIII. To come now to the requiſites for entering *or* beginning poſſeſſion, there muſt be both detention of the body, and detention of the mind for uſe; for neither of the two alone can begin poſſeſſion. Corporal poſſeſſion alone, can neither begin it nor continue it; and if an act of the mind were enough, poſſeſſion would be very large and but imaginary; but the manner of this ſeiſure of poſſeſſion to begin it, is very diverſe, even by all the ſeveral ways which are before ſet forth [y].

XIX. Poſſeſſion being once begun, it is continued not only by reiteration of poſſeſſory acts, but even by the mind only tho' there be no outward acts exerced, and the mind and affection to continue poſſeſſion is always preſumed unleſs the contrary appear; ſo that *tho'* the thing once poſſeſſed be void as to outward acts, yet it is held *as* poſſeſt by the mind; and any contrary act of others entering to that poſſeſſion, is unwarrantable and intruſion. For as hath been before ſhown, intruſion is where the entry is made in poſſeſſion without violence, but without warrant or conſent, as ejection is by violence: but theſe contrary acts, tho' unwarrantable, yet they take away the poſſeſſion that is detained by the mind [yy].

XX. Poſſeſſion then is loſt by a contrary poſſeſſion, and it is interrupted by contrary acts *or* attempts of poſſeſſion, which if they do not attain the effect to expel it, it is called a troubled or diſquieted poſſeſſion; for nothing can be poſſeſſed *in ſolidum* by more than one, either ſimply or in relation to the ſame right; for as there cannot be more proprietars than one of the ſame kind, tho' one may be ſuperior and another vaſſal; ſo *there cannot be more poſſeſſors than one, and ſo* more liferenters cannot poſſeſs *in ſolidum*; and therefore the entry to poſſeſs that which is already poſſeſſed, muſt expel the prior, or elſe introduce a partial and

[xx] See below II. 3. 27. 7. *ſecund.* See above I. 9. 25.

[y] *L.* 3. § 1. *l.* 8. *ff. de acquir. vel amit. poſſeſſ.*

[yy] *L.* 6. *pr. et* § 1. *l.* 3. § 9.

common poſſeſſion. Yet it is not the contrary attempts, or every act that expelleth a prior poſſeſſion; but if the ſame be violent, the prior poſſeſſor hath the benefit of a poſſeſſory judgment [z], and may lawfully uſe violence to continue poſſeſſion, which afterwards he may not, for recovery thereof, when it is loſt, tho' unwarrantably or violently, unleſs it be *ex incontinenti*. *And in like manner clandeſtine poſſeſſion expelleth not the prior poſſeſſion retained by the mind, which upon the firſt appearance, may be continued againſt the clandeſtine poſſeſſion as againſt the violent.* Thus poſſeſſion is transferred from one to another: but poſſeſſion is ſimply loſt, when it is forſaken and relinquiſhed. It is not eaſy to be known when poſſeſſion is detained by the mind and when relinquiſhed: wherein there is a general rule, that dereliction is not preſumed except it appear by evident declaratory acts or circumſtances, as when it is thrown away in any publick place where it cannot but be taken up, or when another is ſuffered to poſſeſs without contradiction, or when poſſeſſory acts have been long abſtained from; all which conjectures are *in arbitrio judicis*.

XXI. From what hath been ſaid the ordinary diſtinctions of poſſeſſion may be eaſily underſtood, as being either natural or civil, continued quiet and peaceable, or interrupted and diſturbed, lawful or unlawful, under which diſtinction are comprehended *poſſeſſio bonæ fidei*, which may be called innocent poſſeſſion, and *malæ fidei* or fraudulent; and poſſeſſion publick, or clandeſtine, and long poſſeſſion, momentary, or precarious.

XXII. To come to the right implied in poſſeſſion, it is mainly in two points; *Firſt*, In the right to continue it againſt all illegal contrary acts. *Secondly*, In the right of appropriation of the fruits conſumed *bona fide*. Both theſe are introduced by poſitive law, for utility's ſake: for, by equity *every* man might at any time recover the poſſeſſion of that which is his own, by force, and all the fruits thereof, whether extant or conſumed: but civil ſociety and magiſtracy being erected, it is the main foundation of the peace, and preſervation thereof, that poſſeſſion may not be recovered by violence, but by order of law; and therefore there is no more allowed to private force, than to continue poſſeſſion againſt contrary violent and clandeſtine acts, immediately after acting of the former or notice of the latter: but a violent clandeſtine and unlawful poſſeſſion *being fixt*, may not be troubled tho' there be an evident right; much leſs may poſſeſſion be entered where there *is* a right in *another party himſelf, or his predeceſſor* to whom *he* is heir in that thing, for as they are accounted as one perſon in law, ſo their poſſeſſion is accounted as one poſſeſſion. Like unto this is the right of apparent heirs, to *uplift* [x] their predeceſſors rents tho' they be not infeft, which will not only exoner the poſſeſſors, but if the apparent heir die un-infeft, his neareſt of kin will have right to the rents reſting from his predeceſſor's death to his own death; and theſe will be ſubject to his own proper debts albeit they will not affect the land itſelf; but the next apparent heir muſt enter to the defunct laſt infeft, and his perſon and eſtate will only be liable for the debts of the defunct to whom he entered. And the rents reſting for the years of the apparent heir's time, when he might have entered, belong to his executors [y].

XXIII. The other poſſeſſory right is that which was allowed in the civil law, *bonæ fidei poſſeſſor facit fructus conſumptos ſuos* [yy]; the reaſon whereof is, becauſe they who enjoy that which they think their own, do conſume the fruits thereof without expectation of repetition or accompt, elſe they are preſumed to preſerve them, or employ them profitably for reſtitution; and if it were otherwiſe, there *would* be no quiet or ſecurity to mens minds, who could call nothing ſecurely their own, if the event of a dubious right might make them reſtore what they had conſumed *bona fide*; and as this is in favour of the innocent poſſeſſor [z], ſo it is in hatred of the negligence of the other party not purſuing his right.

XXIV. This

[z] *L.* 1. § 25. *de vi et vi armata.* [x] F. poſſeſs. [y] See below III. 5. 2. II. 3. 16. 4. II. 6. 17. 3
[yy] *L.* 22. *C. de rei vind.* [z] *L.* 136, *ff. de R. jur. l.* 25. § 11. *ff. de Pet. hæred.* [zz] *L.* 10

XXIV. This right is only competent to poſſeſſors *bona fide*, who do truly think that which they poſſeſs to be their own, and know not the right of any other [zz]. But private knowledge upon information, without legal diligence, or other ſolemnity allowed in law, at leaſt unleſs the private knowledge be certain, is not regarded, nor doth conſtitute the knower *in mala fide*, *March* 14. 1626, *Niſbet* and L. *Weſtraw*. But a mother was not found to enjoy this benefit in prejudice of her children, there being ſeveral preſumptions of her knowledge of their right, *Nov.* 20. 1662, Children of *Wolmet contra* Lady *Wolmet*. In ſome caſes a citation and production of any other evidently preferable right is ſufficient, when the poſſeſſor hath no probable title; but where he hath a *doubtful* title, *mala fides* is only induced by litiſconteſtation, or ſentence. In reductions, whether the defender is liable for the bygone profits, from citation, litiſconteſtation, or decreet, is in the arbitriment of the judge, *July* 7. 1627, *Pitmedden* and Lord *Elphinstoun contra Smith*. In a tack reduced upon a failzie, *the defender was made liable from citation*, *Hope*, reduction, *Seton contra Seton*. The like, *Had. June* 2. 1610, *Hunter contra Lord Sanquhar*. The like, as to a decreet of removing reduced, and the violent profits found due only after litiſconteſtation in the reduction, *Had. Jan.* 24. 1611, *Jouſie contra Mortimer*. And found only to take effect after ſentence, in a reduction of an appriſing, becauſe the half of the ſum was paid, *Hope*, *appriſing and* poinding, *Lamb contra Hepburn*. And tho' the poſſeſſor's right was but a tack, which fell in conſequence with the ſetter's infeftment, reduced in parliament, yet the tackſman's poſſeſſion *bona fide* was ſuſtained, tho' he needed not to be called to the decreet of parliament, ſeeing on that decreet there was nothing done to make him know it, or put him *in mala fide*, *July* 19. 1664, *Eliz. Douglas*. Upon this ground an adjudger was preferred to the bygone duties uplifted by him, to a prior appriſer, who charged the ſuperior to infeft him before the adjudication, *December* 1. 1632, *Kilkerran*. This was extended to the profits uplifted by infeftment upon a diſpoſition, tho' granted after the liferent-eſcheat fell, in prejudice of the ſuperior and donatar, *July* 3. 1624, *Muir*; and was extended to a tack or feu of wardlands not confirmed by the ſuperior, in prejudice of his donatar of the ward, *March* 13. 1627, *Ley*. And was extended to the profits of a procurator-fiſcal's place, wherein the incumbent ſerved three years without interruption, tho' his right was reduced thereafter, and declared null *ab initio*, *Feb.* 17. 1624, *Thomſon*. It was alſo extended to one, who having a poſterior right of reverſion, *had* firſt redeemed and poſſeſſed thereby, as to bygones before the citation, tho' he had not poſſeſt ſo long as to give him the benefit of a poſſeſſory judgment, *Nov.* 18. 1664, *Guthrie*. It was alſo ſuſtained againſt a minor, reducing upon minority and leſion, yet the poſſeſſor by virtue of his contract, was ſecure as to bygones, before citation; here there was a probable cauſe of contracting for an onerous conſideration, tho' not fully equivalent, *Feb.* 16. 1666, Earl *Winton*. Upon this title, a tenant was liberate from *rents*, *which by the tack he had right to retain in payment of annualrents*, *tho' warned* by a fiar after the death of his father the liferenter, in reſpect the *father* ſet the tack without mention of his liferent, and was reputed fiar, *Feb.* 16. 1669, *Hamilton*. Poſſeſſion *bona fide*, was found to liberate an appriſer from being comptable to the other appriſers within year and day, *July* 17. 1675, *Boid*. It was alſo ſuſtained againſt the donatar of forfeiture, *Jan.* 28. 1679, *Blair*. It was alſo ſuſtained upon an infeftment for relief, whereby the rents were to be imputed in ſatisfaction, both of the principal and annual, *Feb.* 8. 1676, *Scrimzour*. Yea, it was ſuſtained, tho' the poſſeſſor's author's title was forged, he being a ſingular ſucceſſor, not acceſſory to, or conſcious of the forgery, even after improbation of his title was proponed by exception, but not ſuſtained, but reſerved by way of action, in which the title was found falſe, yet the *bona fides* was extended to the rents ſpent, till he was put *in mala fide*, by probation of the forgery; but he was found liable *in quantum lucratus*, for getting more price for the land in queſtion, than he paid to his author therefore, *January* 18. 1677, *Dick* of *Grange*.

[zz] L. 109. *ff. de V. S.*

Grange *. But unlawful poſſeſſion is valid in this caſe, if it be vitious, violent, clandeſtine or momentary: but it is not ſo evident when a poſſeſſion is accounted momentary; ſure little time will ſuffice in moveables, but in lands more time is required, as a year or term, or thereby **.

This right is different from the poſſeſſory judgment competent upon infeftments, which requires longer time; and becauſe it is an effect of infeftments, tacks, or the like, we ſhall ſpeak thereof in theſe titles [a]. If the poſſeſſion *bona fide* be by virtue of a colourable title, tho' perhaps null in itſelf upon informalities requiſite in law, or upon inhibition, interdiction, or want of power in the granter, it is effectual; yet when by a common or known law, the title is void materially, in this caſe the poſſeſſor is not eſteemed to poſſeſs *bona fide*, it being ſo evident, *nam ignorantia juris non excuſat:* as if a relict ſhould poſſeſs lands or others, the marriage being diſſolved by her huſband's death within year and day, *Nov.* 16. 1633, *Grant.* Hereby it is evident, that poſſeſſion hath much in it diſtinct and ſeveral from fact [aa], and therefore it ſtands in place of a title in all Ejections and Spuilzies.

XXV. By the canon law, which is ſo far allowed by our cuſtom, *poſſeſſor decennalis et triennalis non tenetur docere de titulo etiam in cauſa falſi*, whereupon prebendars were aſſoilzied from production of their proviſions, in an improbation, *Hope, improbation, B. of Galloway contra the prebendars of the Chapel-royal.* But this hinders not reduction, where the title is ſuppoſed, but craved to be reduced upon a better right, as when the debate is, who hath the right of patronage. *Hope, patronage, E. Wigtoun contra L. Drummelier* ***; *Had. July* 24. 1622, *E. Wigtoun contra Biſhop of Glaſgow*; for in theſe caſes an eccleſiaſtical perſon's title was to be reduced *in conſequentiam* with the patron's title, which hath not this privilege. This poſſeſſion muſt be as being holden and repute a part of the benefice, and muſt be proved by witneſſes; and therefore the poſſeſſion of lands by tollerance, was found probable by witneſſes, to elide *twenty* years poſſeſſion thereof by a miniſter, who pretended to it as a part of his glebe, *Gosford, June* 22. 1671, *Duke and Ducheſs of Monmoth contra heritors of Haſſenden* ****. But if the church-mens title can be found, their poſſeſſion will be aſcribed thereto, and regulated thereby: and therefore the Biſhop of *Dumblain*, as Dean of the *Chapel-royal*, having long poſſeſſed ten chalders of victual, as a part of his benefice, there being found a mortification of that victual by the King, bearing the King to have had right by diſpoſition from another, and that other's right being produced, it did bear a reverſion in the body thereof for ſeven thouſand merks, which being paid to the King when the Biſhops were ſuppreſſed, and his grant of redemption *(obtained)* thereupon voluntarily, without an order or ſentence, the church-mens poſſeſſion more than thirteen years before the redemption, and thirteen years after the redemption, was elided by the reverſer's right and redemption. Neither did the act of ſederunt, after the reformation, declaring ten years poſſeſſion of kirk-lands, before the reformation, and thirty years after, to import

* The queſtion of *bona fide* conſumption was not determined in this caſe. The forged deed was an aſſignation of which the defender, had, for a ſmall ſum, purchaſed a tranſlation, after improbation had been proponed by way of exception by a competing arreſter, and reſerved. The aſſignation was afterwards proved to have been forged, but the defender was notwithſtanding preferred upon another aſſignation which had been really granted in favour of his author. The court however only allowed him to draw in the competition to the extent of the ſum he paid for the tranſlation. The arreſter was preferred as to the remainder, but appointed to aſſign his debt to the defender to that extent.

** The defence of *bona fides* was ſuſtained againſt a relict infeft, in favour of one who poſſeſſed two years and a half after the huſband's death, in virtue of an appryſing on a bond to which the wife had conſented, tho the bond, as to the wife, was null *ipſo jure*, as granted *ſtante matrimonio*, *Jan.* 26. 1636, *Lady Borthwick contra Ker.* But the defence of *bona fides*, upon a right to which the wife had not conſented, was repelled, *March* 2. 1637, *Keith contra Simſon.*

*** *Hope* mentions the *ratio decidendi* in this caſe to have been, in reſpect of the expreſs words of the rule of the chancellary, *dummodo ad officium per eos ad quos præſentatio pertinuit præſentati fuerunt.*

**** In this caſe the miniſter did not inſiſt upon his right, but the other heritors pleaded upon it, in order to prevent the deſignation of other land for a glebe.

[a] See below II. 7. 22. IV. 3. 47. IV. 17. 2. & 3. IV. 22. 5. & 8. IV. 26. 3. & 15. IV. 47. 7.

[aa] See above, § 8. *h. t.*

import a right, ſuſtain this church-man's poſſeſſion; that act being only for feus, granted by church-men, not for rights granted to church-men, *July* 11. 1676, *Biſhop of Dumblain*. And it was found, that thirteen years poſſeſſion of vicarage by a miniſter, did not prefer him to a tackſman, where the miniſter's title was a decreet of locality produced, and not containing the teinds in queſtion, *Feb.* 24. 1681, *Doctor Leſley*. This right in favour of church-men, is by a rule of chancellary of *Rome*, which hath been continued after the reformation, as being convenient, that leſs time and title ſhould give right to the church benefices, whoſe mortifications may be *more* eaſily loſt, or ſuppreſſed, than other rights. There is alſo another rule in that chancellary, that *triennalis pacificus poſſeſſor beneficii eſt inde ſecurus*; this rule gives not right to the church, but prefers one church-man to another, if he continue to poſſeſs three years, without interruption, tho' he could not defend himſelf by his right [b].

There is a third benefit by poſſeſſion of benefices and ſtipends, which is by ſeven years peaceable poſſeſſion, whereby they have the benefit of a poſſeſſory judgment, and cannot be called in queſtion but by reduction, or declarator; and therefore a miniſter's poſſeſſion of his ſtipend for ſeven years, was continued, tho' it partly affected the ſtock, and no title produced but a horning upon a decreet of locality, which was loſt and never booked, *Dec.* 6. 1672, *Veitch*. And a miniſter having poſſeſſed his ſtipend ſeven years after the reſtitution of Biſhops, was preferred to a Dean, who had a right before the year 1637, and tho' all Biſhops and Deans are reſtored by act of Parliament, to their rights and poſſeſſions as before 1637, until the Deans right were declared *in petitorio*, *Feb.* 9. 1675, *Dunlap*. And by an act of ſederunt, poſſeſſion of benefices, or eccleſiaſtical rights, thirty years after the reformation, or ten years before, is appointed to ſtand as a valid title, *Hope, poſſeſſion, E. Hume contra E. Buccleugh*; *Spotiſ. kirkmen, Dec.* 16. 1622. *p.* 190.

XXVI. So alſo poſſeſſion of a forfeited perſon five years, he being reputed as heritable poſſeſſor, is appointed to ſtand as a valid right to the King, and his donatar of the forfeiture, *Parl.* 1584, *cap.* 2. And ſo it was found, tho' the donatar was neareſt of kin to the forfeited perſon, and might *have been* preſumed to have had his rights, *July* 19. 1623, *Maxwel contra L. Weſtraw*, where *Hope* obſerves, "That the donatar was ordained to make faith, that he had juſt reaſon to affirm that the rights were wanting," *Hope, poſſeſſion*. This was ſuſtained, tho' it was offered to be proved, that the rights were reduced *in foro contradictorio*, upon recognition, *Had. Feb.* 20. 1611, *Maxwel contra Hairſtones*. The like, tho' the forfeited perſon's predeceſſor was denuded, by a public infeftment of wadſet, and poſſeſſed alſo by a back-tack, ſeeing the wadſet might have been renounced; *and* therefore it was left to the inqueſt, appointed to cognoſce by the act of Parliament, whether the poſſeſſor was reputed as heritor, or as a back-tackſman, as was found *Nov.* 11. 1658, in the caſe of *Scot of Scotſtarbet contra tenants of Garvock*. So effectual is poſſeſſion *activè*, beſides that it is the ground of preſcription, whereby property and all other rights are introduced; and *paſſivè*, it is ſufficient to hold out all others, who have not a good right, and it is always favourable in dubious caſes; from the experience whereof is the vulgar ſaying, "That poſſeſſion is eleven points of the law;" but the ſaid caſe is altered by a clauſe in the Parliament 1690, *cap.* 33. That all eſtates forfeited ſhall be ſubject to all real actions and claims againſt the ſame, tho' they be not raiſed nor inſiſted on within the five years preceeding the forfeiture, excepting bygone feu-duties, annualrents, and other annual preſtations, *for which there is no diligence done within five years preceeding the forfeiture* *.

XXVII. Poſſeſſion as diſtinct from right, is aſcribable only to that title, by which it did begin, in prejudice of him from *whom* the poſſeſſion was acquired,

* Upon occaſion of the two rebellions in 1715 and 1745, ſpecial acts of Parliament were made for aſcertaining and ſecuring the debts and claims affecting the different eſtates then forfeited.

[b] See below II. 8. 29.

and to whom it muſt be reſtored, notwithſtanding any other right in the poſſeſſor, to which he might aſcribe it, and which, after he had quit the poſſeſſion, might recover it, *Spotiſ. poſſeſſion*, *Herreis contra Anderſon*; [*idem*, *removing*, *Cunningham contra Cook.*] But as to all others from whom the poſſeſſion flowed not, the ſame may be defended upon all rights in the poſſeſſor, or him from whom he hath tollerance or right.

Poſſeſſion attained without proceſs, by one who had in his perſon both a wadſet and an appryſing of the lands, was found only aſcribable to the appryſing, that the ſame might be ſatisfied by intromiſſion, as being *jus nobilius et durior ſors*, as was found *July* 13. 1658, in the caſe of the *Earl of Nithſdale contra Counteſs of Euccleugh.*

XXVIII. The main real right is Property, ſtanding in the middle betwixt Community and Poſſeſſion, which *precede* it, and Servitude and Pledge which follow it, of which [*laſt*] *infra title Servitudes.* But the nature of Property is beſt underſtood, when it is compared with Community; for in this they both agree, that either hath a power to diſpoſe of things; and in this they differ, that community is a promiſcuous and a conjunct power, but property is a disjunct and ſeparate power of diſpoſal, which, if it be with diminution of any part of the fruits or uſe, it is a diminiſhed property, and that diminution is called a Servitude or Pledge; but tho' the proprietar, and thoſe who have ſervitudes, have both the power of diſpoſal of the ſame thing, yet in this they differ from community, that it is not promiſcuous, but a diſtinct power, relating to diſtinct effects and intereſts. The way to diſtinguiſh betwixt property and ſervitude is, that the greateſt intereſt retaineth the name of property, which hath in it a power of diſpoſal of the ſubſtance of the thing, or alienation thereof; whereas ſervitude is the leſſer right, and reacheth but *to* the fruits or uſe in part, or for a time. It will be here proper to inquire, into the manner of the conſtitution of property where it was not; as for the tranſmiſſion of property, being conſtitute, from one to another, it comes in afterwards amongſt conveyances, or tranſmiſſions of rights, *infra*, *lib.* 3.

XXIX. The *firſt* and moſt ſimple way of conſtitution of property, is by poſſeſſion of things *common to all men ſo far as the poſſeſſor's uſe required*; for, as before is ſhown, the original *community* of the creatures did neceſſarily carry this with it, that every one might poſſeſs that which was poſſeſſed by no other, in ſo far as his uſe required, and might not be lawfully diſpoſſeſſed thereof without his own conſent, which made it to become proper to him, and that he might defend violence againſt his poſſeſſion of it. This property began firſt in moveables, *as in* cloaths, and ornaments of the body, inſtruments for ſubduing the creatures, as darts, which are the moſt antient inſtruments of force, while man was ſatisfied with the natural fruits of the earth, and ſuch other creatures as for his uſe and delectation, he ſeized on for the time.

XXX. *Secondly*, Appropriation was by man's induſtry and poſſeſſion by ſubduing and taming the creatures, and his affection to make uſe of them not for a time, but conſtantly; for thereby not only his common right and poſſeſſion, but his induſtry and labour did properly intitle him to theſe things he poſſeſſed: thus when man made uſe of the other creatures, not by his own ſtrength alone, nor by darts, ſtones, or the like; but made uſe of one creature to maſter others, as hounds, hawks, *&c.* theſe inſtruments of pleaſure managed by him, became unqueſtionably proper to him; then man proceeded alſo to ſubdue and make proper cattle, as cows, oxen, ſheep, horſe, mules, camels, *&c.* by conſtant uſe-making of their birth, fruits and work.

XXXI. *Thirdly*, Property having extended itſelf to the ground, appropriated ſeats for habitation, and fields for paſturage and tillage, and that for a conſtant abode; whereas at firſt, tho' man's uſe-making of the earth did introduce ſome kind of property in it for the time, yet was it without a purpoſe or evidence of a conſtant or perpetual appropriation; but men moved with their cattle from place to place, without

without fixing in any one place. This fixing of the ground began firſt in houſes and wells, which in the places of the world firſt inhabited by man were rare, and of great neceſſity and uſe, and therefore digged with induſtry, and preſerved with great earneſtneſs.

XXXII. *Fourthly*, When man increaſed upon the earth, and ſocieties began to be erected, they poſſeſſed whole countries, and divided them amongſt them, by meiths and marches; and when any one of them ſwelled to that greatneſs, that their territories could not contain them, either the whole, or the excreſce of them, removed to places of the earth not then inhabited, and fixed ſeats for themſelves; tho' the unjuſt ambition of ſome of them, made them expell others; yet that, as contrary to the law of nature, was abhorred, and gave occaſion to the reſt, from that ſame law, to concur with and maintain the oppreſſed. *So that now the whole face of the earth became changed from its original community, and there was a tacite conſent of diviſion, and property owned and eſtabliſhed throughout the world; except ſome few barbarous nations: and nothing was left common that could be proper; but the few ways of community, of which before, now only remain. In which diviſion and appropriation, this is alſo implied by the common conſent of nations, that what is poſſeſſed or appropriated by none or relinquiſhed, is not now common to all, but is held as belonging to none.*

XXXIII. And therefore, *Fifthly*, Property is introduced by poſſeſſion of things, which are yet ſimply void and belong to none, and that without limitation. This is acknowledged by the law of nations, and their common conſent, whence is that principle, *Quod nullius eſt, fit primi occupantis. And this way of appropriation differeth from the firſt way, whereby things common and their fruits become proper by ſeiſure and poſſeſſion; for that being an effect of the native community, was, with this limitation, implied in the nature of the community; "that one might ſeize upon no "more than his uſe required, without hurt to the reſt who enjoyed the ſame community," as in a theatre which is common to a city, every citizen, as he cometh, may poſſeſs a place for himſelf, by ſtanding or ſitting there: but he may not lie along, if thereby others of the ſociety might be hindered to be preſent to behold. So if property were now but the effect of that original community, when the earth is ſo ſtraitened with the increaſe of men, it would be the ground of perpetual contention and war, that the poſſeſſions of ſome were unequal and exceeded, and others had not enough: therefore, for preſervation of the common peace of mankind, the cuſtom and conſent of nations hath allowed property of things void, by occupation, without any further debate.* All theſe ways of appropriation are by Poſſeſſion or Occupation, and thus are all free creatures appropriated, as fowls of the air, wild beaſts of the earth, fiſh of the ſea, without diſtinction, upon whoſe ground they are taken; and tho' men may be hindered to come within the grounds of others [bb], there being now no *right of* paſſage upon account of hunting, hawking, or fiſhing (yea, tho' in ſome nations, the uſe of ſome of theſe free creatures be prohibited to any but to the ſovereign power), yet the perſonal reſtraint hindereth not, but he who ſeizeth upon any wild creature in another man's bounds, it becometh his own, tho' he be puniſhable for that treſpaſs [c]; and poſitive law may make a part of the puniſhment to be the loſs of what he hath taken. So likewiſe, it is the firſt ſeizure that introduceth property, and not the firſt attempt and proſecution; as he who purſueth or woundeth a wild beaſt, a fowl or fiſh, is not thereby proprietar, unleſs he had brought it within his power, as if he had killed it or wounded it to death, or otherwiſe given the effectual cauſe whereby it cannot uſe its native freedom; as at the whale-fiſhing at *Greenland*, he that woundeth a whale ſo that ſhe cannot keep the ſea for the ſmart of her wound, and ſo muſt needs come to land, is proprietar, and not he that lays firſt hand on her at land. Tho' the falling in upon another's game when he alone is in proſecution, may be uncivility or injury, yet it hindereth not the conſtitution of property; tho' it be a juſt ground to annul

[bb] *L.* 16. *ff. De ſerv. præd. ruſt.* § 12. *inſt. De rer. div. et acq. &c.* [c] *Arg.* § 12. *inſt. De rer. div. &c. L.* 13. § *ult. ff. De injur.*

annul the right of the firſt poſſeſſor, and make him reſtore to the firſt proſecutor, if he continue his purſuit with a probability to reach his prey. And therefore, in the laſt *Dutch* war, a frigat of the King's called *the Nightingale*, and a *French* frigat being then auxiliary to the King in that war, having rencountered a *Dutch* privateer who had poſſeſſed and manned three prizes, and having debelled him; in the mean time the prizes made ſail to eſcape; but while the two frigats were taking two of theſe prizes; a *Scottiſh* privateer attacked the third called *the Tortoice*, and made her ſtrike ſail; but not knowing whether the other frigats were friends or foes at ſuch a diſtance, did not board her till they came near; and the *French* frigat being nearer than the *Engliſh* frigat, both the *French* frigat and the *Scottiſh* privateer claimed *the Tortoice* as their prize. The *Engliſh* Captain ſent the prize to *Leith*, and declared the caſe under his hand; whereupon the Admiral adjudged *the Tortoice* prize to *Rankine* the *Scottiſh* privateer; but the matter being brought before the Lords by reduction, the *French* privateer purſued not but the King's Advocate; yet the Lords found, that the frigat under the King's pay having defeat the *Dutch* privateer, who was poſſeſſed of *the Tortoice*, and being in view and proſecution of her, that *Rankine*'s capture and poſſeſſion was injurious, otherwiſe than to aſſiſt the firſt attacker; unleſs it were proved, that the prize would have eſcaped if it had not been ſtopped, and forced to ſtrike ſail to Captain *Rankine*, *Feb.* 15. 1677, *King's Advocate*. *.

The creatures are underſtood to be free while they are not within the power of any; but fiſhes within ponds are proper, and fowls, tho' never ſo wild, while they are in cuſtody. Amongſt theſe free creatures theſe which are tame are not comprehended, but only theſe which are wild; which, if they be tame, contrary to their nature, are ſo long proper as their tameneſs remains; but if they return to their antient wildneſs, the property thereof is loſt ſo ſoon as the owner ceaſeth to purſue for poſſeſſion; and it is ſo long continued, or underſtood to be continued by the mind, having once begun to be poſſeſt by bodily acts; and therefore the proſecution of wild creatures will not begin, tho' it may continue the property of them **. Bees are numbered amongſt theſe wild creatures, which therefore are not proper tho' they hive in trees, more than fowls who ſet their neſts thereupon, but if they be within a ſkep, or work in the hollow of a tree, wall or in a houſe, they are proper; or while they hive, or flying away are purſued by the proprietar; but thereafter they belong to him who next getteth them in his power: as alſo theſe *which* were tamed and become wild, become theirs who regain and tame them again, and return not to their firſt owner. Thus alſo gems, pearls and precious ſtones, are appropriated by the finders. And likewiſe lands not poſſeſt; or which do ariſe of new, as do ſome iſlands in the ſea, or more frequently in publick rivers, which by the civil law are accounted to accreſce to thoſe whoſe ground lies neareſt, proportionably to that part of the ground that fronts them; but where ſuch civil conſtitution is not, ſuch iſlands are publick as the rivers are in which they are bred [cc].

XXXIV. The next way of appropriation, is by acceſſion, whereby the acceſſories of things proper are alſo proper, as the birth of all cattle, and their fruits. It is likewiſe a natural acquiſition of property, which ariſeth by accretion of parts, accretion of birth and of fruits, and even the dung or any other profit, followeth

* The *French* frigat was in purſuit of *the Tortoice* when the *Scotch* privateer took her, but at ſeveral miles diſtance, and was a ſlow ſailor. This was proved before the Admiral, who preferred the *Scotch* privateer. The court of Seſſion likewiſe preferred the *Scotch* privateer upon this proof, that the prize would moſt probably have eſcaped from the *Engliſh* and *French* ſhips. The deciſion is agreeable to the opinion of *Trebatius*, *L.* 5. § 1. *ff. de acq. rer. dom.* in the caſe of a wild animal ſeverely wounded, tho' others of the *Roman* lawyers preferred the firſt occupant, even when the perſon who gave the wound was in purſuit, and the animal had no probable chance of eſcaping. This laſt opinion *Juſtinian* has adopted, § 13. *inſt. eod.*

** This may ſeem contrary to the opinion of *Trebatius*, *L.* 5. § 1. *de acq. rer. dom.*—The purſuit alone of a wild animal will in no caſe transfer the property; but the purſuit, with probability of ſucceſs, after a ſevere wound given, was thought by the *Roman* lawyer ſufficient to produce that effect. The practice obſerved in the whale-fiſhing, and the deciſion in the caſe of *the Tortoice* ſloop, are agreeable to this doctrine.

[cc] § 12—18. *et* 22. *inſt. de rer. div. &c. L.* 3. § 14. *ff. de acq. poſſeſſ. L.* 8. § 1. *et* 2. *ff. fam. hercis.*

followeth the property of that whereunto it is acceſſory; becauſe by common utility that is underſtood to be comprehended in the common conſent of mankind. So trees and all plants as the birth of the earth, are carried therewith while they are growing thereupon even to ſingular ſucceſſors; but if ſeparated or contained in moveable boxes, they are not ſo carried with the ground, as acceſſories, but are ſeparate moveables. So likewiſe the natural fruits of the ground, as graſs and herbs, are carried as the fruit thereof and acceſſory thereto. But by our cuſtom, corns and induſtrial fruits, are eſteemed as diſtinct moveables, even before they be ſeparated or ripe, and belong not to purchaſers of land, or heirs.

Theſe are the ways of conſtituting property by natural equity, without conſideration of the poſitive law of any particular nation; but no doubt, as the ſole diſpoſitive will of the owner, may ſtate the property of what is his and fully at his diſpoſal, in another: ſo may the publick conſent of any people introduce ways of appropriation, as they find moſt convenient for publick good, and that either expreſsly by ſtatute, or declaration of the legiſlative authority, or tacitly by conſuetude; and albeit it be a good and ſolid rule, *Quod meum eſt, ſine me alienum fieri nequit*, yet it hath the exception of publick ſanction or common cuſtom; and ſo tho' it be not by the ſole and proper conſent of the owner, yet it is by the conſent of that ſociety of people or their authority, wherein the ſubmiſſion or conſent of every one in the ſociety is implied, in ſo far as the deſign of aſſociation extends: and therefore *firſt*, in fungibles and all ſuch things as are not diſcernible from others of *the ſame* kind, poſſeſſion is generally eſteemed to conſtitute property, which is moſt evident in current money, which if it be not ſealed, and during its remaining *unſealed*, is otherwiſe undiſcernible, it doth ſo far become the property of the poſſeſſor, that it paſſeth to all ſingular ſucceſſors without any queſtion of the knowledge, fraud, or other fault of the author; without which, commerce could not be ſecured, if money, which is the common mean of it, did not paſs currently without all queſtion, whoſe it had been, or how it ceaſed to be his [d]; and tho' that law *relates to* [e] the caſe of commixtion of money with another's money, (*by one*) who was not owner of it, whereby it is eſteemed as conſumption of the money commixed, yet that ground doth neceſſarily reach all money, ſo ſoon as it paſſeth to any ſingular ſucceſſor by commerce, for thereby it is conſumed in the ſame way.

XXXV. *Secondly*, Upon the like ground it is, that appropriation by alluvion, is admitted in all nations, for thereby the adjection of another's ground inſenſibly, and unperceivably, by the running of a river, becomes a part of the ground to which it is adjected; becauſe it is uncertain from whoſe ground ſuch ſmall and unperceivable particles are carried by the water, and thereby alſo the frequent queſtions that would ariſe betwixt the proprietars, upon the oppoſite banks of rivers are prevented; and tho' the adjection may be perceivable and conſiderable in a tract of time, it maketh no difference, if at no particular inſtant the adjection be conſiderable; as the motion of the palm of a horologe is inſenſible at any inſtant, tho' it be very perceivable when put together, in leſs than the quarter of an hour.

XXXVI. *Thirdly*, Upon the ſame ground confuſion of liquids, which are not *afterwards* ſeparable, altereth the property, in ſo far, that what before belonged to ſeveral owners ſeverally, becometh now to belong to the ſame owners *pro indiviſo*, according to the proportion of the value of their ſhares; neither is there any difference, whether the confuſion be made by the conſent of parties, by accident, or by miſtake, or fault, the effect being the ſame in all: for, becauſe the parts are undiſcernible and inſeparable ſo as to give every owner the individual body he had before; therefore he can only receive by equivalence, the like value by diviſion.

XXXVII. *Fourthly*, Upon the ſame ground, commixture of grain or other arid bodies, belonging to diverſe owners, which cannot be eaſily ſeparated, or of any

[d] L. 78. *ff. de ſolution.* [e] F. *is in.*

any materials in one maſs, work or artifice, if they be not ſeparable, they induce a communion proportionable to the value of the ſeveral ingredients: and tho' all the ingredients remain without alteration of their ſubſtance, ſo that in ſubtility, the property of each part might be conſidered as remaining with the former owner, not only in commixture, but in confuſion, alluvion and money: yet publick authority for utility's ſake, conſtituteth or declareth the property in manner foreſaid, which is alſo conſequent from neceſſity, and the nature of the thing, tho' there were no poſitive law; and ſuch commixtures are not like the commixtures of a flock, where every individual is diſcernible and ſeparable, as having the ſeveral marks of their diſtinct owners; and if a commixture in that caſe ſhould become undiſcernible, it would of neceſſity introduce a community; as if different flocks of unmarked lambs ſhould in any way fall to come together, ſo that the owners, or the ſervants, could not diſtinguiſh their own, there were no remedy but to divide according to the number belonging to the ſeveral owners, and till that diviſion were made, every owner had a proportionable intereſt in every individual, ſeeing none of them could ſay or inſtruct this or that to be properly his own.

XXXVIII. *Fifthly*, Poſitive law for the common benefit, conſtituteth property by neceſſary conjunction in conſtructure; ſuch as the Roman law *de tigno juncto*, whereby a beam, or any other material built in a houſe, becomes proper to the owner of the houſe or building, that policy be not prejudged by demoliſhing of buildings; which therefore taketh effect whether the materials be made uſe of *bona* or *mala fide*; yea, tho' the materials were affected with theft, which in other caſes is *labes realis*, the publick intereſt would not ſuffer demolition, but give the prior owner the value, *ſecundum pretium affectionis*, and further puniſh the tranſgreſſor; as the Roman law gave the double value; but if before receiving of that ſatisfaction, the building come to be demoliſhed, there is no doubt but the owner of ſuch materials will recover the ſame, *rei vindicatione* *.

XXXIX. Upon the like ground of common utility, the Roman law did conſtitute property by contexture, whereby the materials wrought into cloth, garments, or other artifact, did become the property of the owner of that artifact, if without deſtruction thereof, or conſiderable detriment thereto, ſuch materials could not be ſeparated therefrom; in which they made no difference, whether theſe materials were made uſe of *bona* or *mala fide*; nor did the inherent *labes* of materials ſtollen, hinder the acceſſion and appropriation thereof by contexture [f]: but both in conſtructure and in contexture, he who thereby acquireth the property of materials belonging to other owners, ſeeing the reſtitution thereof ceaſeth, he is liable, not only for recompenſe, *in quantum locupletior factus eſt*, but alſo for reparation of the damage of the former owner, in which the manner of acquiſition is conſidered; for, if the materials of others be made uſe of, in conſtructure or contexture *bona fide*, the ordinary value thereof is only due, but otherwiſe the greateſt value, according to the eſtimation of the former owner *per pretium affectionis*.

In contexture it is conſidered, what is the deſign of the Artifact, that it may appear what is principal, and what is acceſſory; as in cloaths, the materials, tho' much more precious than the cloth, are acceſſory thereto, and the property of the whole befalleth, not to the owner of the materials, but to the owner of the cloth. And precious ſtones ſet in rings are acceſſory thereto, tho' more precious than gold, or any other material of the ring. But otherwiſe, if a gem be ſet in gold, the gold becomes acceſſory thereto [ff]; and wherever the caſe is dubious, that which is of greateſt value carrieth the property of the whole. Albeit that controverſies of this nature have been ſeldom moved with us, as to conſtructure, or contexture;

* The commentators on the civil law diſtinguiſh here between a *bona fide* and a *mala fide* builder; againſt the firſt they only allow to the owner after the fall of the building a *rei vindicatio* of the beam in caſe the double was not before recovered; but againſt a *mala fide* builder they allow action for the beam, even altho' he had already paid double. This diſtinction does not appear to be very well ſupported by the texts they quote from the *corpus juris*.

[f] § 26. *inſt. de rer. div.* [ff] *L.* 14. § 13.—16, *l.* 20. *ff. de aur. argent. leg.*

contexture; yet it is not to be doubted, but we would proceed upon the like grounds of equity and utility.

Upon the like ground of acceſſion, queſtions in relation to pictures are to be reſolved; for if the ground, board, or table of a picture belong to one, and the ſame be painted by another, either for his own uſe, or for the uſe of a third party, there doth not continue two diſtinct properties, one of the board, and another of the picture, nor a communion by proportion of intereſt, but the property of the whole befalleth to one, as to which, there was a contrariety betwixt the two Roman juriſconſults, *Paulus* and *Caius*, for *Paulus* allowed the picture to follow the board, as acceſſory thereto, and carried therewith [g]; but *Caius* on the contrary attributed the board as acceſſory to the picture [gg]; and tho' both *doctrines* be confirmed by *Juſtinian* in the Digeſts; yet in the Inſtitutes he prefers the opinion of *Caius* [h], upon that reaſon, that it were ridiculous, that a precious picture of *Apelles* ſhould follow a board, tho' of the loweſt value, albeit before, *purple ornaments*, tho' of greater value than cloth, were declared by him to be carried therewith [hh]. Poſitive law may determine this point either way, without injuſtice, according to equity and expediency; but there are diverſe caſes in the matter, which ſhould be diverſly reſolved; as, if any picture be painted upon a wall, or other immoveable, it doth neceſſarily cede to the ground thereof, and *ſo, a pari*, wherever the picture is, for ornament of its ground, as when a ſhrine, or cabinet, or the like moveables, are painted, becauſe the adorning of the ground is in that caſe deſigned; but a face, or any other picture where the board is only deſigned for it, the board is moſt conveniently eſteemed as acceſſory thereto; and in all caſes, the owner of the whole is liable *in quantum lucratus eſt*, even tho' the painting be done by him who knew that the ground was not his own; for in that caſe, the preſumption is not ſtrong enough, that he did it *animo donandi*; for it cannot be imagined, that the making uſe of an inconſiderable board of another, ſhould infer the purpoſe of gifting a fine picture thereupon, neither that they who paint a wall, ſhrine, or box of others, being artiſans, who work for profit, did the ſame to gift, but to *bind* the other party. So writing upon parchment, paper or other tables, was by the Roman law accounted as acceſſory thereto [i], which is very diſſonant from that which is there determined of pictures; and therefore, is every where in deſuetude, as is obſerved by *Grotius*, *Minſynger ad* § 33. *inſt. De R. div.* and others, both as to writing and printing, in the ſame way as painting; for if the writing be upon the wall or other moveables of another, or if it be upon the books of others, it cedeth thereto; but if it be upon paper or parchment, the deſign and uſe whereof is for writing, and the uſe whereof is conſumed and loſt by writing, it doth follow the writing; and it were very unreaſonable to think, that the evidents and ſecurities of lands, or any manuſcript, ſhould be acceſſory to the paper or parchment whereon they were written, and which were only deſigned to bear and preſerve the writ, and *it* not to be carried therewith.

XL. It is a rule in the Roman law, which we follow, *inædificatum ſolo cedit ſolo*; for thereby all buildings of houſes, walls, wells, dykes, *&c.* and generally, all things fixed to the ground, or walls, are accounted as parts of the ground, and paſs therewith, tho' not expreſſed, to all ſingular ſucceſſors; and not to executors, but to heirs; and thence, not only the materials of others become the owners of the ground, on which they are builded, and for preſerving of policy, cannot be demoliſhed, as hath been ſaid of conſtructure: but likewiſe, he that builds with his own materials upon another man's ground, the ſame accreſce to the ground, and if the owner of theſe materials knew the ground to be another's, the Roman law gave him no recompence therefor, but preſumed it to be done *animo donandi*, which is rather penal, in hatred of theſe who incroach

[g] *L.* 23. § 3. *ff. De rei vind.* § 26. *eod.* [gg] *L.* 9. § 2. *ff. De acquir. rer. dom.* [h] § 34. *inſtit. De rer. diviſ.* [i] § 23. *inſt. De rer. div. L.* 3. § *penult. ff. ad exhib.*

croach upon the ground of others, than from any ſufficient ground of preſumption; and therefore our cuſtom doth allow a recompence to the builder, in ſo far as the heritor was profited thereby, in that he might get a greater rent for that building, *Feb.* 5. 1692, *Sandilands contra L. Niddrie* *. But building of houſes by tenants for their own uſe, tho' at their removing, they leave the land in better condition, than at their entry, they get no ſatisfaction therefor without paction. And a liferenter having rebuilded a jointure-houſe, which was burnt by accident in her widowity, and re-built by her ſecond huſband, was found to have no ſatisfaction therefor, except the houſe had been accuſtomed to be ſet for rent, and that the liferenter or her huſband had no power to demoliſh any thing that was fixed to the ground, *Feb.* 2. 1672, *Captain Guthrie*. *But* an appryſer having re-builded a burnt houſe, was not preſumed to gift the ſame to a liferenter, albeit her *(prior)* ſaſine was regiſtrate, but ſhe had her option, either to get ſo much out of the rent of the tenement, as it was worth before the reparation; or to have the poſſeſſion of the tenement, paying the annualrent of the ſums neceſſarily and profitably wared upon the reparation thereof, during her life, *Jan.* 24. 1672, *Hacket*.

XLI. There remains to be cleared, that appropriation which is by Specification, whereby of materials belonging to other owners a new ſpecies is produced, whether the product belongs to the owners of the materials, or to him for whom the work is made. As to which the two great ſects of the antient lawyers were divided, *Proculus* and his followers attributing the property of all the materials to him that made the work, and *Sabinus* and his, attributing the whole to the owner of the materials: but *Tribonian* midſeth the matter thus, that if the product can eaſily be reduced to the firſt matter, the owners of the matter remain proprietars of the whole, as when a cup or other artifact is made of metal; but otherwiſe the materials cede to the workmanſhip, not only when the materials are conſumed, but even when they remain, and cannot be reduced to their firſt nature; as wine of other mens grapes, malt of other mens bear, cloth of other mens wool, and even a ſhip of other mens timber; but not by malting of barley **, or dying of cloth, or the like, which change not the ſpecies. *Conanus, lib.* 3. is of opinion, that whether the workmanſhip or the materials be more precious, the property is carried by the value. And *Grotius* is of opinion, that there ariſeth a communion, as in confuſion of liquors, proportioned according to the value of the materials and workmanſhip. Poſitive law, or cuſtom, may, without injuſtice, follow any of theſe ways, reparation being always made to the party who loſes his intereſt, unleſs the preſumption be ſtrong enough to infer, that the workmanſhip was performed *animo donandi*, by him who knew the materials belonged to another.

XLII. In immoveables the conſtitution or tranſmiſſion of property, is expreſſed in writ, and is parted in many intereſts; but in moveables, property is ſimple and full without ſervitude, and there is no other intereſt in them, unleſs they be impledged [k]; neither needs the title *of* conſtitution, or tranſmiſſion of property in moveables, be inſtructed by writ, *or proved otherwiſe*, but is preſumed from poſſeſſion; and therefore, for the reſtitution or recovery of moveables from the poſſeſſor thereof, it is not ſufficient to inſtruct that the purſuer had a right thereto; as *being* the birth or fruit of his ground or cattle, or as being bought by him, and in his poſſeſſion; but he muſt *condeſcend and* inſtruct the manner how his poſſeſſion ceaſed, as being either taken from him by violence, or by ſtealth, or having ſtrayed, and being loſt or the like, *Nov.* 18. 1680, *Forſyth*; and the reaſon thereof is, becauſe moveables paſs without writ, and oft-times without witneſſes; and therefore, whatever right a party once had to moveables, it is preſumed to be tranſmitted by donation, ſale, or otherwiſe, unleſs it be proved that he

* This deciſion not found.

** This ſeems to be a miſtake, and is contradictory to what is ſaid in the line immediately preceeding. The author probably had in view what is obſerved by *Caius, L.* 7. § 7. *fin. ff. De acq. rer. dom.* that threſhing out of grain is not to be conſidered as creating a change of the ſpecies.

[k] See above I. 14. 4.

he loſt poſſeſſion, as aforeſaid; or otherwiſe, that it be proved by the defender's oath, that when he acquired right, he knew the thing in queſtion to be the purſuer's proper goods; for in that caſe, even his private knowledge will prejudge him, tho' he had bought it at a competent rate; tho' it be not ſo in heritable rights, to whoſe conſtitution and tranſmiſſion, writ and ſolemnities are neceſſary; neither will it avail, tho' it were a horſe bought in public market and booked there; for we have not the privilege of fairs which the *Engliſh* have, that horſe bought in public market ſhould be ſecured to the buyer, without further queſtion, but he buys the ſame with the peril of the ſeller's right, *March* 19. 1639, *Ferguſon*. Hence it is, that in all actions for recovery of moveables, there is no more libelled, than that the moveables were the proper goods of the purſuer, and in his poſſeſſion, for ſuch a time, by uſing the ſame as his own proper goods, and condeſcending how he ceaſed to poſſeſs, as being lent by him, which was found relevant to be proved by witneſſes, tho' the queſtion was of a book of a conſiderable value *(above a hundred pounds)*, *Jan.* 27. 1665, *Scot*; or that the goods did ſtray, *Feb.* 3. 1672, *Scot of Gorrenberry*; or if the goods were in the poſſeſſion of a defunct at his death, the preſumption of ſale ceaſeth, *July* 4. 1678, *Home*; or if there be a ſtronger contrary preſumption; as was found in the caſe of jewels, which the defender neither could uſe as proper to his quality, nor was he a merchant or jeweler; theſe jewels *having been* once impignorated by writ; in that caſe poſſeſſion was not found ſufficient to infer property, *Dec.* 12. 1665, *Ramſay*. And even in the caſe of ſhips, which are the moſt conſiderable moveables, property was preſumed by poſſeſſion without writ, *July* 26. 1673, *Captain Hamilton*; and the property of money was inferred, by having the key of the cheſt in which the money was unſealed, unleſs a contrary poſitive probation were adduced, *June* 18. 1675, *Taylour*. Yea, moveables acquired *bona fide*, for onerous cauſes, were found not liable to hypothecation or *to the* conditions of a written diſpoſition of them, *in favour of the acquirer's author*, unleſs they had been affected with diligence, when they were in the hands of him to whom they were diſponed with theſe conditions, *Dec.* 17. 1675, *Creditors of Maſtertoun*[1].

TITLE II.

Repriſals, where, of Prizes, &c.

I. *Repriſals, or letters of marque.*
II. *Repriſals, how limited.*
III. *Spoil in war, how uſed.*
IV. *Private intereſt in public war.*
V. *Juriſdiction of the Admiral, and Lords of Seſſion in prizes.*
VI. *Rules in condemning prizes.*
VII. *Grounds of confiſcating neuters ſhips.*
VIII. *Denunciation of war muſt precede.*
IX. *Counterband how proved or preſumed.*
X. *What is counterband.*
XI. *Soldiers are counterband.*
XII. *What other perſons are counterband, and the ſeveral treaties thereanent.*
XIII. *How regulated in the laſt* Dutch *war.*
XIV. *Counterband confiſcates, tho' the ſhip be only ſeized in her return from the enemy's port.*
XV. *The* Dutch *declaration of war.*
XVI. *Other grounds of confiſcation.*
XVII. *A part belonging to an enemy makes the whole ſhip prize.*
XVIII. *The loading makes the ſhip prize.*
XIX. *Contrivances in the laſt* Dutch *war to prevent confiſcation.*
XX. *Preſumptive grounds of confiſcation*
XXI. *As, for want of documents.*
XXII. *For double documents.*
XXIII. *For throwing papers over board.*
XXIV. *Evidences of contrivances.*
XXV. *How a part is confiſcated and the reſt not.*
XXVI. *Grounds of confiſcation not ſuſtained.*

THESE being the ways of appropriation by private right, appropriation by public right is by war and force, where there is no common judge or authority;

[1] See below III. 2. 7. IV. 30. 9. & 10. above I. 14. 4.

thority; for in that caſe equity, and that common juſtice which is acknowledged by all nations as the rule of right and wrong, eſpecially in ſo far as it is owned by the law of nations, is a ſufficient warrant for obtaining ſatisfaction by force, where it is denied by juſtice; but our deſign here being only to conſider private rights, we ſhall but notice that which by publick authority is allowed in theſe caſes to be the peculiar right of private perſons, which doth only reach moveables ſeized upon by repriſals, or the goods of enemies or their partakers taken in publick war.

I. *Repriſals*, or letters of marque, are granted by princes or ſtates, by their warrant or commiſſion, to ſeize upon the goods of all perſons under the dominion of ſuch princes or people, who have refuſed to make juſt reparation, for the wrongs and damages done by any of their ſubjects, which the law of nations doth juſtly and neceſſarily allow, for the common good of mankind; for if private perſons be injured, by thoſe who are not under one common authority with them, by piracy, pillage, or otherwiſe, oft-times they cannot know the injurer, and all force being ſtated in public authority, they cannot make uſe thereof to redreſs or avenge themſelves; and therefore they can only make application to the ſovereign authority of that ſociety of people, whereof they are members, and repreſent and inſtruct the injury and damage ſuſtained by them, by the ſubjects of thoſe *other* princes or ſtates, and thereupon deſire that a redreſs may be demanded, which is ordinarily done by ambaſſadors or other miniſters of ſtate; and if redreſs be not ſo obtained, the ſovereign authority of the perſons injured may, and ought to give commiſſions for ſeizing upon the goods of any of the people of that ſociety, whereof the injurers are members, till juſt ſatisfaction and reparation be obtained; and tho' there be that ſingularity in it, that the goods of thoſe who did not the injury, are taken to ſatisfy the ſame; yet therein there is not only neceſſity, but moral juſtice, allowed and approved by the cuſtom of all nations, by their common conſent; for without this ſocieties could not be preſerved; and therefore, the publick aſſociation of people implieth this in it, that the ſociety is liable for reparation of the injuries and damages of any of their ſociety, when reparation is refuſed.

II. Repriſals ought to be limited to a juſt ſatisfaction, and therefore what is thereby ſeized ought to be adjudged in courts of admiralty, wherein it ought to be proved, that the goods ſeized belonged to perſons of that ſociety, of which the injurer is a member, and to be valued according to the rate they are worth, where they are brought in, and to be adjudged, in ſatisfaction to the injured of their damage and intereſt, in whole or in part: ſo that the excreſce ſhould be forthcoming to the owner thereof; the expences of recovery being alſo ſatisfied; and, ſo ſoon as ſatisfaction is obtained, the repriſals ought to ceaſe: neither doth the uſe-making of repriſals in this juſt order and meaſure, import the breach of treaties, or common peace, or infer publick war, tho' they may become the occaſion thereof.

III. But when the injury is publick and atrocious, the law of nations hath neceſſarily and juſtly allowed publick war, not only to reach the moveables of publick enemies, but their territories, juriſdictions and eſtates, wherein the proportion of ſatisfaction cannot be ſo meaſured, nor is it ſo conſidered as in repriſals. That which accrueth to private perſons in war, is only the giving of quarter, or getting of ſpoil, in ſo far as the ſame is allowed, or permitted by the commanders in chief, or warranted by publick authority; as is ordinary to the ſoldiers upon defeats of their enemies to ſeize upon, and appropriate to themſelves ſuch moveables as are upon their enemies perſons, or in their baggage: and ſometimes for the encouraging of ſoldiers beſieging, and for the obſtinacy of the beſieged, the plunder of places gained by force, is for ſome time permitted, and ceaſeth ſo ſoon as countermanded. In other caſes, what belongs to enemies is confiſcated for publick uſe, and then ſoldiers ought to be contented with their wages.

IV. The main private intereſt in public war, is that which accrueth by commiſſions

miſſions granted by the admiral, for ſeizing and appropriating of the ſhips and goods of publick enemies, and of thoſe who become partakers of the war, and who carry not themſelves as friends or neuters, to the princes or ſtates engaged in the war: for by our cuſtom albeit ſuch ſhips and goods be confiſcated as publick, belonging to the King or States; yet private perſons, who undertake theſe commiſſions, have for their expences the profit of theſe ſeizures, paying a fifteenth part thereof to the King, and a tenth part to the Admiral.

There have been many queſtions as to the rights and intereſts of allies, and neuters, very fully and accurately debated, and decided in the ſeſſion, upon occaſion of the late wars betwixt the King and the States of the United Provinces, which, becauſe they are of great uſe, for clearing the important points that occur in theſe controverſies, and for vindicating of the public juſtice of this kingdom, we ſhall in the cleareſt and ſhorteſt method we can, give account of what hath been determined in all the prizes which came before the Lords of Seſſion in theſe wars.

V. The Lord Admiral of Scotland is the Judge ordinary and the ſole Judge in the firſt inſtance of all prizes taken at ſea, but in the ſecond inſtance the Lords of Seſſion (who are the ſupreme Judges in all civil cauſes in Scotland, which are not determined by, or depending before the Parliament or their commiſſioners), upon complaint of iniquity committed by the Admiral, before final ſentence, advocate ſuch cauſes, wherein they *find probable ground of* iniquity alledged and inſtructed, *or* in the ſecond inſtance, after ſentence, do grant letters of ſuſpenſion, or reduction of the Admiral's decreets; whereupon all intricate and difficile queſtions in matters of prizes come to be debated and determined by the Lords. There is no queſtion, when the goods and ſhips ſeized belong to enemies, but only when they do belong, or are pretended to belong to allies or neuters, the ſhips being furniſhed with many falſe and double documents for that effect. So the Lords, upon complaint of iniquity committed by the Admiral, it being alledged, that the Lords were not judges in the matters of prizes in the firſt inſtance, yet they found, both by the amplitude of the power of their juriſdiction, and by the cuſtom in former times, that it was competent to the Lords to advocate cauſes from the Admiral upon iniquity, albeit the proceſs cannot begin before them in the firſt inſtance; for as they are the King's ordinary council, all matters, not belonging to the juriſdiction of another court, belongeth to them; and therefore they may, and oft have advocate cauſes from the Juſtice General, and other Judges in criminal cauſes; albeit the Lords cannot decide theſe cauſes, as being only Judges in cauſes civil, yet they may advocate the ſame, that in caſe the reaſons of advocation be relevant and proved, they may remit the cauſe to the proper and competent Judge, if the reaſon of advocation be upon incompetency, or to other unſuſpect Judges, if the reaſon be upon the ſuſpicion of the Judge, as being concerned in the cauſe, or nearly related to the parties, or having enmity againſt any of them; and therefore, the Lords in the advocation raiſed by *Cap. Gilleis*, *June* 12. 1673, it being alledged that the Admiral had committed iniquity, in granting a conjunct probation for proving the property of the ſhip and loading; the Lords found this no relevant ground of advocation of the cauſe, it being *in arbitrio judicis*, whether to grant a conjunct probation before anſwer to the relevancy of the reaſons of adjudication; or to diſcuſs the relevancy firſt, and then to admit the points found relevant to probation; but in the other way, witneſſes are adduced for either party: yet this being only *ex nobili officio*, the Lords remitted the cauſe to the Admiral, and ordained him to proceed to diſcuſs the relevancy, there being pregnant grounds of adjudication inſtantly verified, and upon his refuſal, they did advocate the cauſe to themſelves; they did alſo ordain the Admiral to proceed upon the evidences adduced to adjudge or aſſoilzie, without allowing a conjunct probation before anſwer, and declared, that if he proceeded not accordingly, they would advocate the cauſe, albeit the Daniſh treaty bear, "that their "ſhips ſhall not be meddled with, or their goods diſloaded, till they be adjudged "in

" in a court of admiralty ; " for the Lords are the King's great court of admiralty, in the ſame way as his commiſſioners in England are judges in the ſecond inſtance, of prizes brought before the Admiral of England, *Dec.* 17. 1673, Captain *Stuart*. But advocations, as they are now diſcharged from the Admiral in maritime cauſes, by act 16. P. 1681, ſo they may ſeem diſcharged from the Lords of Juſticiary by their late conſtitution, *act* 16. *P.* 1672.

VI. When queſtions concerning prizes come before the Lords, they do not exclude the defences of ſtrangers, as being competent and omitted in the firſt inſtance, tho' that be a rule by our cuſtom, but do proceed according to the common law of nations, and ſo they decided, *July* 23. 1667, *Hans Jurgan*, which was the firſt caſe occurring in that queſtion, and was always followed thereafter : for the rule by which the Lords have always proceeded in the matter of prizes hath been the law and cuſtom of nations ; and therefore the tenor of *a* commiſſion *granted by the Admiral*, *Feb.* 21. 1668, *Bartholemew Parkman* *. And the treaties betwixt the King and his allies, in ſo far as they differ from the common law of nations, have always been allowed by the Lords, as exceptions from that general rule, and good defences to the people, comprehended in theſe treaties. In dubious caſes the Lords have proceeded by the King's inſtructions, ordinarily adhibited to the admiralities of all his kingdoms, that they might keep one uniform rule with ſtrangers, in which, not only reſpect hath been had unto juſtice, but even favour towards allies, and policy and prudence towards all neuters, that none of them might receive offence, by the extenſion of juſtice in favourable caſes.

VII. The ground of juſtice for confiſcating the ſhips of thoſe who are not enemies, is, that they have aſſiſted the enemy in carrying on the war, and thereby became acceſſories to the war, and by that delinquence do confiſcate the ſhips and the loading, by which they have had acceſſion ; for the law and cuſtom of nations hath very fitly reſtricted the reparation of this delinquence, ſo as not to ſtate the parties offenders as enemies, and thereby to make all their goods confiſcable as enemies goods, but doth limit the ſame to thoſe ſhips, in which the concourſe is acted, if they be ſeized in that voyage, in which they give aſſiſtance with counterband, and the like, *or in their immediate return*.

Engagement in war by princes and ſtates, cannot juſtly hinder the free trade of other people, upon whom neither party hath either obligation or juriſdiction ; but the common conſent and cuſtom of nations requireth an equality and neutrality in all other parties, that they concur not in the war with either party, forbearing aſſiſtance in the war, which is by furniſhing them with men, inſtruments of war, materials ſpecially requiſite for the preſent war, money furniſhed for publick uſe, and in ſome caſes victual **, as when it is carried to places beſieged ; and other things which have promiſcuous uſe in peace and war, when there is a ſpecial application thereof to the neceſſary uſe of the war ; as iron, braſs, lead, pitch, tar, and the like, which are therefore called counterband goods, or prohibited goods ; and by the denunciations of war, intimation is ordinarily made to neuters, from what things to abſtain, as from carrying of counterband goods towards enemies ports, or carrying the goods and ware of enemies, whereby their trade is promoted, and they enabled to maintain the war ; or by carrying on their trade under the colour of the trade of neuters ; and therefore, in time of war, neuters do inſtruct their veſſels with paſſes and other documents, for proving that the bottom and goods belong to their ſubjects, who are free-men, and that the parties engaged in the war, or any of their ſubjects, have no intereſt therein;

* The admiral's commiſſion authoriſed the ſeizure of ſhips in the return of that voyage in which they had carried counterband to the enemy, tho' no counterband ſhould be found at the time of the ſeizure. This the court of ſeſſion in an after caſe, *July* 16. 1673, Captain *Lvel*, determined to be the law of this country, § 14 *infra, h. t.* In the deciſion quoted they found, that this point could only be determined by the law of nations, as to which they ordered an enquiry ; and that the tenor of the Admiral's commiſſion was not to be the rule.

** See a letter by order of King *Charles* II. to the court of ſeſſion, inſerted in the acts of ſederunt, *July* 8. 1673.

therein; which paſſes are upon the oaths of the owners of the ſhip, or maſters thereof, and thoſe who embark the loading; and where there is any treaty, the formula of ſuch paſſes uſeth to be expreſſed, always including an oath, and to be given *before* ſuch magiſtrates as are agreed upon in the ſaid treaties.

VIII. Seeing then the acceſſion of neuters is a delinquence, it can have no place where there is not a publick denounced war, which is preſumed to be known to the delinquent; and therefore *a* ſhip and goods belonging to neuters, were not found prize, becauſe carrying counterband goods towards the enemy's ports, unleſs the war had been notourly known at the place where they looſed, *at the time they left it*, and acts of hoſtility, and declaring of prizes, in neighbouring places, was not found ſufficient, *July* 23. 1667, *Hans Jurgan*. The like was found of a ſhip of *Hamburgh*, carrying counterband goods to *Daniſh* ports, after acts of hoſtility betwixt the King and the *Danes*, becauſe the ſhip was taken before the proclamation of the war againſt the *Danes*, *Feb.* 25. 1668, *merchants of Hamburgh*.

IX. If ſhips have in them counterband goods, they may be brought up, if the port be not expreſſed upon oath, *or* [1] be *not* a free port, or be contradicted by the oaths of the ſkipper and company, which infers a full probation, in caſe they acknowledge an unfree port; and a preſumptive probation, in caſe the paſs bear not a free port, is a ground of ſeizure; yet it admits of a contrary probation, for proving of the true port, *Jan.* 21. 1673, *Hendrick Anderſon*. The like was found, where the paſs made the port uncertain and ambiguous, bearing *London* to be the port, but a greater fraught promiſed, if the ſhip was brought up into *Holland*, which was found *might* be elided by a poſitive contrary probation, *Feb.* 19. 1673, *the owners of the Palm-tree and Patience*.

X. Amongſt counterband, pitch and tar were found comprehended, *January* 14. 1668, *Capt. Allan*; timber proper for ſhipping, as maſts, *&c.* is unqueſtionably counterband, but timber of promiſcuous uſe, is not counterband, except in ſpecial caſes, for the peculiar uſe of the war. There is a particular article in the firſt treaty betwixt the King and the *Swedes*, by which it is declared, that in regard the moſt of the materials of the *Swediſh* trade are pitch, tar, maſts, *&c.* which are counterband, yet the King declares, theſe ſhall not be ſeized upon that account, which was not found ſufficient to defend a *Swediſh* ſhip carrying ſuch counterband goods, not being the product of their own country, *January* 14. 1668, *Capt. Allan*. In the laſt treaty betwixt the King and the *Swedes*, there is an article, bearing, "That counterband ſhall be prize, *ſi deprehendatur*;" and therefore, it was thereby inferred, that the ſhip and remanent loading was not prize, *July* 18. 1673, *Capt. Wincheſter*. The like *July* 24. 1673, *Capt. Donaldſon*.

There was the like article, both as to counterband, and enemies goods, in the treaty at *Breda*, betwixt the King, the *Dutch*, the *French* and the *Daniſh*, at the pacification of the firſt *Dutch* War; but that pacification being broken by the ſecond *Dutch* war, it was not found effectual in the ſubſequent war, upon a letter from the King *. *A* ſhip was not found prize for carrying of victual or money to an enemy's country, *July* 16. 1673, *Capt. Lyel*.

XI. There is no doubt but carrying of ſoldiers to the enemy's country, of what nation ſoever they be, is counterband, and uſeth to be expreſſed in the treaties of allies generally, under the name of men, which can only be underſtood of ſtrangers when they are actual ſoldiers in the enemy's ſervice, for thereby there is a greater participation of the war, than either by carrying of enemies goods, or by carrying the inſtruments of war towards the enemy's ports; but otherwiſe paſſengers who are neuters, may freely go to the ports of enemies for trading, travelling, or any other end, not being found or preſumed, to be-

* See a letter wrote by order of King *Charles* II. inſerted in the acts of ſederunt, *July* 8. 1673.

[1] F. *and*.

come citizens or ſoldiers there, but reſiding only as factors for ſtrangers; and ſo not contributing with the enemy to the war, they do not exceed the bounds of neutrality.

XII. The difficulty is greater in caſe perſons belonging to the enemy's country, be carried in the ſhips of allies or neuters, and there is little doubt but the perſons of enemies, reſiding in the enemy's country, and contributing to the war, have the ſame or more effect, than the carrying of their goods, tho' that hath not occurred to be determined with us, and there is leſs doubt, that being born in the enemy's country, or having reſided there as citizens, but having left the ſame before the war, doth no further ſtate them as enemies, than that by their language, or other evidence, they are preſumed to be enemies, unleſs they make it appear, that they had left the enemy's country, and fixed their reſidence elſewhere: neither will any burdens impoſed upon their lands or houſes, import their concourſe in the war as enemies. There was a ſpecial conceſſion by the King in favour of the King of *Spain*, that becauſe the language of his ſubjects in the *Netherlands*, is the ſame with theſe of the *United Provinces*, that there ſhould be no ſeizure of the ſhips belonging to his ſubjects, upon account of being ſerved, or navigated by *Hollanders*. There is alſo an article in the *Swediſh* treaty, that it ſhould be free for them to make uſe of *Dutch* maſters for navigating their ſhips, provided that theſe maſters fix their domiciles in *Sweden*, and become citizens and inhabitants there.

Theſe conceſſions gave great occaſion of doubt, whether theſe or other allies or neuters, might make uſe of *Hollanders* as mariners, or ſervants in their ſhips, becauſe, if without that conceſſion they were free to hire *Hollanders* for ſervants, they might hire them for maſters of ſhips, as well as other mariners, and ſo needed no ſuch privilege, and therefore run no hazard by being navigated by *Hollanders*; but if they might not lawfully make uſe of a *Holland*'s maſter, till they had it by ſpecial privilege, *a pari* they could not make uſe of *Holland*'s mariners. It is clear, that the being by nation *Hollanders* inferreth no hazard, either as to the maſters or ſea-men; for the war is only with the citizens and inhabitants of the enemy's country, ſo that the true domicil or reſidence is the main point in queſtion. There is alſo great difference betwixt the maſter or ſtearſman, and the common mariners; for the maſter is in poſſeſſion of, and intruſted with the ſhip, which is affected both with his delinquence, and by his contracts of bottomary; and therefore his oath alone is always accounted ſufficient probation, as to the property of the ſhip, and frequently the ſtearſman is intruſted with the loading; in which caſe alſo his oath will be ſufficient probation as to the property thereof; but the oaths of the mariners have only been made uſe of as ordinary witneſſes, proving by the concourſe of two or more; and the confeſſions of the maſter, ſtearſ-man, or company at ſea when they were taken, have not been allowed as ſufficient probation, to confiſcate the ſhip or loading; yea, tho' renewed after they came to land, but only when taken judicially; and very little uſe hath been made of the privateer, or his company, for proving againſt ſtrangers, but only their own oaths, and other evidences; but the oath of the ſkipper alone was found to prove againſt his owners, *July* 13. 1669, *Capt. Wood.*

The taking the privilege for a *Holland*'s maſter, upon the conſiderations aforeſaid doth not import, that mariners may not be made uſe of who are by nation *Hollanders*, if they reſide not in the juriſdiction of the enemy; neither will the being of ſome of them aboard, infer ſuch evidence, that the whole ſhip and loading belong not to neuters and free-men; but if the moſt part of the company be *Hollanders*, or if the maſter be a *Hollander*, the preſumption is ſtrong, and gives ſufficient ground for ſeizure, *July* 9. 1668, *Capt. Allan*; and therefore it is fitly declared by treaties, that if the maſter by nation be a *Hollander*, the paſs ſhall bear expreſsly, "That it is ſworn upon oath, that he is citizen and inha-
" bitant in *Sweden*."

XIII. The

XIII. The King by his proclamation of the firſt war againſt the *Dutch*, did command to ſeize and make prizes of all ſhips, where there were found any number of men belonging to the enemy; and therefore a *Swediſh* ſhip was found prize, becauſe navigated with *Hollanders*, all or the moſt part of her company being ſuch, albeit ſhe had a paſs from *Sweden* in the terms of the *formula* contained in the *Swediſh* treaty; and albeit the treaty bear, that where ſuch a paſs is, *in bona aut homines nullo modo inquiratur*; becauſe in that ſame article it is ſubjoined, *niſi gravis ſuſpicio ſubſit*, and it was a moſt weighty ground of ſuſpicion, that the ſhip or goods belonged to *Hollanders*, that the company acknowledged that they reſided in *Holland*, and were taken on there, immediately before this voyage in this proceſs: (where it being alledged, that the confeſſion of the company, taken by an Admiral Depute at *Cromarty*, was extorted by holding ſwords and piſtols to their breaſts, or that the ſame was ſo extorted at ſea, when they were taken, it was found ſufficient to enervate their teſtimonies, if they were made to ſwear at ſea, the privateer and company having ſwords and piſtols in their hands; becauſe to evite the infamy of perjury, they might adhere in their judicial re-examination to their teſtimonies taken at ſea upon oath, albeit not true; or if by force or juſt fear they did ſo depone before the Admiral-depute *), *Feb.* 25. 1668, *the owners of the ſhip called, The Caſtle of Riga.* The like was found, where a great part of the company were *Hollanders*, *June* 30. 1668, *Paterſon.* And in the caſe betwixt *Captain Allan and Parkman*, decided, *July* 9. 1668, the ſhip was found prize, for having a number of *Hollanders* ſailors, *viz.* three, the company being nine, and for having a ſmall parcel of tar, as counterband, aboard, and having aboard the product of counterband, taken in the immediate return of that voyage; upon all which grounds jointly, the ſaid ſhip was declared prize **.

But in the ſecond war there hath no ſhip been declared prize upon account of the company's being *Hollanders*, neither becauſe the maſter was a *Hollander*, if he were not alſo a part owner, albeit two of the company were *Hollanders*, *July* 24. 1673, *Captain Bennet.* But the maſter being a *Hollander*, was found a ſufficient ground of ſuſpicion and ſeizure, but not of confiſcation, the property being proved to pertain to free men; and therefore probation was allowed to either party, *July* 16. 1673, *Captain Lyle.* For the hiring of the enemy's people is no aſſiſtance to them in the war, but rather a weakening of them, ſo that if thoſe of the enemy's country be only aboard as ſervants to neuters, and not upon their own account, either as traders or paſſengers, there hath been no inquiry in the laſt war as to their reſidence, neither hath any thing as to that point been mentioned, in the laſt proclamation of war, or in his Majeſty's inſtructions to the admiralties of his kingdoms; and tho' the law might have reached ſhips navigated by *Hollanders*, reſiding in *Holland*, and not changing their domicile; yet in favour and prudence, that ground hath not been ſuſtained, it being more the King's intereſt to allow his enemies to withdraw from their country, than to force them to ſerve only there.

XIV. *Counterband* is not only a cauſe of confiſcation, when taken going towards enemies ports, but alſo when the ſhip is taken in her return from the enemy's port in that ſame voyage, for then the delinquence is compleat, whereas it had not taken effect before the ſhip attained the port; and yet might be juſtly ſeized before the full effect, becauſe the ſeizure of the ſhip in her voyage is the impediment that the effect is not attained; and therefore, the common cuſtom of nations hath allowed ſuch ſeizures; for otherwiſe it were impoſſible to hinder neuters to carry counterband goods to enemies, for carrying on the war; neither will

* It was found in this caſe, that threatenings uſed at ſea were not enough to deſtroy the credit of the witneſſes, unleſs they had been made to ſwear there; and that, to invalidate the depoſitions emitted before the Admiral-depute, it was neceſſary to prove, that threatenings had been uſed at land about the time the teſtimonies were given.

** None of the points here mentioned were determined by this deciſion, except the firſt. It was found to be a ſufficient ground of condemnation, that a great part of the company were *Hollanders*.

will the pretence of altering their reſolution, to ſail to or diſload in a free port, be a ſufficient defence, unleſs the ſhip were actually ſtearing another courſe; but if a ſhip ſhould be purſued to be ſearched for counterband in her paſſage to an enemy's port, and ſhould be waited for, till her return, and taken as ſhe came from that port, there could be far leſs pretence to excuſe that delinquence; and therefore, it was one of the grounds of confiſcation of *Parkman*'s ſhip, taken by Captain *Allan*, that ſhe was taken in the return of the ſame voyage, in which ſhe carried counterband to the enemy's ports, *July* 9. 1668 *. And tho' in that caſe the reaſon was libelled that the ſhip was taken, having in her the product of counterband, as having the ſame effect with counterband itſelf, *quia ſurrogatum ſapit naturam ſurrogati*, yet without that, in the foreſaid caſe of Captain *Lyle*, *July* 16. 1673, it was found ſufficient that the ſhip was taken in the return of that ſame voyage, in which ſhe carried counterband, without mention of the product thereof, in which caſe it was found neceſſary, that the ſhip *ſhould* belong to the ſame owners, that had carried in the counterband; ſo that tho' the ſhip had been light without any loading, ſhe would have been prize, unleſs ſhe had been a *Swediſh* ſhip, and ſo ſecured by the *Swediſh* treaty, confiſcating only counterband, when it was actually taken. But it is a moſt convenient moderation of the law of nations, that the delinquence of carrying counterband, is followed no further than the immediate return of that voyage, otherwiſe it would be the foundation of marring trade, by perpetual quarrels, upon pretence of counterband carried in to enemies in former voyages. In theſe wars there has been no occaſion to determine, whether it be a cauſe of confiſcation, if a ſhip be taken in her return of that voyage, wherein ſhe was loaded with enemies goods.

XV. The *Dutch* by their declaration did prohibit all friends and allies, not only to carry counterband goods to any port in the King's dominions, but to be found therewith upon his coaſts, or diverting, from the voyage they might make with counterband, towards the King's ports; holding that for a ſufficient probation of their intending theſe ports, which *(it)* is like they would not *(be allowed to)* take off by documents aboard, expreſſing their own ports, or the ports of neuters, it being ſo eaſy to procure falſe and colourable documents; yet that was never ſuſtained as a relevant ground of adjudication with us.

XVI. By what hath been ſaid, the confiſcation of the ſhips and goods of allies and neuters, upon account of counterband, and the aſſiſtance given to enemies thereby, have been fully cleared. The other chief ground of confiſcation of ſhips and goods of neuters, is by their concourſe with enemies, in carrying on their trade; and therefore, in all the treaties, the *formula* of paſſes doth require, that it be atteſted upon oath, that the ſhip and loading belongs to the ſubjects of that ally, and no part thereof to the King's enemies; and likewiſe the particular kinds and quantities of the cargo, and the owners thereof, and of the ſhip, muſt be expreſſed. Some are of opinion, that an unfree ſhip confiſcates the loading as acceſſory thereto, but *that* an unfree loading, or a part thereof, doth not confiſcate the ſhip, which is but a groundleſs ſubtilty; the reaſon of this confiſcation being the partaking with enemies in carrying on of their trade, it taketh place alike in the ſhip and loading, or any part thereof, *July* 15. 1673, *Captain Wilſon*; but it being a delinquence, it hath ſtill the exception of the *bona fides*, and ignorance of thoſe who partake in that conjunction of trade. But tho' the ſociety or partnerſhip was entered into before the war, it was not found to liberate, ſeeing there was time and opportunity to diſſolve it thereafter, *July* 17. 1673, *Maſter of the Golden Falcon*.

XVII. That a part of the ſhip belonging to an enemy, doth confiſcate the whole ſhip and loading, hath been oft-times decided, even in the caſe where the maſter being a part owner, was hired by the *Swedes*, or other allies, and was a ſworn citizen in *Sweden*; unleſs it were ſufficiently inſtructed, that he were an inhabitant

* No judgment was given upon this point in the deciſion quoted.

inhabitant and reſidenter there, and had changed his domicile from *Holland*, and carried his wife and family, if he had any, to a neutral place. Neither was the production of a burgeſs-brief in *Sweden* found ſufficient, ſeeing the ſkipper by his oath acknowledged, that he left his wife lying-in at *Amſterdam*, *Feb.* 28. 1673; and *July* 18. 1673, *Maſter of the Elſingburg*. The like was found, becauſe the maſter by his oath acknowledged, that he was a *Hollander*, and a part owner, and that the evidence that his domicile was ſtill in *Holland*, was more pregnant than that he had changed the ſame to *Copenhagen*, *June* 25. 1673, *Captain of the St. Katharine*. The like was found, where the ſkipper's oath bore him to be a part owner and a *Hollander*, and that he intended to change his domicile, but had not done it, tho' he produced a *Swediſh* burgeſs-brief, *July* 10. 1673, *Captain Fraſer*. *It was ſo decided July* 23. 1673, *Captain Seaton*; *where the ſkipper's oath contradicted the paſs, acknowledging himſelf a part owner, and an Emdener under the juriſdiction of the States, tho' he ſhewed certificates of being a burgeſs, and having children in Denmark; ſeeing it was alſo deponed, that his wife and family remained in Emden. The like was found in the reduction at the inſtance of the owners of the ſhip called, The Calmer, which was firſt found prize by the Admiral, and twice thereafter by the Lords, becauſe the ſkipper's oath contradicted the paſs, bearing the ſhip to belong wholly to Swedes; and yet he deponed, that he was an eight part owner, and a Hollander, and probation having been adduced by commiſſion, both from Sweden and Holland, the moſt pregnant probation was, that his true domicile was at Amſterdam, Dec.* 13. 1673, *Clerk*.

XVIII. The loading belonging to enemies, was alſo found to make the ſhip prize, ſeeing it appeared, that they knew the ſame to belong to enemies, when unloaded, and had no privilege by treaty, *July* 15. 1673, *Captain Wilſon*. In like manner, the moſt part of the loading being proved to belong to a Jew, reſiding and trafficking in *Amſterdam*, the *loading* was found prize, but the ſhip belonging to *Lubeck* was found free, becauſe ſhe looſed from *Liſbon* before the certainty of the war, and ſo was *in bona fide* to engage for a freight with a *Hollander*; neither was it reſpected that this *Jew* was an agent for the King of *Portugal*, ſeeing he was a reſiding trafficking merchant in *Holland*, *Feb.* 11. 1673, *Earl of Kincardin*; but thereafter this ſhip was alſo found prize upon other grounds.

XIX. The greateſt difficulty in the matter of prizes, is, the diſcovery and probation of the intereſt of enemies. If probation be not had from the oath of the ſkipper and company, or from the documents found aboard, there remains no more but preſumptive probation, which ſometimes is ſo pregnant as it admits no contrary poſitive probation, and oft-times it doth admit the ſame, and then there is probation allowed to either party, for clearing the matter of fact, either as to the property of ſhip or goods, the true reſidence of the maſter, or the port truly intended, or any other matter of fact, whereupon confiſcation or liberation may be inferred.

In the ſecond *Dutch* war, they had found out ſo cunning contrivances to cover their trade, that the ſame could hardly be ſo far diſcovered as to make a lawful probation; for they did not only procure paſſes from the *Swedes* and *Danes*, and other allies and neuters, and upon the privilege granted to *the Swedes* of *Holland's* maſters, did ſend perſons intruſted by them, as maſters or ſteerſmen to manage their trade, under pretence of fixing their domiciles in *Sweden*, or in *Denmark*, conform to theſe treaties: but alſo, they intruſted their money to merchants, or factors, belonging to the countries of allies and neuters, who bought ſhips and goods in their own names, but to the uſe and behoof of the *Hollanders*, and upon their riſk, advantage and profit, ſo that they had a pretence to depone, that the property of ſhip and goods did belong to theſe free-men, who bought them, becauſe there lay only an obligation of truſt upon them, to communicate the ſame to *Hollanders*; as did appear by a report returned from the Magiſtrates of *Stockholm*, upon a commiſſion from the Lords for clearing the property of the

ſhip called, *The Wine-grape*, and her loading; for the perſons, who by the paſs made faith as owners, being interrogate, "Whether they had lent their names "for the behoof of the *Dutch*, or had bought the ſhip and goods for their uſe, "ſo that the benefit or loſs was to redound to the *Dutch*;" they declined to give a direct anſwer upon oath denying the ſame, and only aſſerted, that they ought not to be interrogate upon ſuch indirect dealing, or the like, or to that purpoſe: yea, uſe was made of the names and truſt of his Majeſty's ſubjects, to colour the *Dutch* trade, and many paſſes were procured from the Admiralty of *England* for the ſame effect: all which were the more eaſily obtained, becauſe the ſufferings of innocent merchants, upon account of their governors, was generally pitied, and the profit of privateers was as generally hated and envied.

XX. The ordinary grounds of a preſumptive probation of the intereſt of enemies, by the cuſtom of nations, are theſe: *Firſt*, If in the time of war, ſhips were not inſtructed with paſſes upon oath, expreſſing the owner of ſhip and loading; and therefore *(from)* the want of paſſes, or the want of documents for inſtructing the property of the ſhip and loading, or any part thereof, the ſame is preſumed to belong to enemies. *Secondly*, Falſe or forged documents. *Thirdly*, Double documents *. *Fourthly*, Deſtroying of documents, as throwing the ſame over board, or throwing them away at the time of the capture; infer that the ſhip or loading, or ſome part thereof, belonged to enemies, and likewiſe the having aboard double flags, to be made uſe of at divers occaſions.

XXI. As to the *firſt* ground of confiſcation upon want of documents; *Firſt*, There is no neceſſity to have aboard a vendition of the ſhip in writ; *becauſe* in ſhips, as other moveables, property is preſumed from poſſeſſion, *July* 26. 1673, *Captain Hamilton*. Neither doth the want of a paſs, conform to the *formula* in the treaties, as being defective and not expreſſing the port to which the ſhip was direct, infer confiſcation: in this caſe there was no counterband goods aboard, ſo that tho' the true port had been the enemy's port, it would not have inferred confiſcation, *Jan.* 21. 1673, *Anderſon, maſter of the Sun of Dantzick*. The like was found, *Feb.* 19. 1673, *the owners of the Palm-tree and Patience*; and upon *Feb.* 27. 1673, *the owners of the King David*; where a *Swediſh* ſhip wanting a paſs, conform to the *Swediſh formula*, and not being upon oath, tho' theſe were found preſumptive probations of the intereſt of enemies; yet not ſo pregnant as to exclude a contrary poſitive probation, that the property of the ſhip and goods belonged to free-men; and the not expreſſing the port in the paſs of a *Swediſh* ſhip, was not found ſo to infer the goods to belong to enemies; but that it admitted a contrary probation, that the ſhip and loading belonged to free-men: and becauſe the loading was pitch and tar, which is counterband, the not expreſſing the port being eſſential as to counterband, would have confiſcated the ſhip and loading, unleſs it had been ſecured by the *Swediſh* treaty, declaring pitch and tar, and others, being the growth of *Sweden*, not to be counterband, *Feb.* 28. 1673, *the maſter of the St. Peter of Stoad*.

Paſſes for ſhips in time of war, muſt be renewed for every voyage, and cannot otherwiſe expreſs the kinds and quantities of the cargo, which was ſuſtained as one of the reaſons of the adjudication of the ſhip called *The Elſingburg*, at the inſtance of Captain *Douglas*, decided, *July* 18. 1673, yet a ſhip was not found prize as wanting a paſs for the preſent voyage; in reſpect, ſhe having looſed at *Nantz*, and having there a particular paſs, ſhe was forced into *England* by ſtreſs of weather, and there ſold her loading, and went back to *Nantz*, and took in the like loading for the ſame owners and port, and therefore altered not the firſt paſs, *June* 17. 1673, *Captain Donaldſon*.

It

* By a letter from King *Charles* II. to the Lords of Seſſion, recorded in the books of ſederunt, *Dec.* 18. 1680, the Court is directed to adjudge all ſhips as lawful prize in which ſhould be found "double or concealed "documents, letters, bills of loading, ſea or freight brieves, or for which any falſe or double writings ſhould "be offered to the court."

It is likewiſe moſt neceſſary, that paſſes be truly granted upon oath made, which is the greateſt ſecurity againſt colourable documents, and therefore it was ſuſtained as one of the grounds of the adjudication, of the ſhip called *the St. Mary*, that the maſter by his oath acknowledged, that he had not made faith, as the paſs bears, as was found *June* 25. 1673, and upon that reaſon a ſhip was found prize; in which caſe alſo one witneſs deponed, that papers were thrown over-board, *July* 9. 1673, *Capt. Gillis.*

XXII. Double documents infer confiſcation, but that is chiefly underſtood, when the documents are contrary in material points; but where there was one paſs from the college of commerce, and another from the King of *Sweden*, having ſome contrariety, but not in material points, the ſame was not found to make the ſhip prize, *June* 13. 1673, *Capt. Wincheſter.*

XXIII. The throwing of papers over-board, or deſtroying the ſame at the time of the capture, is a moſt pregnant ground of confiſcation; for thence it is preſumed, that theſe papers would have inſtructed the property to belong to enemies; and therefore being proved but by one witneſs, it put the burden of probation upon the ſtrangers, that the ſhip and loading belonged to free men, *Feb.* 28. 1673, *the maſter of the White Dove*: regard was alſo had to the ſame, tho' but proved by one witneſs, in the confiſcation of *the Bounder*, *July* 9. 1673; and if there were concurring witneſſes in this point, it would infer *præſumptionem juris, et de jure*, not admitting a contrary probation.

XXIV. Ships have oft-times been found prize by the concourſe of ſeveral evidences of a contrivance, under colourable documents; and therefore a ſhip was found prize, becauſe the paſs did not mention the port, which a toll-breive bore to be *Breme*, and the maſter by his oath acknowledged the port to be *Amſterdam*, and that the owners were other perſons than were expreſſed in the paſs, and that the maſter reſided in *Holland*, tho' the paſs bore him to be a burgeſs in *Dantzick*, againſt which a contrary probation was not admitted, *January* 23. 1673, *the owners of the Crown of Dantzick*: a ſhip was alſo confiſcated becauſe the maſter and ſteerſman deponed, that they knew not to whom the goods belonged, but that they had order from a merchant in *Amſterdam*, to conſign them in the packhouſe of *Stockholm*, to be delivered to ſuch perſons as ſhould ſhow ſuch marks, *July* 10. 1673, *Capt. Fraſer*; and in like manner *the Fortune of Trailſound* was found prize, *July* 22. 1673, becauſe it was acknowledged upon oath, that if the ſhip were taken by *Hollanders*, the company ſhould depone the goods belonged to the tar-company in *Stockholm*, as the paſs bears; and if it came ſafe to *Scotland* or *England*, they ſhould declare the ſame belonged to *Samuel Souton* an *Engliſh*-man reſiding in *Sweden*.

XXV. Albeit a part of the ſhip or loading be found to belong to enemies, and that thereby the whole becomes prize, as being partners with the enemy in carrying on their trade, yet thoſe who can ſhow that they were in an invincible ignorance of the intereſt of an enemy, and did all that they could do to ſecure againſt the ſame, by taking the oaths of the owners of the whole ſhip and loading, that the property belonged to themſelves, and no part thereof to an enemy, it would take off the delinquence of that party, and preſerve their intereſt, which was never pleaded during theſe wars, but by ſome of the King's ſubjects; as in the firſt war, the King having by his proclamation, warranted all ſhips even from enemies, to be employed for bringing timber for the re-building of *London*, a great part whereof was then lately burnt, certificates and paſſes being always had from the Duke of *York*, then Lord High Admiral of *England*; whereupon *John Dyſon* merchant at *London*, fraughted a ſhip of *Norway*, whereof *Boaz Neilſon* was maſter, called *the Raphael*, to import to *London* ſix thouſand deal-boards; the ſhip in her voyage to *London* was taken by Captain *Wood*, and the whole ſhip and loading adjudged as prize, which being brought before the Lords by reduction, they found, that the ſhip and loading became prize, becauſe there were found aboard fifteen hundred deals belonging to the owners or company,

ny, who then were in enmity in the *Daniſh* war; and yet the ſix thouſand deals belonging to the *London* merchant, who had contracted *bona fide* by the King's proclamation, did not become prize with the ſhip, as was decided *July* 13. 1669, *Captain Wood*; for the *London* merchant not being on the place of embarking, could not know whether there was more entered than the deals he fraughted, or whether the owners gave truly an oath upon the property and quantity of the loading. And in like manner, Sir *Francis Clark* merchant at *London*, having ordered a parcel of braſs-wire to be brought home to him from *Sweden*, the ſame was embarked in the ſhip, called *the Calmer*, which was taken in her voyage to *London*, by Captain *Smeatoun*, and was adjudged prize by the Admiral, becauſe the paſs was convelled by the maſter's oath, yet the parcel of braſs-wire belonging to Sir *Francis Clark*, was found not to be prize, *Dec.* 13. 1673, *Sir Francis Clark*; and that becauſe Sir *Francis* reſiding in *England*, and not being upon the place of embarking, could not know the falſehood or ſimulation of the paſs, or other grounds of confiſcation; and albeit there was no document aboard for this parcel of braſs-wire, which would have inferred a preſumptive probation againſt allies or neuters, that the ſame belonged to enemies, yet the ſame or any other preſumptive probation, tho' ſo ſtrong againſt neuters, that it would admit no contrary probation; yet as to the King's ſubjects reſiding in his dominions, who could not trade but under colourable documents, it was not found *dolus malus*, unleſs they had, or could have known the intereſt of any of the King's enemies. Likewiſe, ſome merchants in *Hull*, having embarked a loading in a ſhip of *Hamburgh*, called *the Lyveday*, the Admiral found the loading prize, becauſe there were double and forged documents made uſe of, againſt which no contrary probation could have been admitted, for neuters who being free with all parties engaged in the war, had no reaſon to make uſe of falſe or double documents, ſo that it is neceſſarily inferred, that the ſhip or loading belonged not to neuters, but to enemies; yet the matter being brought in queſtion by reduction, the Lords found, *that the King's ſubjects were in a different ſituation from neuters, and* that there being no ground of confiſcation of the ſhip, but it was a free *Hamburgh* ſhip, except upon account of the colourable documents for the loading, they admitted a contrary probation that the property of the loading belonged to the merchants of *Hull*, *Nov.* 14. 1673, *maſter of the Lyveday*.

XXVI. We have now gone through the ordinary grounds of adjudication of prizes, there are ſome other grounds that have been alledged for confiſcation, but have not been ſuſtained; as 1°, It was not found a ground of confiſcation of a ſhip or loading, that the ſame belonged to the ſubjects of the Duke of *Holſtein*, who held *that part* of his eſtate of the King of *Denmark*, then a declared enemy to the King, unleſs the Duke of *Holſtein* had contributed to the war, as was found *January* 4. 1667, *Herriſon*; neither that the ſhip wanted a vendition in writ, *July* 26. 1673, *Captain Hamilton*; neither was it found a relevant ground of confiſcation, becauſe the ſhip was bought in *Holland*, and taken at ſea ere ſhe touched any other ground, *Feb.* 21. 1673, *the owners of the ſhip called the Prince of Eaſt-Freezland*; the like was found in the foreſaid caſe of Captain *Hamilton*: neither did the inſurance of ſhip or loading in *Holland* infer a ſufficient ground of confiſcation alone, tho' it might concur with others as an adminicle, albeit the inſurance was alledged to put the riſque and hazard of the capture upon the King's *enemies*, without detriment to his *friends*; yet the Lords found, that ſeeing the property of the goods inſured did remain in the King's allies, the ſame ought not to be confiſcated; neither was it alledged, that the inſurance was expreſsly againſt capture, but only againſt hazard at ſea in general, *July* 22. 1673, *Captain* *July* 17. 1673, *maſter of the Golden Falcon*.

This further is to be obſerved, that when the ſhips of neuters have aboard counterband, the defect of documents for the counterband, or double, or colourable documents to cover the ſame, will not infer confiſcation, if the property be proved to belong to free men, and that the true port intended was not an ene-

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my's port; becauſe in ſuch caſes neuters have neceſſity of colourable documents: but as to the property of ſhip and goods, they have no ſuch neceſſity; and therefore, contrary probation is not admitted againſt the ordinary preſumptive probation, by wanting of documents, concealing or deſtroying of documents, or making uſe of double or falſe documents.

When prizes adjudged by the Admiral are rouped and ſold, if by reduction they be liberated by the Lords, the owners *of the privateer* are decerned *each in ſolidum*, to reſtore the price, the ſhip and loading being indiviſible, *and* oft-times ſome are aſſumed as owners who are not ſolvent, *June* 10. 1680, *the Anne of Chriſtiana*. And if the ſhip and loading be orderly rouped, upon the Admiral's warrant, or ſold upon his decreet, before the ſame be called in queſtion by citation upon reduction, albeit the Lords thereafter liberated the ſhip, they will decern no more but the price obtained by the roup before the Admiral's adjudication, or the price obtained by ſale, *bona fide*, after the Admiral's decreet, *December* 13. 1673, *Clark*: and if the King's fifteenth part, and the Admiral's tenth part, be *bona fide* paid, they are liberated *pro tanto*, and the ſtrangers muſt have recourſe to the treaſury, and againſt the Admiral for repetition.

TITLE III.

Infeftments of Property, where, of Charters, Seiſins, Reſignations, Confirmations, &c.

I. *The original of fees.*
II. *Feudal juriſdiction, eſpecially of the King in Parliament.*
III. *Feudal juriſdiction of ſuperiors with us. Method obſerved in treating the ſubject of this title.*
IV. *Allodials properly what.*
V. *Requiſites of proper fees.*
VI. *Kinds of improper fees.*
VII. Dominium directum et utile *eſſential to all fees; and the vaſſal's right muſt acknowledge the ſuperior's.*
VIII. *A rent or return due to the ſuperior.*
IX. *Fidelity neceſſary.*
X. *Feudal contracts.*
XI. *Udal rights.*
XII. *Infeftment what it ſignifies.*
XIII. *How writ is neceſſary for infeftments.*
XIV. *What kinds of writs are neceſſary for infeftments.*
XV. *The tenor of formal charters.*
XVI. *When inſtruments of ſeiſin became neceſſary.*
XVII. *The tenor of formal ſeiſins.*
XVIII. *The eſſentials neceſſary in ſeiſins.*
XIX. *Seiſins do not ordinarily prove without warrants and adminicles, and what theſe are.*
XX. *Regiſtration of ſeiſins, reverſions*, &c.
XXI. *Regiſtration of reſignations* ad remanentiam.
XXII. *Regiſtration of the allowance of appriſings and adjudications, inhibitions and hornings.*
XXIII. *The atteſt of the notary and two witneſſes, neceſſary in ſeiſins.*
XXIV. *Extracts of ſeiſins not probative in improbations.*
XXV. *Tranſumpts of ſeiſins.—Preſcription of land-rights.*
XXVI. *Bounding infeftments.*
XXVII. *Baſe infeftments, how far effectual without poſſeſſion.*
XXVIII. *Infeftments by confirmation.*
XXIX. *Infeftments upon appriſing or adjudication.*
XXX. *The effect of appriſings or adjudications with a charge.*
XXXI. *Infeftments ward.*
XXXII. *Feus of ward-lands, how far valid.*
XXXIII. *Infeftments blench.*
XXXIV. *Infeftments feu.*
XXXV. *The annexed property of the crown, how ſet in feu.*
XXXVI. *Feus of the annexed property after diſſolution with diminution of the rental.*

XXXVII. *Feus of kirk-lands.*
XXXVIII. *Inſeftment in burgage.*
XXXIX. *Inſeftment in mortification.*
XL. *Manſes and gleibs.*
XLI. *Conjunct inſeftments.*
XLII. *Inſeftments to heirs ſubſtitute.*
XLIII. *Inſeftments ſimple and tailzied.*
XLIV. *Union.*
XLV. *Erection.*
XLVI. *Warrandice.*
XLVII. *Tacit conditions implied in ward-lands.*
XLVIII. *Tacit conditions in warrandice and relief.*
XLIX. *Tacit conditions in inſeftments of offices.*
L. *Tacit conditions in excambion.*
LI. *Tacit conditions in feus.*
LII. *Liferents reſerved in inſeftments of property.*
LIII. *Exceptions in inſeftments, how far effectual.*
LIV. *Faculties reſerved in inſeftments.*
LV. *Burdens of ſums in inſeftments, how far effectual.*
LVI. *The effect of impoſſible or unlawful conditions in inſeftments.*
LVII. *Conditions inconſiſtent are null.*
LVIII. *Clauſe* de non alienando *in tailzies.*
LIX. *Clauſes reſtrictive and irritant in tailzies.*
LX. Regalia *not expreſſed, are not carried by inſeftment.*
LXI. Regalia *carried in baronies, tho' not expreſſed.*
LXII. *Juriſdiction and courts.*
LXIII. *Juriſdiction of baron-courts, how far reſtricted.*
LXIV. *Iſſues of baron-courts belong to themſelves.*
LXV. *Inſeftments of conſtabulary.*
LXVI. *Fortalices, how far extended.*
LXVII. *Forreſtries.*
LXVIII. *Hunting of deer,* inter regalia.
LXIX. *Salmond-fiſhing.*
LXX. *Cruives.*
LXXI. *Mills.*
LXXII. *Privilege of brewing.*
LXXIII. *Part and pertinent.*
LXXIV. *Wood and coal.*
LXXV. *Houſes, biggings and park-dykes.*
LXXVI. *Fowling, hunting and fiſhing.*
LXXVII. *Cunningars.*
LXXVIII. *Dovecotes.*
LXXIX. *Free iſh and entry.*
LXXX. *Herezelds.*
LXXXI. *Steel-bow goods.*

THE *Roman* empire in *Italy*, being long oppreſſed, was at length ſuppreſſed by the inundation of the *Longobards*, and other barbarous nations, who ſeated themſelves there, and divided theſe beautiful *and fertile* countries amongſt their captains, *who* ſubdivided the ſame to their ſoldiers, for their military ſervice; and as they were the authors of this new right, ſo did they term it by a new and barbarous name, *Feudum*, which the *Germans* call *Fiff*, and we with the *Engliſh* call a *Fee*. Concerning theſe there was no common written law, but the ſeveral provinces had their diverſe cuſtoms, as they thought moſt ſuitable to the nature of this right, and their own utility. As to theſe books annexed to the civil law, called *Libri feudorum*, tho' they have great reſpect amongſt lawyers, yet they are but the obſervations of private perſons; and ſo not a written publick law.

By this irruption, which happened in the ſixth century, the *Roman* civil law was ſopite for five hundred years, *till it* was revived in the *twelfth* [1] century, and did take in with it the feudal cuſtoms, which have been propagated through the moſt civil nations in the world; not only for ſtrengthening them towards war, but becauſe Sovereigns had thereby a new intereſt over their ſubjects, *their inferiors* thereby becoming their feudatars and vaſſals, owing always to them fidelity and *aſſiſtance*, following them as their clients and aſſecles, acknowledging them as their lords, ſuperiors, and paramounts in their lands and heritages, which are all derived mediately or immediately from the ſovereign authority, as the common and ſupreme ſuperior of all the ſubjects, who have no more than the right of unfixed moveables.

II. And thence alſo ariſeth the feudal juriſdiction, whereby not only the ſovereign power, but all ſuperiors do by the advice and aſſiſtance of their vaſſals, who are called Peers of their court, order and determine all things, not only relating to themſelves and their vaſſals, but to all others, who are locally within

[1] F. *eleventh.* See above I. 1. 12. *fin.*

in their territories, both in civils and criminals, in ſo far as they derive juriſdiction, civil or criminal, from the ſovereign power, immediately or mediately. No nation is more exact in this than *Scotland*, wherein the King as ſupreme ſuperior, ruleth by his vaſſals aſſembled in parliament; in which at firſt, all were perſonally preſent who held lands immediately of him, as barons great and ſmall, free-holders of any moment, holding a forty ſhilling land of old extent of the King, and prelates for church-lands; the free-burghs were alſo repreſented in parliament by their commiſſioners, as holding their burgage-lands, and their freedoms and privileges of burghs, as feudatars of the King; ſo that there was not one foot of ground in *Scotland* whoſe lord was not preſent in Parliament, by himſelf or his delegate. But when fees holden of the King became ſub-divided, and multiplied, two or more commiſſioners were admitted in Parliament, in name of the meaner barons and free-holders; and all were accounted great barons, who held an hundred merk land or above of the King, and the reſt meaner barons, *Parl.* 1503, *cap.* 78.

III. So alſo other ſuperiors have their courts, conſiſting of their vaſſals, who are obliged to anſwer ſuit thereto, who as a jury, gave doom and judgment of old, when all matters proceeded by jury or inqueſt, as it was alſo in the King's court by ſheriffs, bailies, *&c.* of which the ſhadow or formality yet remaineth, of having a doomſter as a member of court to pronounce ſentence, tho' inqueſts be in moſt things laid aſide through recent uſe and cuſtom. The very right of ſuperiority carries this right of juriſdiction over the vaſſals, unleſs by their infeftments, or preſcription, they be exempted, by having courts and there iſſues in their infeftments.

Our learned countryman *Craig* of *Rickertoun*, hath largely and learnedly handled the feudal rights *and cuſtoms* of this and other nations, in his book *de feudis*; and therefore we ſhall only follow cloſely what ſince his time by ſtatute or cuſtom hath been cleared or altered in our feudal rights, which is very much; for he having written in the year 1600, there are ſince many ſtatutes and variety of caſes, which did occur, and were determined by the Lords, and have been *de recenti* obſerved, as they were done by the moſt eminent of the Lords and lawyers, as by *Haddingtoun*, who was preſident of the Seſſion, and by preſident *Spotiſwood*, and by *Dury*, who continued in the Seſſion from the year 1621 until his death in the year 1642. And tho' theſe deciſions have been intermitted, ſince that time, till King *Charles* II.'s return, the loſs is not great, theſe times being troubleſome, and great alterations of the Lords; but the deciſions of the Lords have been conſtantly obſerved ſince that King's return, by which moſt of the feudal queſtions are determined; and theſe things which *Craig* could but conjecture from the nature of the feudal rights, the cuſtoms of neighbouring nations, and the opinion of feudiſts, are now commonly known, and come to a fixed cuſtom; neither doth he obſerve any deciſions particularly further than his own time, in which our feudal cuſtoms could be but little determined, ſeeing the Lords of Seſſion were mutable and ambulatory, till the year 1540, in which King *James* V. did perfect the eſtabliſhment of the ſeſſion in a College of Juſtice, who at firſt, could not be ſo knowing and fixed in their forms and cuſtoms; and therefore, it cannot be thought ſtrange, if the feudal cuſtoms, as they are now ſettled, do much differ from what *Craig* did obſerve; he hath indeed very well obſerved the origin and nature of feudal rights, and the cuſtoms of *Italy* where they began, and of *France* and *England*, whence they were derived to us; and therefore, we ſhall ſay little as to theſe; and ſo much only of the rights themſelves as muſt neceſſarily be introductory to our fixed cuſtoms, in which we ſhall follow that ſame method (as moſt accommodated to the matter) which we obſerved in the former title of *Real Rights*: but there being in feudal rights nothing of that original community there ſpoken of, but only promiſcuous properties of incorporations or perſons; or otherwiſe a ſervitude of common paſturage, *&c.* Therefore, we ſhall firſt ſpeak of the right of property of lands, both in relation

on to the ſuperior and to the vaſſal. Next, of the ſervitudes competent in fees; which comprehending all rights, not reaching the alienation of the ſubſtance, but the leſſer intereſts only extending to the profits or uſe of hereditaments, it muſt comprehend both the intereſt introduced by law, as teinds, and thoſe that are by conſent by infeftments or other grants, or long poſſeſſion; as liferents, conjunct-fees, terces, and the right of courteſy, annualrents, penſions, rentals, tacks, &c. *or* real ſervitudes, as thirlage, paſturage, &c. And laſtly, feudal pledges, which are called wadſets. But in all, we are here only to ſpeak of the conſtitution of feudal rights, leaving the tranſmiſſion thereof to heirs, or ſingular ſucceſſors, to the third book of the *Inſtitutions*.

IV. The property of all lands and immoveables, or hereditaments, is either allodial or feudal. Allodial is that, whereby the right is without recogniſance, or acknowledgement of a ſuperior, having a real right in the thing; thus are moveables enjoyed; and lands and immoveables were ſo till thoſe feudal cuſtoms. Now there remains little allodial; for lands holden feu, *or blench*, or burgage, or lands mortified, are not allodial, ſeeing they acknowledge a ſuperior, having the direct right *of property*, and to whom, there muſt be ſome rent or return, tho' they be not ſo proper fees, as land holden ward. Yet the ſuperior's right in the ſovereign power, is not feudal, but allodial with us, tho' ſome kingdoms be holden of ſuperiors as feudal. The gleibs of miniſters ſeem to come neareſt to allodials, having no infeftment, holding rent, or acknowledgement, tho' they be more properly mortified fees, whereof the liferent-eſcheat befals to the King only [m].

Kirks and kirk-yards are only allodial, without any acknowledgement of a ſuperior, but they are deſtinate for pious uſes, and are ordained to be upheld and repaired, *Parl.* 1563, *cap.* 76. And the pariſhioners of every pariſh are ordained to build and repair kirk-yard dykes, with ſtone and morter, two ells high, and to make kirk-ſtyles therein, *Parl.* 1597, *cap.* 236. The manner of repairing kirks was remitted to the Council by the ſaid firſt act of Parliament, and thereupon an act of Council was made, which is ratified, *Parl.* 1572, *cap.* 54. but it is not repeated in the ratification, but only in general, that the pariſhioners were warranted to name perſons to ſtent their neighbours *.

V. A fee ſignifieth either the right itſelf, or the thing affected with the right, whether it be corporeal, as lands, lochs, woods, fortalices, mills; or incorporeal, as annualrents, fiſhing, juriſdiction, paſturage, or the like.

Fees at firſt were only granted for fidelity and military ſervice *of the vaſſal*; and therefore they implied, 1. A free and gratuitous donation, as to money, or other anterior cauſe. 2. None could ſucceed therein, but ſuch as could perform that ſervice, whereby women were excluded. 3. They could deſcend to none but to the male-iſſue of the firſt vaſſal's body, which ceaſing, they became void, and could not be tranſmitted to the collaterals, or to the aſcendents of the firſt vaſſal. 4. Whenſoever they were open, or void by the death of the vaſſal infeft, they returned to the ſuperior, until the vaſſal's heir *was* capable of military ſervice, which was eſteemed to be ſo ſoon as he attained majority, and (*and they alſo returned to the ſuperior*) while they were in non-entry by the negligence of the vaſſal, not demanding infeftment; but in his minority, when he was unable to ſerve, both the lands and the vaſſal were in the hands of the ſuperior in ward and cuſtody, or of his donatar *as his legal tutor, who was to educate him for his own ſervice, and to entertain him*, beſide which he had then no other profit of his fee; *and if he married without the ſuperior's conſent, he loſt a ſum equivalent to that tocher which might be ſuitable to his quality and eſtate; and if, contrary to his ſuperior's will, he refuſed a ſuitable match, he forfeited the double of his tocher. The reaſon introductory of this was, becauſe the ſuperior*

* The act of Privy Council here mentioned, is dated *Sept.* 13. 1563. By the confuſion of the council-records it was long a-miſſing, but appeared firſt in Mr. *Keith*'s hiſtory of the reformation, vol. I. p. 525 edit. 1734. It is now publiſhed in the late accurate Abridgement of the ſtatute law of *Scotland*, p. 444. The burden of repairing two thirds of the church is thereby laid upon the pariſhioners, and of one third upon the parſon; agreeable to which the court of Seſſion determined, *Had. June* 25. 1623. *Patrick Schaw contra E. of Winton*, and *penult. Nov.* 1628, *Kirk of Selkirk contra Stewarts*.

[m] See below, § 40. *h. t.* II. 4. 63.

ſuperior might be much concerned in the affinity contracted by his vaſſal in his marriage.

In all fees, fidelity *of* the vaſſal to his ſuperior is neceſſarily implied, and if any thing was acted contrary to fidelity and gratitude, againſt the life and fame of the ſuperior, to the great prejudice of his eſtate or neareſt relations, the fee became void; wherein is alſo comprehended the vaſſal's diſclaiming of his ſuperior, or owning another in his place; or infefting another vaſſal without his ſuperior's conſent.

Fees are not only unalienable without conſent of the ſuperior, for the reaſons now adduced; but *becauſe* they are *ſtricti juris*, and there is no obligement upon the ſuperior to receive any ſtranger, or ſingular ſucceſſor to be his vaſſal, except what the law hath introduced *with us* by ſtatute or cuſtom, in favour of creditors, for obtaining ſatisfaction of their debts, by appriſing or adjudication, whereby the ſuperior may be compelled to receive ſingular ſucceſſors: yet the diſpoſition, procuratory, or precept of ſeiſin before infeftment are aſſignable, and the ſuperior may be compelled to receive aſſignies, if the diſpoſition be in favour of aſſignies: but infeftment being once taken, he is not obliged to receive any aſſigny or ſingular ſucceſſors, otherwiſe than in obedience of horning upon appriſing or adjudication, getting a year's rent for accepting a new vaſſal [n].

VI. Theſe being the antient requiſites of fees, that is *accounted* a proper fee which hath them, and the want of any of them makes it improper in ſo far; but moſt of them are now changed by the tenor of the infeftment; as when the fee is granted to the vaſſal, and the heirs of his body, it is ſo far improper, that women may ſucceed; if it be granted to him and his heirs ſimply, then his collateral heirs or aſcendents may ſucceed, or if to his heirs-male whatſoever; much more if to the heirs or deſcendents of other perſons in tailzies. Fees are alſo granted, not for military ſervice, or ſervice indefinitely, but for ſome definite particular ſervice, as for carrying of a ſword, or other enſign of honour, before the ſuperior *on* ſolemn days; or not for ſervice at all, but for ſome rent, which is either inconſiderable, as a mere acknowledgment of the ſuperior, as a penny money, or a grain of pepper, a roſe, *&c.* or for a feu-farm duty in money, or any fungible, or other performance: or, when the avail of the marriage, and profit of the ward is taxed to ſuch a ſum.

Hence we may conſider, what remains as the eſſentials of fees, and common *to all kinds* thereof, which are theſe.

VII. *Firſt*, There muſt remain a right in the ſuperior, which is called *dominium directum*; and withal, a right in the vaſſal, called *dominium utile*: the reaſon of this diſtinction and terms thereof is, becauſe it can hardly be determined, *that* the right of property is *either* in the ſuperior or vaſſal alone, ſo that the other ſhould only have a ſervitude upon it; tho' ſome have thought ſuperiority but a ſervitude, the property being in the vaſſal, and others have thought the fee itſelf to be but a ſervitude, to wit, the perpetual uſe and fruit; yet the reconciliation and ſatisfaction of both, have been well found out in this diſtinction, whereby neither's intereſt is called a ſervitude; but by the reſemblance of the diſtinction in law, betwixt *jura et actiones directæ*, and thoſe which for reſemblance were reductive thereto, and therefore called *utiles*, the ſuperior's right is called *dominium directum*, and the vaſſal's *dominium utile*, and without theſe the right cannot conſiſt. As there muſt be a right in the ſuperior, and another in the vaſſal, ſo the vaſſal in his right muſt neceſſarily hold of, and acknowledge the ſuperior, as having the direct right in the fee, otherwiſe the two diſtinct rights without this ſubordination, will make but two partial allodial rights.

VIII. *Secondly*, There is neceſſarily implied in fees, ſome rent or return to the ſuperior for the fee, which may be either ſervice, money, or other fungible,

[n] See below II. 4. 32.

or prayers and ſupplications, as in fees mortified to the kirk, or other performance.

IX. Or at leaſt *Thirdly*, the vaſſal's fidelity to the ſuperior, implying, not only negative, that he may not wrong the ſuperior, but poſitive, that he muſt reveal to his ſuperior any deſign againſt his life or fame: which fidelity, tho' it be not expreſſed, yet it is neceſſarily implied in all kinds of fees, and cannot be taken away by any paction to the contrary, without deſtroying the very nature of this right.

X. To come now to the conſtitution of the property of lands, in fee and heritage, the feudal contract *being* of itſelf alienative, as loan, ſale, exchange, and the contracts in law, called, *do ut des*, and *do ut facias*; (of which two laſt, the feudal contract is a kind, ſeeing thereby land or other immoveable is given, for giving or doing ſomething) therefore, as in others, ſo in it, the will of the owner muſt conſtitute the right in the vaſſal; and ſeeing by the cuſtom of nations, ſome kind of poſſeſſion is neceſſary to conſtitute or transfer property, the ſuperior's delivery of poſſeſſion to the vaſſal, or acknowledgment and approbation thereof in the vaſſal, to be holden by him in fee, were ſufficient to conſtitute and perfect the fee.

XI. And therefore in the udal right of lands in *Orkney* and *Zetland*, whereby, without any infeftment inveſtiture or other right or writ, they enjoy lands and hereditaments; it ſufficeth them to inſtruct by witneſſes, that they have poſſeſſed, as being holden and repute heritable poſſeſſors of ſuch lands; but the law and cuſtom of *Scotland* hath, in all other places, neceſſarily required writ, not only for evidence of the conſtitution of this right, but as ſolemnities for the perfecting and ſolemnizing thereof, without which it becomes not a complete real right of the ground, except where ſuch writs have been deſtroyed, or loſt in times of trouble, and then a proving the tenor of them muſt be uſed: or in ſome caſes the heritor may be cognoſced by an inqueſt, as heritable poſſeſſor. But ordinarily writ is requiſite, which writs are called an infeftment or an inveſtiture.

XII. Infeftment or *infeudatio*, ſignifieth the *act* conſtitutive of a fee, as its etymon indicateth: ſo alſo inveſtiture is the ſame, more metaphorically, as we are ſaid to be inveſted or indued with any right, as men are covered with a garment or cloak, and denuded and diveſted thereof, when it is extinct or tranſmitted: ſo both infeftment and inveſtiture ſignify the writs, which are evidents, ſignifying the acts conſtituting the fee; and theſe are two, the diſpoſitive will of the ſuperior, and his delivery of poſſeſſion by himſelf, or his bailie in his name, to the vaſſal, or his procurator or attorney.

XIII. Of a long time, infeftment hath required writ as a neceſſary ſolemnity, and not only as a mean of probation that the ſuperior did truly diſpone to the vaſſal, any immoveable in fee and heritage, and that accordingly the vaſſal attained poſſeſſion, natural, civil, or ſymbolical; for if writ were adhibited only for probation, other probation might alſo be admitted, not only againſt the ſuperior, or his heirs by their writ or oath, but even againſt their ſingular ſucceſſors, or other competitors, by whoſe oath of knowledge or writ, the truth of the infeftment, and of theſe two neceſſary acts to conſtitute a fee, might be proved; and albeit the ſuperior's oath would not prove againſt a ſingular ſucceſſor, yet his writ anterior to that ſingular ſucceſſor's right, acknowledging, that he had at ſuch a time inveſted ſuch a perſon as his vaſſal, and entered him in poſſeſſion, would prove againſt his aſſigny; but neither of theſe ways would conſtitute a fee, and ſupply a written infeftment, except where the peculiar cuſtom of fees without writ hath been immemorial, and therefore ſuſtained as ſufficient: and albeit it be provided by antient ſtatutes [o], that the heritable poſſeſſors of lands may be cognoſced by inqueſt, yet that was only upon conſideration of calamity and war, whereby writs were deſtroyed, and where no competition was by any pretending a written

[o] *Stat. Rob.* III. *c.* 36. § 5. See below IV. 45. 17. 10.

a written infeftment, and poſſeſſion conform, the queſtion being only betwixt the ſuperior and his vaſſal, who with his predeceſſors had been in immemorial poſſeſſion, as being holden and repute heritable poſſeſſors, by performing the deeds proper to vaſſals of ſuch lands, and ſo holden and repute as heritable poſſeſſors by the neighbourhood; which I have not heard to take effect for others, but the King's immediate vaſſals, who claims property in no land as ſupreme ſuperior, but what is annexed to the crown, or whereof the property is acquired to the King, by the caſualities of his ſuperiority, or by acquiſition from other proprietars; and therefore he doth never exclude the antient heritable poſſeſſors, tho' they have loſt their rights by public calamity, wherein not only adminicles in writ, but the teſtimonies of witneſſes above exception are received; whereby if the right be not proved to be blench, or feu by the exchequer-rolls, which bear all the King's property and the reddendos thereof, or by Æques made in exchequer, the fee will be held ward, and according to the probation and verdict of the inqueſt, charters will be granted by the King in exchequer, and ſo there ſcarce can be pretended any fee, which hath not been already eſtabliſhed by writ, except in *Orkney* and *Zetland*.

XIV. The writ requiſite to conſtitute a fee, muſt contain the preſent diſpoſitive act of the ſuperior, by which he diſpones to the vaſſal and his heirs the fee, in whatſoever terms he expreſſeth it, whether he gift, grant, alienate, ſell or diſpone, tho' theſe ſeveral terms expreſſed, may import a different title and warrandice; yea, albeit no cauſe or title be expreſſed or implied, but only that the ſuperior diſpones; or tho' the cauſe or title inſinuated be not true, yet it was ſufficient with poſſeſſion, until the ſolemnity of inſtruments of ſeiſin was introduced, and is ſtill ſufficient when ſeiſin is rightly adhibited; for we follow not that ſubtility of annulling deeds, becauſe they are *ſine cauſa*, but do eſteem them as gratuitous donations; and therefore narratives expreſſing the cauſe of the diſpoſition, are never enquired into, becauſe, tho' there were no cauſe, the diſpoſition is good, and albeit neither the *tenendas*, *reddendo*, or the *modus acquirendi*, be expreſſed, yet if the property was the diſponer's, and he do but expreſs the diſpoſition to be in fee and heritage, it is valid; for the *reddendo* is underſtood to be ſervices, accuſtomed in ward-holdings; and thereby will be carried, tho' not expreſſed, all the parts and pertinents of the fee.

And therefore any diſpoſition *per verba de præſenti* in fee, is valid as to that part of the infeftment, and altho' the diſpoſition contained an obligement to grant charters, yet the not granting thereof doth not prejudge. And tho' charters be granted relative to prior obligements, yet they are good, without neceſſity to prove theſe. Nor will it be ſuſtained, for the ſuperior or any competitor to ſay, that if the prior obligation, diſpoſition or contract were produced, it would be found conditional, or have clauſes in favour of the ſuperior, or that competitor, whether generally or particularly alledged: but if theſe were loſt, the charter is ſufficient, and no more is underſtood to be in the real right, than what is contained in the charter; yea, tho' the charter bear, that it is granted "according "to the proviſions and conditions contained in ſuch a contract, diſpoſition or bond," which may import, that the ſuperior by granting the charter without theſe, hath not paſt from them; and therefore, he may inſiſt upon them as perſonal obligements, and the vaſſal will be obliged to produce the ſame *ad modum probationis*, by exhibition or incident diligence, whereupon he muſt depone, whether he has them, or had them ſince the citation, or did at any time fraudulently put them away: but if without fraud they be loſt, the charter is ſufficient; yet if any other ſhould found relevant alledgeances upon the original diſpoſition, if they be ſuſtained, he will get diligences to cauſe the ſame be produced *ad modum probationis*.

Precepts of *clare conſtat* [q] are alſo ſufficient, ſeeing they contain a precept to infeft ſuch a perſon as vaſſal, which implies the diſpoſitive will of the ſuperior; and

[q] See below III. 5. 26.

and therefore is valid in place of a charter from its date, albeit it hath no effect againſt ſingular ſucceſſors, as to that vaſſal's predeceſſor's rights, which muſt be inſtructed by the rights themſelves, and not by the ſuperior's acknowledgment.

And for the ſame reaſon, other precepts of ſeiſin, not relating to particular charters or ſeiſins, but either ſimple, or bearing *ſecundum chartam conficiendam*, are ſufficient, altho' theſe charters be never granted: but there will be underſtood a proper ward-holding gratuitous, without warrandice, extending only to the heirs of the vaſſal's body, but not reaching to collaterals or aſcendents, unleſs the precept expreſs or inſinuate an onerous title, as vendition, excambion, *&c.*

But ſince writ became to be an eſſential ſolemnity of fees, the ſuperior's preſent diſpoſitive act muſt be in writ, but his preterit declaratory act, acknowledging ſuch a perſon and his predeceſſors to be vaſſals, and have the fee, or his obligement to grant the fee, tho' never ſo expreſs, which relates *but* to a diſpoſition *de futuro*, will not ſupply a charter, tho' clad with real poſſeſſion, or having ſeiſin by inſtrument, bearing to be *propriis manibus*, *tho' by theſe the ſuperior may be compelled to grant charters ſolemn and complete, bearing expreſsly all the clauſes ordinary in ſuch writs.* Yet in ſome caſes, adminiculation of a ſeiſin will ſuffice, as in the liferents of wives being proportional, or in very antient rights, or where in competition no better right is ſhown; and in rights of property that are old, tho' the immediate warrant of the ſeiſin be loſt, the obligement to grant ſuch infeftment will be valid, not only againſt the ſuperior, or his heirs and ſucceſſors, but againſt others having ſingular titles.

Much leſs is it neceſſary to have formal and ample charters in the beſt ſtile upon parchment in Latin, ſealed; albeit vaſſals are obliged to accept no other, and the notaries drawers of informal charters, may be depoſed and cenſured, yet the right will not be annulled, or poſtponed to poſterior more formal and ſolemn rights, for want of theſe formalities.

XV. The formal tenor of charters is different, according to the ſeveral kinds of infeftments; whereof ſome are original infeftments, by which the fee was firſt conſtituted, and therefore are moſt plain and ſimple, containing the diſpoſitive clauſe, relating or inſinuating the title or original of the right; if it be an original charter from the King, it begins with his royal title, *Carolus Dei gratia, &c.* And bears the conſent of the treaſurer, or commiſſioners of the treaſury, and bears a narrative of the motives, inducing the King to grant the ſame; and if it be ward or blench, in burgage, or mortification, it bears, *Damus, concedimus & in perpetuum confirmamus.* But if it be a feu-charter, it bears, *Arendamus, locamus, in emphyteuſin dimittimus et in perpetuum confirmamus*; and then follows the clauſe *tenendas*, and the clauſe *reddendo*, which if it be ward, bears, *Servitia debita et conſueta*: if blench, the particular blench-duty, *nomine albæ firmæ:* if feu, the particular feu-duty, and ſometimes the duplication thereof, and the marriage of the heir: if burgage, it bears, *Servitia burgalia:* if in mortification, it bears, *Preces et ſupplicationes.* And ordinarily warrandice, which, tho' very ample, hath no effect; for if the right prove invalid, there is no action againſt the King, who doth always diſpone *pleniſſimo jure*, but *periculo petentis*; eſpecially when he diſpones as ſupreme ſuperior, by the right of his crown: but if he diſpone for a price or cauſe onerous, as for ſums of money, or by excambion, the lands acquired by him, being no part of the revenue of the crown, or annexed property; in theſe *utitur jure privato*, and his warrandice may have effect, as to his private patrimony, but not as to the patrimony of the crown.

Charters granted by the King of fees by progreſs, are either upon reſignation or by confirmation, or upon appriſing or adjudication, which differ from original charters, in their ſeveral ſpecialities; as, charters upon reſignation after the diſpoſitive clauſe, bear the conveyance, "That the lands or others were reſigned "in the hands of his Majeſty, or his commiſſioners, by a procuratory of reſig- "nation apart, or in a diſpoſition or contract, expreſſing its date, in favour of "the

" the acquirer, his heirs or aſſignies ;" whereupon reſignation being made in the reſigner's life *, the charter will be granted to him, or to his heirs ſerved generally ; or to his aſſignies, having right by aſſignation to the procuratory of reſignation.

Charters of confirmation do deduce the right to be confirmed, which if it be a charter *à ſe*, bearing, " to be holden from the diſponer of the King," and expreſſing the *tenendas* and *reddendo*, the King's charter doth in the like ſtile, generally relate the charter to be confirmed, and then ratifies, confirms, and approves the ſame in all the heads and articles therein, and then ſubjoins the tenor and words of the charter. *Theſe charters of confirmation, whenſoever granted, are drawn back to the date of the charters confirmed, (which were abſolutely null till confirmation) unleſs there be a* medium impedimentum, *as a prior infeftment by confirmation or upon reſignation by the ſuperior ; yea, tho' the infeftment by confirmation be after the death of the granter of the charter to be confirmed, if the ſuperior do confirm it, the confirmation is drawn back, and will import the ſuperior's paſſing from any caſuality falling by the death of the author, unleſs theſe be reſerved, (wherein the neglect of the King's officers may not be imputed in his prejudice) albeit* Craig [r] *relates a caſe betwixt* Kirkcaldie *of* Grange *and* Ker *in the contrary ; and adds this reaſon, that the former vaſſal, granter of the charter to be confirmed, dying before confirmation, it might be truly ſaid, that he died laſt veſt and ſeiſed as of fee, which the ſubſequent confirmation cannot make falſe ; yet this being* fictione juris, *theſe fictions may do much more than this change ; and there is nothing more frequent than to confirm very old charters or diſpoſitions.*

There is another kind of charter of confirmation by the King, of charters granted by his vaſſals to their ſub-vaſſals, not to be holden *à ſe* of the King, but *de ſe* of the diſponer. The effect of which confirmation is to ſecure the acquirer againſt the forfeiture, or recognition of his ſuperior.

Charters by the King upon appriſing or adjudication, do either narrate the appriſing or adjudication before the diſpoſitive clauſe ; or otherwiſe after the diſpoſitive clauſe, by the clauſe beginning, *Quæ quidem terræ per prius hæreditarie pertinuerunt ad* A. B. *&c.* " That the lands and others in the charter, were appriſed or adjudged from the " former vaſſal, or his apparent heir, lawfully charged to enter heir in ſpecial ;" and expreſſes the date of the appriſing or adjudication, and the ſums therein contained, and bears, in the *reddendo*, the duties and ſervices, due and accuſtomed before the ſaid appriſing or adjudication ; likewiſe the King's charters bear as witneſſes, " ſeveral officers of ſtate, and the director of the chancellary, *&c.*"

The King's charters muſt paſs in exchequer upon a ſignature ſigned by the King, or by his treaſurer, or commiſſioners of the treaſury, and a *quorum* of the exchequer ; which ſignature is recorded in the books of exchequer, and then paſſeth under the ſignet, and then under the privy ſeal, whoſe warrant is the ſignature, [and then under the quarter-ſeal, which is called the teſtimony of the Great-ſeal **] and laſtly under the Great-ſeal itſelf.

Charters by ſubjects in moſt things agree with the King's charters, but differ in theſe points, that they begin not with their titles, but thus, *Omnibus hanc cartam viſuris vel audituris* ; and then follows the ſuperior's title or deſignation. And in original charters, the ſpecial cauſe is narrated, as for implement of a certain contract, diſpoſition or obligation ; in them alſo the warrandice is more particularly expreſſed, becauſe it is effectual according to its tenor.

In the charters granted by ſubjects, the precepts of ſeiſin were ordinarily engroſſed, and now by the late act of Parliament 1672, *cap.* 7. precepts of ſeiſin are appointed to be inſert in the King's charters, which before could only paſs by a writ, under the quarter-ſeal, or teſtimony of the Great-ſeal.

* By *act* 35. *P.* 1693, reſignation may be made upon procuratories of reſignation, even after the death of the granter. See Appendix, N° 1.

** This ſentence incloſed in a parentheſis, is not found in the firſt edition, and appears to be a miſtake. Charters never paſſed the quarter-ſeal, but precepts of ſeiſin did, which before the *act* 7. *P.* 1672. were wrote on a ſeparate paper from the charter.

[r] *Lib.* II. 4. 19. *edit.* 1732.

In all charters, both by King and ſubjects, the clauſe *tenendas* uſeth to be inſert, expreſſing the lands, or others by their ordinary deſignations, and then adding, *Per omnes ſuas metas antiquas et diviſas, prout jacent in longitudine et latitudine, cum domibus, ædificiis, boſcis, planis, moris, mareſiis, viis, ſemitis, aquis, rivolis, ſtagnis, pratis, paſcuis et paſturis, molendinis et multuris, et eorum ſequelis, aucupationibus, venationibus, piſcationibus, petariis, turbariis, cuniculis, cunicularii, columbis, columbariis, hortis, pomariis, fabrilibus, braſinis et brueriis, geniſtis, ſylvis, nemoribus et virgultis, lignis, lapicidinis, lapide et calce, cum curiis et earum exitibus, herezeldis, blooduitis, et mulierum merchetis, libero introitu et exitu, ac cum omnibus aliis libertatibus, commoditatibus, proficuis, aſiamentis, ac juſtis ſuis pertinentiis quibuſcunque, tam non nominatis quam nominatis, tam ſubtus quam ſupra terram, procul et prope ad prædictas terras ſpectantibus, ſeu ſpectare valentibus, quomodolibet in futurum, libere, plenarie, quiete, integre, honorifice, ſine aliquo impedimeto, revocatione, contradictione, aut obſtaculo qualicunque.*

In the charters by the King or ſubjects, there may, and uſeth to be inſert a clauſe *de novo-damus*, which doth diſpone the fee, as by an original right, in caſe the diſponer's right ſhould be found defective, and to ſecure againſt any title proper to the ſuperior, either as to the property, or any ſervitude or caſuality; which clauſes uſe to be very full, and to expreſs "all nullities, title or intereſt in the ſupe- "rior, with ſupply of all defects;" and bearing all the particular caſualities, with which the fee might be burdened, which are effectual, and extended to the full againſt ſubjects. But as to ſuch clauſes in the King's charters, they are fully extended as to all intereſt in the King, relating to the property, ſuch as "nullities, "forfeiture, recognition, purpreſture, diſclamation:" but the general words, *Pro omni jure titulo et intereſſe*, are not extended againſt the King, to any caſuality of ſuperiority, (not reaching, but burdening the property) except ſuch only as are particularly expreſſed: and therefore a *novo-damus*, in a biſhop's charter from the King, diſponing a patronage, *pro omni jure*, was found to give the biſhop's ſucceſſor right to that patronage, tho' *it* was a laick patronage, without neceſſity to inſtruct that the biſhop had any pretence of a title thereto before, but that the *novo-damus* was as effectual as an original right, *Feb.* 29. 1680, Sir *John Scot* of *Ancrum*. But a *novo-damus* by the King, bearing, *pro omni jure titulo et intereſſe*, and expreſſing ward, was found not to exclude the King's donatar from the marriage, as being a caſuality differing from the ward, which uſeth to paſs by a ſeveral gift, *July* 17. 1672, Lord *Hatton*.

The reaſon of the different extention of the clauſe *de novo-damus*, as to the King and ſubjects is, becauſe ſubjects are preſumed to take ſpecial notice of all clauſes that they inſert in their charters, which *in dubio* are interpreted *contra proferentem*. But theſe clauſes do more eaſily paſs by inadvertency in exchequer; and therefore their gifts are more regulated by their acts, than by the common ſtyle thereof. For tho' gifts of ward comprehend non-entry, ay and while the entry of the righteous heir; yet by act of exchequer, it is only extended to three terms after the ward, tho' the old ſtyle be ſtill continued.

Charters do alſo comprehend ſeveral conditions and proviſions, of which hereafter. And ſome charters do expreſs a bounding, which is ordinary in theſe within burgh. And ſome do expreſs a particular enumeration. And ſome have only the general name of barony, or tenendry, or ſome other common deſignation, under which there may be particular deſignations comprehended. And ſome charters bear "courts and their iſſues," or particularly "infang-thief, outfang-thief, pit and gallows."

XVI. Theſe charters, or other writs in place of charters, tho' they do never ſo fully comprehend the diſpoſitive will of the ſuperior, yet they never become a real right till they be completed by ſeiſin, which imports the taking of poſſeſſion; for ſeiſin and ſeizure are from the ſame original, ſignifying laying hold of, or taking poſſeſſion; and diſſeiſing is diſpoſſeſſion; and therefore, it is a needleſs queſtion, whether ſeiſin or poſſeſſion are diſtinct, and which are moſt effe-

ctual; for till the ſolemnity of inſtruments of ſeiſin was introduced to accompliſh the real right of fees, poſſeſſion was neceſſary to be joined to the diſpoſition, which poſſeſſion might either be natural by actual inhabitation, manuring or ſtocking of the ground, *poſitione ſedium*; or might be civil, by uplifting the fruits and duties; or it might be ſymbolical, *poſitione pedum*, by entering upon the lands as vaſſal upon the ſuperior's warrant. But if this ſymbolical poſſeſſion were *retenta poſſeſſione naturali*, the ſuperior diſponing to another, who firſt attained the natural poſſeſſion, he would have been preferred to the ſymbolical poſſeſſion, as being ſuſpect and ſimulate, *retenta poſſeſſione*; therefore till the time of King *James* I. any charter, diſpoſition, or precept from a ſuperior to a vaſſal, mentioning his heirs, or an heritable right, with true and real poſſeſſion, without ſimulation, was ſufficient to complete the fee. So a charter with natural poſſeſſion was ſuſtained, being in the reign of King *Robert* II. *June* 24. 1625, *town of Stirling*. And alſo before the reign of King *James* I. *Hope*, *alienation and infeftment*, *Earl of Marr contra Biſhop of Aberdeen*.

But King *James* I. having been long detained in *England*, being taken in his voyage *going to France*, did thence bring in the ſolemnity of ſeiſins by the inſtrument of a nottary, about the year 1430, as *Craig* relateth [s], and yet ſaith, that long thereafter, even near to his time, the Bailie's ſeal upon the ſuperior's diſpoſition, charter, or precept, was ſufficient to inſtruct delivery of poſſeſſion.

Neither was there neceſſity then in any caſe to prove the delivery, or the ſuperior's entering the vaſſal in poſſeſſion, but that was preſumed from the poſſeſſion itſelf; and therefore, it needs not be debated how the vaſſal entered in poſſeſſion, or what warrant the Bailie had to give him poſſeſſion, or what warrant the perſon who received the poſſeſſion for the vaſſal had, as his procurator or attorney; for *if the vaſſal were in the natural and civil poſſeſſion*, all theſe powers were preſumed. Neither were precepts of ſeiſin, or attornies then in uſe; for as this ſolemnity of an inſtrument of ſeiſin was introduced from *England*, ſo was the name of attorney, which is frequent there, but ſeldom uſed here, except in caſes of ſeiſin.

After inſtruments of ſeiſin became in uſe, they were not only ſuſtained as the mean of probation, that poſſeſſion or ſeiſin was given or taken, but they were the neceſſary ſolemnities to accompliſh the right, which could not be ſupplied by any other mean of probation, tho' the ſuperior with a thouſand witneſſes, ſhould ſubſcribe all the contents of a ſeiſin, it would be of no effect to make a real right without the atteſt of a nottary, in which ſenſe the vulgar maxim is to be underſtood, *Nulla ſaſina nulla terra*, which is not only neceſſary to the firſt vaſſal, but muſt be renewed to all his heirs and ſucceſſors; altho' by the cuſtom of *France*, the vaſſal being once infeft, his heirs need not be infeft, but do continue to poſſeſs by his right, as the heirs of tackſmen do with us: but every heir muſt be infeft in fees, otherwiſe, if they die uninfeft, they never attain the real right, but only a poſſeſſory title to the fruits and rents, from the predeceſſor's death till their own death, which will belong to their executors, in ſo far as unuplifted from their predeceſſor's death, till their own death or renunciation to be heir, and will be affected for their proper debts, which will not affect the heritage, or the next heir entering *, who muſt enter to the defunct, who died laſt infeft, and will be liable for his debts, but not for the debts of his apparent heir, who was never infeft, [except there be a competition upon the defunct fiar's debts, which will be preferred to the apparent heir's executors creditors, but if there be no debts of the laſt infeft or apparent heir, the rents will remain *in hæreditate jacente*, and will belong to the next heir without confirmation **].

XVII. Let

* By act 24. P. 1695. If the apparent heir has been three years in poſſeſſion, his creditors have action againſt the next heir making up a title to the eſtate by adjudication or ſervice.

** This paſſage ſeems contradictory to what immediately precedes it, and differs from what is delivered above, II. 1. 22. and below, II. 6. 17. 3. III. 5. 2. The deciſion *Nov.* 22. 1683, *M'Blair contra Crichton* and *Rome*, probably

[s] *Craig* II. 7. 2. edit. 1732. See below IV. 3. 4.

XVII. Let us then conſider the formal tenor of an inſtrument of ſeiſin, and the meaning thereof, and then conſider the eſſentials and neceſſary requiſites thereto, and how far unformal ſeiſins have been ſuſtained. A formal ſeiſin is the inſtrument of a nottary-publick, bearing the delivery of ſymbolical poſſeſſion, by the ſuperior or his Bailie, to the vaſſal or his attorney, by delivery of earth and ſtone, and other ſymbols accuſtomed upon the ground of the fee; which inſtrument ſhould contain the name of God, as its initial words, *In Dei nomine, Amen*, that it may keep the nottary in remembrance of his faith and truſt, deterring him to take the name of God to a falſhood or lie. 2. It ſhould bear the date by the day, month, and year of God, and was accuſtomed to have the indiction and name of the Pope, which ſince the reformation hath not been in uſe: but it ſhould contain the name of the King, and the year of his reign. 3. It bears the appearance of the vaſſal or his certain attorney, which is ſufficiently inſtructed by having of the precept of ſeiſin in his hands, which is but *præſumptio juris*, and doth not exclude a contrary probation, eſpecially as to the heir of the firſt vaſſal, who, by taking infeftment, becomes liable for all his predeceſſor's debts, and therefore if the ſuperior ſhould grant a precept of *clare conſtat*, the bearer thereof, as attorney for the apparent heir, taking ſeiſin, would involve the apparent heir in all his father's debts; and therefore it may be proved by the ſuperior and attorney's oaths, that the precept of ſeiſin was without warrant from the apparent heir, and ſo was fraudulent and colluſive, to involve him in his predeceſſor's debts, and in an over-burdened and hurtful ſucceſſion. 4. It muſt bear the delivery of the precept of ſeiſin to the ſuperior, if he be preſent, or in his abſence, to his Bailie, whoſe warrant is ſecured, becauſe there is a blank left in the precept for his name, in which blank any perſon's name being filled up, he is ſufficiently authoriſed as Bailie in that part, ſpecially conſtitute. 5. It bears the Bailie's accepting of the precept, and delivering of it to the nottary in preſence of the witneſſes. 6. It muſt bear the nottary's reading of the precept, and exponing it, if it be in Latin, and then the words of the precept ſhould be ingroſſed. 7. It bears the ſuperior or *the* Bailie's delivering of earth and ſtone of the land to the vaſſal, or to his attorney, bearer of the precept; or delivery of any other accuſtomed ſymbol, as a penny for an annualrent, a net for fiſhing, a clap *and happer* for a mill. 8. It bears the attorney's requiring inſtruments. 9. It muſt bear, that theſe things were done upon the ground of the land, or other hereditament, and the hour of the day, before two witneſſes at the leaſt, required thereto, which witneſſes muſt now ſubſcribe with the nottary, ſince the late act of Parliament 1681 [ss]. And laſtly, the atteſt of the nottary, bearing the authority of his creation, and that he was preſent with the witneſſes, ſaying, *vidi, ſcivi et audivi*, that the things contained in the inſtrument, were ſo done as is expreſſed therein, and that he took a note thereof, and thereupon drew a formal inſtrument, and inſert the ſame in his protocol, whereunto are adjoined his ſign, his motto contained in his commiſſion, relating to his faithfulneſs and truſt, and his name or the initial letters thereof.

XVIII. If any of theſe be omitted, the nottary may be exauctorate and puniſhed by the Lords, but the eſſentials are much fewer. Yet the ſeiſin muſt contain the delivery of ſymbolical poſſeſſion, by the ſuperior or his Bailie to the vaſſal, or his attorney, upon the ground of the land, or other tenements in preſence of the nottary and witneſſes, with the date and ſubſcription of the nottary. But the delivery of the ſymbol of an office, having no particular place or ground, is ſufficient any where, as a batton for a military office, or a ſcroll, book, or cape for a civil office: but where the fee hath a particular ground or place, there it muſt be taken upon the ground, and it will not be ſufficient to be in view of

bably gave occaſion to this inconſiſtency. The edition 1681 does not contain what is incloſed in the parentheſis, and is therefore conſiſtent with the author's doctrine in other places of his book.—By a late ſolemn deciſion *June* 27. 1755, *Stewart Nicolſon Schaw contra Houſton of Johnſton*, it was eſtabliſhed, that the executors of an apparent heir have right to the rents falling due during his apparency, and not the next heir entering.

[ss] See below IV. 42. 9. *ad fin.* act 5. P. 1681.

of the ground; yet law or cuſtom may otherwiſe order it in caſe of neceſſity; as the infeftment of lands in *Nova Scotia* were appointed to be taken at the caſtle-gate of *Edinburgh*. And when lands are rightly united or erected in baronies, ſeiſin taken upon any part thereof ſufficeth for the whole; and without union, ſeiſin taken upon any part of the lands, will ſerve for all the lands in the infeftment lying contigue. *Craig* relates [t], that a ſeiſin was found null and falſe, where it bore, "Theſe things were done upon the ground of the land," albeit the parties had put part of the ground of the land within their ſhoes *on which they ſtood*, but were not upon the fixed ground thereof.

The inſtrument of ſeiſin muſt be taken by a publick notary lawfully authoriſed, at the leaſt ſo holden and reputed; for tho' the notary be deprived, it will not vitiate the inſtrument taken *bona fide*, by perſons who knew not his deprivation, till it be commonly known, or letters of publication intimated at the market-croſs. But a ſeiſin was found null, becauſe it wanted theſe words, *vidi, ſcivi et audivi*, *Hope, precepts and inſtruments of ſeiſin*, *Primroſe contra Durie*.

In antient rights, or where there is not a more ſolemn infeftment, a ſeiſin hath been ſuſtained, tho' with conſiderable defects, as where the ſeiſin bore not "de-"livery of earth and ſtone," but only "actual, real *and corporal poſſeſſion*," *June* 17. 1630, *E. of Wigton*. But not where the ſeiſin wanted delivery of earth and ſtone, and the name of the attorney, *Hope, ſeiſin, L. Lie contra E. of Lauderdale*. A ſeiſin was ſuſtained, tho' it did not repeat the precept, and did not bear "de-"livery of earth and ſtone," but only "of the ground of the land," yet was preferred to a poſterior formal ſeiſin, taken after the matter was litigious, *and after* the ſeiſin *had been* ſuſtained againſt the purchaſer's author, *Dec.* 23. 1680, *Lamberton*. And a ſeiſin of land and a mill was ſuſtained, bearing "delivery of earth "and ſtone of the land and mill, with all ſolemnities requiſite," *March* 15. 1631, *Smeiton* *.

XIX. Seiſins being but the aſſertions of notars, do not prove nor inſtruct a real right, unleſs they be aſtructed by a warrant or adminicle in writ [u], except that it be againſt tenants at the inſtance of their maſter, who is known to be in poſſeſſion: or that preſcription hath run by one or more ſubſequent ſeiſins, and 40 years peaceable poſſeſſion. And albeit the moſt ordinary warrant of ſeiſins be the ſuperior's precept ingroſſed or related to in the ſeiſin, yet after 40 years poſſeſſion, there is no neceſſity to produce precepts of ſeiſin, procuratories or inſtruments of reſignation, even in the caſe of reductions of infeftments for want of theſe, *Parl.* 1594, *cap.* 218. In which there is not required peaceable poſſeſſion, neither yet continued poſſeſſion, as is required in the act of preſcription, ſo that interruptions as to this point will not alter the caſe. But there is no neceſſity to produce any more for inſtructing an infeftment, but the ſeiſin, and a warrant thereof, ſuch as a precept of *clare conſtat*, a precept out of the chancellary, a diſpoſition or contract of alienation, according as the ſeiſin doth relate to the one or the other; as if the ſeiſin bear, to proceed upon a precept contained in a charter, diſpoſition, or contract of alienation, theſe muſt be produced *ſpecificè* as they are related; not only *paſſivè* to defend in reductions, but *activè*, as titles of reductions, declarators, and all other proceſſes, except againſt tenants or naked poſſeſſors, or where preſcription hath run, becauſe the charter when it is related to, is a part of the inveſtiture, making up the real right; and therefore, as hath been now ſhown, § 14. *h. t.* there is no neceſſity to produce a diſpoſition, contract of alienation, or bond, tho' the charter relate thereto. But if the ſeiſin bear, to proceed upon a precept contained in a diſpoſition, contract of alienation or bond, then theſe are parts of the infeftment, and make up the real right, and ſo muſt be produced, that the defender may except or

* By act 17. 1686, ſeiſins are allowed to be wrote book-ways; the number of leaves are appointed to be mentioned in the notary's atteſtation, and the witneſſes to the giving the ſeiſin as well as the notary, are appointed to ſubſcribe each leaf.

[t] *Craig* II. 7. 14. edit. 1732. [u] See below IV. 42. 9.

defend upon any cauſe therein contained, in favour of himſelf, his predeceſſors or authors; unleſs the infeftments be antient, and clad with long poſſeſſion, in which caſe it is like the Lords would extend the foreſaid ſtatute, and would ſuſtain a diſpoſition, contract or bond, as a ſufficient adminicle of the ſeiſin, tho' it related not thereto. And albeit this ſtatute mentions only, that charter and ſeiſin ſhall be ſufficient, under which a diſpoſition or contract of alienation muſt be comprehended, when the ſeiſin is immediately taken thereupon, and not upon a formal charter, for then they are the real charter; yet it is not like they would reject a bond obliging to grant ſuch infeftment, albeit it do not *de præſenti* diſpone, as a ſufficient adminicle to ſuſtain a ſeiſin, where they had been 40 years in poſſeſſion, altho' preſcription was not completed by immediate ſubſequent ſeiſins or uninterrupted poſſeſſion [uu], the party making faith, that he did not keep up, or conceal any other part of the inveſtiture; which would ſufficiently take off the preſumption of fraudful concealing, or away-putting the immediate warrant of the ſeiſin, which might afford defences to the other party. For even in a recent caſe, of the infeftment of a wife in liferent, her ſeiſin was ſuſtained upon production of her contract of marriage, albeit the ſeiſin proceeded upon a bond granted for the ſame cauſe, *June* 29. 1665, Mr. *George Norvil*, where nothing was alledged of long poſſeſſion. And *Nov.* 22. 1628, *Clappertoun*, where a wife's ſeiſin bearing in contemplation of marriage, was ſuſtained without any adminicle, but the marriage, againſt an appriſer from the huſband's *heir after* his death, *Hope, Jeiſin, Murray of Philliphaugh contra Schaw, Gray contra Finlayſon*; but there could be leſs queſtion if the ſeiſin related to a precept apart, and did not bear, whether the precept proceeded upon a charter, diſpoſition, alienation, or bond, for then the production of any of theſe, would adminiculate the ſeiſin.

Seiſins within burgh, for ſerving of heirs by haſp and ſtaple, by the immemorial cuſtom and privilege of burgh, being given by the town-clerk, do prove ſufficiently both the propinquity of blood, that the ſame was cognoſced and ſeiſin given accordingly, without neceſſity of any warrant or adminicle, but ſeiſins of original rights, *or* conveyances to ſingular ſucceſſors, will not be ſuſtained by the town-clerk, without adminicles even as to tenements within burghs, as was found in an infeftment from a father to his ſon, bearing to be upon the father's reſignation, *Feb.* 11. 1681, *Irwing*; *June* 21. 1672, *Mitchel* [w].

Seiſins *propriis manibus*, when either the ſuperior himſelf doth give ſeiſin to his vaſſal's attorney, or when the ſuperior's bailie by his precept gives ſeiſin to the vaſſal, himſelf being preſent, and accepting, or when the ſuperior immediately gives ſeiſin to the vaſſal; in theſe caſes the notary's warrant is ſufficiently inſtructed by the ſeiſin, and by the diſpoſition, contract of alienation, or bond, or when the ſeiſin is *propriis manibus ſecundum chartam conficiendam*, if a charter thereafter made, be ſhown; as a ſeiſin *propriis manibus*, by a father to his ſon, reſerving the father's liferent, was found valid againſt a ſecond wife's infeftment, granted for a competent tocher, being adminiculated by a bond granted by the father of the ſame date with the ſeiſin, obliging him to warrant the ſame, *Feb.* 11. 1669, *Buchan*; yea a ſeiſin *propriis manibus* by a ſuperior, containing reſignation, accepted by the ſuperior, and immediately ſeiſin given *propriis manibus* was ſuſtained, without any warrant ſubſcribed by the ſuperior, but by the vaſſal's diſpoſition, containing procuratory of reſignation, there being no more ſolemn infeftment in competition, *Jan.* 17. 1672, *Young*.

But as to ſeiſins *propriis manibus* by huſbands to their wives, in contemplation of marriage, either before marriage, where marriage followed, or after marriage, having no adminicle but the marriage; the Lords, according to the different caſes, have ſometimes ſuſtained them when they were ſuitable to the parties, and not exorbitant, and where the queſtion was only with the huſband's heir, (or with an appriſer, *Nov.* 22. 1628, *Clappertoun*) *June* 19, 1668, relict of *Wallace of Galrigs*,

[uu] See below II. 12. 20.

[w] See below, § 25. 3. *h. t.*

Galrigs, in which caſe it was inſtructed, that about that time, the wife had diſponed to her huſband her jointure by a former marriage: but ſuch ſeiſins are eaſily improven, if they be not aſſerted by the witneſſes inſert; as in the caſe, *Jan.* 9. 1669, *Wallace* of *Galrigs*, the heir inſiſting in an improbation, there being four witneſſes in the ſeiſin, two of them deponed they were not witneſſes thereto, the third remembered not, the fourth was poſitive for it, and the notary offered to depone, that it was true; yet having no adminicle, his oath was not taken, and the ſeiſin was improved; but if there had been an adminicle, the notary and one of the witneſſes being poſitive, the ſeiſin would not have been improved: for where there is a warrant, mediate or immediate, providing a ſeiſin be given, *Quod fieri debet facile præſumitur*; and therefore the witneſſes not remembering or denial, would hardly improve ſuch ſeiſins, unleſs their teſtimony were poſitive, giving ſpecial circumſtances of their denial, as being in ſuch another country, or far diſtant place at that time, if the truth of that were otherwiſe aſtructed. But the general denial to be witneſſes could import no more, but *non memini*: and therefore an adminicle in writ, with the protocol or oath of the notary, if he were alive, and eſpecially if poſſeſſion followed for ſome time; theſe would ſtronglier approve, than the not remembrance or general denial of the witneſſes inſert would improve. But this dipping upon a general queſtion, *de fide inſtrumentorum*, we ſhall ſay no more of it in this place, nor of the admiſſion and qualifications of notaries; as to which *Craig* [x] relates the cuſtoms of *France*, which were not then, nor have yet been here allowed; but certainly more exactneſs ought to be in the admiſſion of notaries, not only as to their ſkill, but as to their reputation of honeſty and fidelity, and the leaſt want or weakening of theſe ſhould turn them out; and therefore the Lords, by a late act of ſederunt [y], declare they will admit no notary of courſe as formerly; but upon teſtimonial of the perſon's education and reputation, and the trial and report of two of their number. For the introduction of the ſolemnity of the inſtruments of notaries, was, becauſe of old, few could write, and the impreſſion of ſeals were eaſily imitated: yea, ſo rude were ſubſcriptions, even in *Juſtinian*'s time, that ſome could ſo artificially imitate another's hand-writ, that himſelf could not know it, or durſt ſwear it was not his writ. And therefore he introduced two remedies, 1. That private writs ſhould not prove by the ſubſcription of the party, unleſs there were three ſubſcribing witneſſes, knowing the parties-contracters; or that there were three witneſſes who deponed anent the truth of the deed. 2. *Or* that otherwiſe, writs were made in publick by a publick perſon, which at firſt was only done judicially, but thereafter extrajudicially by a notary-publick, *L.* 11. *C. et auth. ſeq. qui potior. in pig.* But our cuſtom hath returned to private writ, and truſteth not the inſtruments of notaries, but where they are adminiculated by writ, except in the caſe where parties cannot write: and then in matters of importance, two notaries and four witneſſes are neceſſary by ſpecial ſtatute. But this is not extended to ſeiſins, but only to the ſubſcriptions of notaries for parties, *Feb.* 11. 1669, *Buchan*; *July* 15. 1680, Biſhop of *Aberdeen*. Yet in ſome caſes of ſmall importance, inſtruments of notaries are probative: and in all caſes where witneſſes would prove, it doth much fortify the ſame, that they were witneſſes required, and inſtrument of a notary taken thereupon; for then the inſtrument of the notary, aſtructed by the witneſſes inſert, make a ſtrong probation.

To return to ſeiſins *propriis manibus*, by huſbands to wives without warrant or adminicle in writ, they are not generally probative, except in ſuch caſes as have been now expreſſed, *Hope*, *ſeiſin*, *Bell and Moriſon contra Thomſon*, *L. of Coldingknows contra Dame Helen Herreis*.

XX. But for the further ſecuring of infeftments and land-rights, that excellent ſtatute which before was attempted, was at laſt perfected, *Parl.* 1617, *cap.* 16. [z] whereby all ſeiſins, reverſions, regreſſes, bonds or writs for making of reverſions, and regreſſes, aſſignations thereto, and diſcharges thereof, renunciations of

[x] *Craig* II. 7. 9. *et* 10. edit. 1732. [y] Act of ſederunt, *July* 30. 1691. [z] See below II. 10. 5.

of wadſets, and grants of redemption, not being regiſtrate in a peculiar regiſter, appointed for that end, *within ſixty days of their dates*, or in caſe of conſigning renunciations, and grants of redemption in proceſs, within ſixty days next after the decreet, ordaining the ſame to be given up to the parties having right thereto, or at leaſt within ſixty days after ſeiſin taken of the lands or rights, to which the reverſions relate, it is declared, that the ſaids ſeiſins and other writs, ſhall make no faith in judgment by action or exception, in prejudice of a third party, who had acquired a perfect and lawful right to the ſaids lands and heritage, without prejudice to make uſe of theſe rights againſt the granter and his heirs: but there are excepted reverſions contained in the body of the infeftment, and all ſeiſins, reverſions, *&c.* of tenements within burgh were excepted; but by the act of *Parl.* 1681, *cap.* 11. they muſt now be inſerted in the town-books, in the ſame way, *and under the ſame certifications*, as other ſeiſins in the Clerk-regiſter's regiſter of ſeiſins, and are ſo marked by the town-clerk, without deputation from the Clerk of regiſter, for half price of ſeiſins without burgh *.

XXI. And to make land-rights yet more ſecure, becauſe the former act did not require regiſtration of inſtruments of reſignation in the ſuperior's hands *ad remanentiam*, whereby purchaſers were not ſecure, but that the lands acquired by them might have been reſigned or renounced to the ſuperior, whereby their author's fee became extinct, without neceſſity of new infeftment, being conſolidate with the ſuperiority, whereby the ſuperior's infeftment carried both ſuperiority and property; therefore, inſtruments of reſignation *ad remanentiam* not being regiſtrate, are declared null, *act* 3. *Parl.* 1669, yet with exception of tenements holding burgage, and therefore a ſeiſin within burgh was ſuſtained, tho' not found in the town-books, *June* 30. 1668, Mr. *Robert Burnet*; *Feb.* 11. 1681, *Irwing*; which is yet good as to ſeiſins, reverſions, or reſignations *ad remanentiam*, before the 6th of *September* 1681, which is the date of the foreſaid act *of Parliament*, at leaſt before the act of ſederunt *Feb.* 22. 1681: for upon conſideration of this caſe, the Lords by act of ſederunt, ordained the burrows to take ſufficient caution of their town-clerks preſent and to come, to inſert in their books all ſeiſins given by them of the tenements within burgh, and all reverſions, or bonds for granting reverſions, aſſignations thereto, and diſcharges thereof, renunciations and grants of redemption, and that within ſixty days after the giving of ſeiſin, or preſenting to them of the reverſions or others foreſaids, and that under the pain of the damage of any party acquiring *bona fide* for onerous cauſes by ſuch latent rights tho' prior, declaring that they will hold all ſuch ſeiſins, reverſions, *&c.* to be given hereafter, and not inſert in the town-books in manner foreſaid, to be latent and fraudulent, keeped up of deſign to enſnare lawful purchaſers.

XXII. And for the further ſecurity of land-rights, becauſe appriſing, or adjudication, with a charge of horning thereupon againſt the ſuperior, maketh for ſome time, a real right; therefore an abbreviate of appriſings, contained in the allowance thereof, written on the back of the ſame, and ſigned by two of the Lords, was ordained to be regiſtrate in a particular regiſter for that purpoſe, within ſixty days after the date of the appriſing; with certification, that any other appriſing, tho' poſterior in date, yet firſt allowed and regiſtrate, ſhall be preferred, *Parl.* 1661, *cap.* 31. which is extended to adjudications, *Parl.* 1672, *cap.* 19. [a] But this relates only to the new form of adjudications then introduced in place of appriſings; but for the old adjudications, upon the renunciations of heirs, or *for* implement of diſpoſitions, neither ſtatute nor cuſtom have yet cleared, whether theſe will be effectual againſt ſingular ſucceſſors from their dates, or from the charge againſt the ſuperior, or only from the ſeiſins thereupon;

* The town-clerk is obliged by the act of Parliament here quoted, to regiſtrate ſeiſins *gratis*, and is only intitled to demand for ſecond extracts half the price of extracts from the regiſters of the ſhires.

[a] See below III. 2. 25.

on; which, as all other ſeiſins, muſt be regiſtrate. And if the Lords do ſuſtain theſe from the charge, it will make a defect in the ſecurity of land-rights, till it be ſupplied by act of Parliament, or act of ſederunt, ordaining the horning againſt the ſuperior, to be regiſtrate in the regiſter of hornings, with the executions of the charge, tho' without denunciation, otherwiſe not to operate againſt ſingular ſucceſſors purchaſing *bona fide*, for cauſes onerous *. And for further ſecurity of land-rights, becauſe they might be reduced upon inhibitions, or interdictions; therefore theſe, if not regiſtrate, are alſo null [b]. And in reſpect, by rebels continuing unrelaxed year and day after the denunciation, the ſuperior hath the fee, during the life of the vaſſal denounced, therefore horning, if not regiſtrate, is alſo null [c]: and the act of preſcription excludes all prior rights, preceeding forty years, unleſs they have obtained poſſeſſion, or done diligence therefor by interruptions, which muſt be repeated every *ſeven* years, or elſe they are null, and muſt alſo be executed by a meſſenger [d]; ſo, that where before, a citation made interruption, which continued for forty years, which might much inſecure purchaſers, they can now laſt but *ſeven* years, in which ſhort time the noiſe thereof may readily reach purchaſers; ſo that if a purchaſer get a progreſs of infeftments for forty years, he may by the regiſters know if there be any real right that can affect the fee within that time, and hath no more to enquire, but as to interruptions within *ſeven* years, which if the Lords appoint to paſs only upon bills, it may be found at the ſignet **: ſo that upon the whole matter, no nation hath ſo much ſecurity of irredemable land-rights as we have. It is true, redeemable rights are not ſo ſecure, becauſe they may be evacuated by order of redemption, which proceeds by inſtruments of premonition and conſignation, which require no regiſtration; and therefere purchaſers of appriſings or adjudications, during the legal reverſion, are in hazard of any order of redemption, or ſummons for compt and reckoning; and likewiſe thoſe who purchaſe wadſets or infeftments of property, or annualrent, for ſecurity of ſums, run the hazard of ſatisfaction and payment of theſe ſums by intromiſſion, or otherwiſe [e], wherein there is little inconveniency; for no man ſhould purchaſe a redeemable right, without conſent of the reverſer, but upon his hazard; or if there be any reverſion, reſervation, or real burden in his author's right *ſibi imputet*, it is his fault and negligence if he did not ſee to it, and ſecure himſelf againſt it when he bought it ***.

The queſtion may occur here, if the keeper of the regiſter of ſeiſins do, according to the cuſtom, mark the ſeiſin regiſtrate, and atteſt the ſame by his ſubſcription, and yet, by negligence or fraud, ſhall not inſert it in the regiſter, whether in that caſe a purchaſer *bona fide*, for cauſes onerous, tho' infeft thereafter, will be excluded by that prior infeftment, marked by the clerk, not recorded. Tho' nothing hath been obſerved in this caſe, yet if ſeiſins marked regiſtrate, tho' not found in the regiſter, were found ſufficient againſt ſingular ſucceſſors purchaſing thereafter, the deſign and tenor of this ſtatute would be eluded; for the ſtatute bears, "if they be not regiſtrate," which muſt import, their being inſert in the regiſter "they are null;" and therefore, tho' the keeper of the regiſter hath atteſted ſuch ſeiſins to be regiſtrate, yet truly they are not regiſtrate: and no purchaſer could be ſecure by inſpection of regiſters, if a falſe atteſt of a clerk could exclude him, who oft-times is inſolvent. Yet by the 19th act, *Parl* 1686, the contrary is ſtatuted, which is declared to extend to former caſes, yet there is a clauſe inſert in this act, that it ſhall no wiſe derogate from the

* By article 3. regulations 1696, abbreviates of adjudications *cognitionis cauſa*, are likewiſe appointed to be recorded within 60 days. But no mention is made of adjudications in implement.

** By act 19 P. 1696. ſummonſes for interrupting the preſcription of real rights, muſt paſs upon bill under the ſignet. The ſummons itſelf, and executions, and all inſtruments of interruption, muſt beſides be regiſtrate; upon interruptions *via facti* an inſtrument muſt be taken and regiſtrate, otherwiſe none of theſe interruptions will be effectual againſt purchaſers.

*** See below another caſe in which purchaſers are inſecure, II. 4. 2.

[b] *P.* 1581. *c.* 119. [c] *P.* 1579. *c.* 75. [d] *P.* 1669. *c.* 10. [e] See below II. 5. 15. II. 4. III. 1. 21.

act 1617, anent regiſtration of ſeiſins; which muſt either annul this act, as reported in Parliament contrary thereto, or elſe it is inconſiſtent with the old act; for a writ is not regiſtrate by the clerk's atteſtation, but by being inſert in the regiſter *. But becauſe the keepers of regiſters are not able to book within the ſixty days appointed by the act 1617, becauſe the writs to be regiſtrate are not preſented till about the end of theſe days, therefore the Lords by an act of ſederunt might declare, that the effect of that act cannot be attained, (ſo that parties may ſee their writs inſert at the time appointed) unleſs they be preſented with thirty days of their dates, that the keepers ſhall not receive them thereafter, and that they ſhall inſert them within theſe ſixty days, being ſo preſented, and ſkall keep minute-books of the writs, wherein the preſenter ſhall inſert the writ and date of preſenting, and ſign it preſented, whereby the keeper cannot change theſe minute-books **.

XXIII. Seiſins, as all other inſtruments, muſt have the atteſt and ſubſcription of the notary, giver thereof, bearing the names and deſignations of the witneſſes inſert, *whereof two will be ſufficient, becauſe the ſeiſin muſt have a warrant ſubſcribed by the author of the infeftment, and ſo needs not two notaries, and conſequently requires not four witneſſes, as other principal writs of importance ſubſcribed by notaries, July* 15. 1680, *Biſhop of Aberdeen.* And a ſeiſin was not found void, becauſe taken in the night, nothing of latency or fraud being qualified, but poſſeſſion conform, *Nov.* 19. 1679, *Arnot* and *Paton* her ſpouſe.

XXIV. If a ſeiſin be only extracted out of the regiſter of ſeiſins, it will not be ſufficient in improbations, (but it proves in all other caſes by the act foreſaid,) becauſe that regiſter is chiefly for publication, as alſo the regiſter of hornings and inhibitions, and not for conſervation; for the keeper of that regiſter doth not keep the principal ſeiſins, but gives them back marked: but if the principal ſeiſin marked as regiſtrate, be wanting, if the notary who gave it be alive, he may renew it out of his protocol, and the keeper of the regiſter of ſeiſins may atteſt it regiſtrate, upon the day mentioned in the regiſter; and therefore the Lords, upon ſupplication, ordained the keeper of a regiſter ſo to mark a ſeiſin, *Jan.* 2. 1678, Sir *Andrew Ramſay* ſupplicant.

XXV. But if the notary who gave the ſeiſin be dead, there remains yet this remedy, that a tranſumpt may be made upon production of the protocol and citation of the author, or his heirs, or any other party having intereſt; which tranſumpt is ſufficient in place of the principal ſeiſin, and may bear both the trauſumpt of the protocol, and of that part of the regiſter where the ſeiſin was regiſtrate. But the inſtrument of a clerk, containing the tenor of a ſeiſin, will not be ſufficient without citation of the parties.

Seiſins taken out of the town-books, not by the town-clerk who gave the ſeiſin, but by his ſucceſſor, will not ſerve for a principal ſeiſin, the town-book being but the protocol of the town-clerk; and therefore, either the town-book muſt be produced, that the ſeiſin may be tranſumed, or commiſſion granted for inſpection, or collation, which being returned, was found to ſuffice as a tranſumpt, *Feb.* 11. 1681, *Irving* [f].

If both the principal ſeiſin and the protocol be wanting, the tenor of the ſeiſin may be proved, upon citation of the ſame parties, as in a tranſumpt; if there be ſufficient adminicles in writ, and witneſſes who ſaw the ſeiſin, *wherein* the extract of the ſeiſin out of the regiſter is a good adminicle.

There is another conſtitution of the property of lands, or other heritable rights, by that excellent act of preſcription, *Parl.* 1617, *cap.* 12. whereby it is ſtatuted and declared, That whoſoever ſhall ſhew a charter of any land or other heritage, and

* By act 18. P. 1697, Purchaſers are again rendered ſecure, and the act 19. P. 1686 is reſcinded. As the law now ſtands, ſuch ſeiſins only as are actually regiſtred are effectual againſt purchaſers.

** The remedy here ſuggeſted to prevent colluſion in the keeper of the record, has received the ſanction of the legiſlature by act 14. P. 1693, appointing minute-books to be kept, in which the day of preſenting muſt be marked, and ſigned by the preſenter and by the keeper.

[f] See above, § 19. 2. *h. t.*

and can prove forty years uninterrupted poſſeſſion, or ſhall ſhew inſtruments of ſeiſin, one or more continued and ſtanding together for the ſpace of forty years, proceeding upon retours or precepts of *clare conſtat*; theſe rights are declared to be good, valid, and ſufficient rights, for bruiking of the heritable right of lands or others, whereby theſe evidents are not only ſufficient to defend, which was the only uſe of preſcription as an exception, but are ſufficient to purſue or compete with the moſt full and formal infeftments of lands, annualrents, or other hereditaments.

XXVI. Infeftments do ſometimes expreſs the meiths or marches of the lands and tenements, which thence is called a bounding infeftment, giving right to all within the bounds, if the giver of the charter had right, or if the vaſſal by that infeftment has had peaceable poſſeſſion till preſcription: otherwiſe bounding charters prejudge not, *Parl.* 1592, *cap.* 138. Yet preſcription will adject that which is within the bounding to another tenement, which will not be elided by poſſeſſing the major part of that tenement; but no preſcription can give right to what is without the bounding, as part and pertinent, *Nov.* 17. 1671, *Young*. But where there is no bounding, poſſeſſion clears the parts and pertinents of every tenement; and in competition, where any ground is claimed as part and pertinent of ſeveral tenements, witneſſes are allowed to either party, for proving the poſſeſſion and interruptions, unleſs it be alledged, that that ground is *ſeparatum tenementum*, having a diſtinct infeftment of itſelf, which will exclude the alledgeance of part and pertinent, if the ſeparate infeftments be not excluded by preſcription, as was found in the ſaid caſe, *Nov.* 17. 1671, *Young*. But tho' the one infeftment contain the ground in queſtion, *per expreſſum*, in the enumeration of the parts of a barony or tenement, and tho' the other infeftment contain no enumeration, or in the enumeration mention not the ground in queſtion, but the ſame is alledged to be part and pertinent comprehended under the common deſignation, or under ſome of the parts enumerated, if both flow from one common author, as original rights, the firſt is preferable, but both will be allowed witneſſes for proving poſſeſſion and interruption, *et in pari caſu aut dubio* the expreſs infeftment will be preferable.

XXVII. But the main queſtion is here concerning infeftments holden of ſubjects, not being paſt upon the granter's reſignation by the ſuperior, or the ſuperior's confirmation, or by his obedience upon decreets of appriſing or adjudication; which therefore are called baſe infeftments, and private infeftments, becauſe they proceed in a more private and ignoble way, being done by the granter and receiver thereof, without the interpoſition of the ſuperior, and were latent rights before the act for regiſtration, or being without clear poſſeſſion, they are ſtill accounted ſimulate rights.

The doubt is, whether ſuch be complete real rights, carrying the property of the ground by the charter and ſeiſin only, or not until poſſeſſion of the hereditament be obtained. The ground of this diſtinction betwixt infeftments, and of the doubt as to baſe infeftments, is from the act of Parliament 1540, *cap.* 105. whereby it is clear, *Firſt*, Before that act, infeftments holden of the diſponer, without reſignation or confirmation, were valid without poſſeſſion, and preferable to all poſterior infeftments, tho' proceeding upon reſignation, or by confirmation; for it is for remedy of this, that this ſtatute is enacted, not upon the account of the manner of holding, but of the privacy and latency; for if the manner of holding were the motive, the baſeſt infeftment might eaſily be made publick by an infeftment upon reſignation to a ſub-vaſſal of the vaſſal, who was laſt infeft; yet it were ſtrange to think a ſub-vaſſal of a baſe vaſſal ſhould be leſs baſely infeft, or more publick, than his baſe infeft ſuperior: and therefore an infeftment is baſe in oppoſition to a noble infeftment, holden of the King, of the kirk or burgage, which are but adminiſtrators for the King of theſe parts of the publick patrimony.

Secondly,

Secondly, By the letter of this ſtatute, poſterior infeftments upon reſignation, or by confirmation, are only preferred to prior private infeftments, when the obtainer of the poſterior infeftment bruiks the lands peaceably, by labouring, manuring, and uptaking of the mails, profits and duties, and ſo are known heritable poſſeſſors thereof, year and day; *and* when ſuch infeftments are for cauſes onerous, or do contain or import warrandice: neither is there any thing mentioned in the ſtatute, as to the competition of infeftments, upon appriſing or adjudication, with prior baſe infeftments, nor of the competition of one baſe infeftment with another: yet cuſtom ſince that ſtatute hath *cleared* and determined the competition of publick and baſe infeftments, and hath reſtricted this ſtatute in ſome points, and extended it in others.

Firſt, Cuſtom hath preferred all publick infeftments upon reſignation or confirmation, or upon appriſing or adjudication to baſe infeftments, tho' prior, if the baſe infeftment hath lain out of all kind of poſſeſſion; and likewiſe hath preferred poſterior baſe infeftments, firſt clad with poſſeſſion to prior baſe infeftments without poſſeſſion, eſpecially in conſideration, that ſuch baſe infeftments are fraudulent or ſimulate, *retenta poſſeſſione*; for the retaining of poſſeſſion is a pregnant ground of ſimulation, not only of infeftments, but in any other rights [g]; as when moveables are diſponed and delivered, but preſently taken back, and the natural poſſeſſion continued in the diſponer; tho' inſtruments be taken upon the delivery, yet other diſpoſitions or legal diligences, attaining and retaining poſſeſſion are preferable, becauſe the other diſpoſitions are preſumed fraudulent and ſimulate; and gifts of ſingle eſcheat or liferent eſcheat, are preſumed to be ſimulate, if the rebel or his conjunct and confident perſons, be long ſuffered to retain the poſſeſſion. And therefore, baſe infeftments, *retenta poſſeſſione*, are alſo preſumed fraudulent and ſimulate, and that not only *præſumptione juris*, by this and other ſtatutes; but *præſumptione juris et de jure*, admitting no contrary probation: for certainly baſe infeftments may be, and oft-times have been without ſimulation, and for onerous cauſes: and yet theſe have never been ſuſtained or admitted to probation of the onerous cauſe which would exclude ſimulation, to validate ſuch baſe infeftments: and albeit long retention of poſſeſſion may raiſe *præſumptionem hominis*, that publick infeftments are ſimulate or without a cauſe onerous, yet that preſumption hath not been owned by law: and ſo is not *præſumptio juris*, but *hominis*, which with other evidences of ſimulation may reduce the right.

Secondly, Cuſtom hath preferred poſterior baſe infeftments, attaining poſſeſſion or uſing diligence to attain it, to prior baſe infeftments, not attaining poſſeſſion, nor uſing diligence to attain it: and albeit the ſuperveening ſtatute for regiſtration of ſeiſins be deſigned for publication thereof, that purchaſers thereafter may not be enſnared or diſappointed, whereby it might ſeem that the difference betwixt private or baſe infeftments, and public infeftments, might have been laid aſide, ſince the ſaid act for regiſtration of ſeiſins, whereby the uncertainty of real rights, by proving baſe infeftments clad with poſſeſſion, by witneſſes (wherein our law is ſo juſtly jealous and cautious, that they are not admitted in caſes where writ uſes to be adhibited) might be avoided: yet the preference of public infeftments, to prior baſe infeftments, not clad with poſſeſſion, being fixed by cuſtom from the *above* ſtatute, before the act for regiſtration of ſeiſins, by the ſpace of threeſcore ſeventeen years, hath been ſtill continued, to the great confuſion and detriment of real rights; for if a baſe infeftment hath a ſubaltern infeftment, with aſſent of the perſon *firſt* baſely infeft, that ſubaltern infeftment is a public infeftment by a ſuperior, whoſe right is but baſe *. Such infeftments as are without conſent of the ſuperior or order of law, have ſtill retained the name and nature of baſe infeftments; and albeit this allegeance uſeth ſometimes to be

* The law in this reſpect is now intirely altered. By act 13. P. 1693, the diſtinction between baſe and public infeftments, in competition of real rights, is taken away, and all infeftments are declared preferable according to the priority of the regiſtration of the ſeiſins alone. See below, Appendix, N° II.

[g] See above I. 9. 12. below III. 3. 21.

be proponed againſt baſe infeftments, that they are null, not being clad with poſſeſſion, yet it is no ſimple nullity, but only a preference of a more ſolemn right, for purſuits for mails and duties, removings, yea, and reductions are ſuſtained thereupon, and will not be excluded upon pretence of want of poſſeſſion, as thereby being null, tho' they had lain long out of poſſeſſion. So a baſe infeftment without poſſeſſion, was found a ſufficient title in a reduction to inforce production of all other infeftments, baſe or public, albeit the ſuperior did not concur, *Spotiſ. kirkmen, Douglas contra the E. of Home* *: and ſuch infeftments do always exclude poſterior arreſtments: they do alſo exclude the terce of the granter's relict, *Jan.* 27. 1669, *Bell* of *Belford* [h]. But baſe infeftments do not exclude the liferent eſcheat of their author, unleſs they attain poſſeſſion *in curſu rebellionis*, *March* 19. 1633, L. of *Renton*; *Feb.* 21. 1667, *Milne*.

Where there is no further ground of ſimulation than the want of poſſeſſion, very little poſſeſſion or diligence for poſſeſſion, will prefer baſe infeftments to poſterior public infeftments, or to poſterior baſe infeftments, clad with poſſeſſion; as the lifting of one term's rent did prefer a baſe infeftment to a poſterior public infeftment, clad with many years poſſeſſion, *Hope, alienation, Hamilton contra M'Adam*. And the payment of a ſmall part of annualrent, far within a term's annual, was ſuſtained to prefer a baſe infeftment of annualrent, which was alſo preferred, becauſe there was a decreet of poinding of the ground, tho' not put to execution, *February* 26. and 27. 1662, *creditors of Kinglaſſie competing*. And a citation for attaining poſſeſſion was found ſufficient, *Feb.* 13. 1624, *parties blank*; *July* 2. 1625, L. *Raploch*; *June* 26. 1662, *Wilſon*; *Jan.* 24. 1679, *Hamilton*. Yea, a baſe infeftment of annualrent was preferred to a poſterior baſe infeftment of property, which interveened before the firſt term, at which the annualrent was payable, and clad with poſſeſſion before that term, ſo that the annualrenter did not lie out of poſſeſſion, but could attain none, *July* 26. 1676, Capt. *Elliſon*. Yet a citation on a ſummons for poinding the ground, being only executed againſt the debtor, and not againſt the natural poſſeſſor, was found not to clothe the annualrent with poſſeſſion, Mr. *Fenton contra Lockhart of Carnwath*, *Nov.* 11. 1690 **. But if the *debtor* was in *the* natural poſſeſſion, citation of him were ſufficient; as was found between *Rollo* and the creditors of *Langtoun* competing [hh].

But an infeftment of property being baſe, will more eaſily be annulled as ſimulate, than an annualrent, becauſe the infeftment of property gets warrant for preſent poſſeſſion, which the annualrent doth not: and therefore a public infeftment interveening before the firſt term of the annualrent, would not be preferred thereto, but would be preferred to an infeftment baſe of the property, *Nov.* 6. 1691, creditors of *Langtoun* competing ***. An infeftment of annualrent, being out of diſcontiguous lands in ſeveral ſhires, was preferred as to both tenements, by getting payment of annualrents from the heritor or tenants, of either tenement, *Nov.* 6. 1678, *Milne* [i]. And poſſeſſion by an infeftment for corroboration of an annualrent, did prefer the principal infeftment of annualrent, having no other poſſeſſion, *July* 9. 1668, *Alexander*. And an infeftment of principal lands, and warrandice lands, being clad with poſſeſſion of the principal lands, theſe being evicted, was found to make the infeftment of the warrandice lands effectual from its date, and preferred to a poſterior public infeftment of the warrandice lands, tho' clad with long poſſeſſion, *Jan.* 9. 1666, *Brown*; *Feb.* 20. 1628, *Forbes*. Yea, baſe infeftments to wives upon their contracts of marriage, are preferred to all poſterior infeftments, and the huſband's poſſeſſion is accounted the wife's poſſeſſion, tho' he be common author to both, *Nov.* 23. 1664, *Niſbet*. And tho' the huſband did not poſſeſs himſelf, but wadſetters deriving right from him, *July* 18. 1667, *Lady Burgie*. And where the huſband's mother did poſſeſs by a liferent flowing from the huſ-

* This deciſion not found.
** This deciſion not found.
*** This deciſion not found. See *Harcus*, N° 619.
[h] See below II. 6. 12. *med.* [hh] *Harcus*, N° 627. *Feb.* 1692. [i] See above II. 1. 13.

band's father, to whom he was heir, it was found ſufficient to clothe his wife's infeftment with poſſeſſion, *Feb.* 21. 1672, *Reid.* But infeftments baſe to wives, not being upon their contracts of marriage, or in place thereof, are not holden as clad with poſſeſſion by the huſband's poſſeſſion. And a baſe infeftment of a wadſet, with a back-tack to the granter, is not held clad with poſſeſſion by the granter's poſſeſſion as tackſman, till ſome further poſſeſſion be attained, *Jan.* 11. 1678, *Laurie.*

Where there is any ground of ſuſpicion or ſimulation, there muſt be a clear poſſeſſion; as a baſe infeftment by a father to his children, was not ſuſtained by the father's poſſeſſion, whoſe liferent was reſerved therein, *June* 26. 1634, *Dury.* And an infeftment by a father to his ſon, was not found clad with poſſeſſion by the father's poſſeſſion, tho' he had a factory from his ſon; but it was not alledged that the father had granted diſcharges, expreſsly relating to the factory, *July* 10. 1669, *Gardner.* Yet in the competition of two baſe infeftments, the former being granted to a ſtranger for relief of cautionry, and the latter granted to a ſon and apparent heir for relief of his cautionry, exceeding the value of the lands, the ſon's baſe infeftment, tho' poſterior, having firſt attained poſſeſſion, and being without all ſuſpicion of ſimulation, was preferred. And it was not found, that infeftments for relief, were in the ſame caſe with warrandice lands, where the poſſeſſion of the principal lands is *fictione juris* a poſſeſſion of the warrandice lands; theſe infeftments being leſs ſubject to fraud or uncertainty, than infeftments for relief, which relate to perſonal debts, (and oft-times generally to all debts or cautionries, contracted or to be contracted,) which debts may be retired and keeped up, and made uſe of by the infeftment for relief, *June* 26. 1677, *Inglis.* The like was found after a full debate *in præſentia*, in the competition of the creditors of *Cockburn*, as to an infeftment of relief by *Cockburn* to the Lord *Sinclair*, *July* 1. 1691 [ii]. It was alſo found, that an infeftment for relief, tho' public, did not give right to the creditor for relief of whoſe debts it was granted, but only to the cautioner, who might renounce it at his pleaſure, in the competition of the creditors of *Langtoun* concerning young *Langtoun*'s infeftment of relief, *July* 8. 1691 [k].

XXVIII. Infeftments by confirmation, do not only require a charter from the diſponer, bearing the lands to be holden of the ſuperior, and ſeiſin thereupon, but require alſo the ſuperior's confirmation, till which it is no real right, but null; but whenſoever the confirmation is added, the right becomes valid from the date of the infeftment confirmed, both as to the right of property, and as to the ſuperior's caſualities; and therefore an infeftment *à ſe*, not confirmed, was found null by exception, tho' clad with ſome years poſſeſſion, *December* 4. 1623, *Paton*; and found null, tho' the confirmation was paſt the Privy Seal, *Hope, confirmation, Hunter contra Dalglieſh.* And alſo found null in an annualrent, holden from the diſponer, not confirmed, *Hope, confirmation, Lord Balmerino contra Lord Coatfield.* But if there were any mid impediment betwixt the charter confirmed, and the confirmation, it excludeth the confirmation and whole right, as an appriſing and infeftment thereupon; but confirmation of a right, not bearing to be holden of the ſuperior, but of a vaſſal, makes it not a public infeftment, nor takes it away the ſuperior's ordinary caſualities, as ward, *&c.* [kk], but only recognition and forfeiture, *Hope, confirmation, Lady Cathcart contra vaſſals of Cathcart, Nov.* 17. 1627, *L. of Clackmannan contra Burn.* Hence it is, that becauſe confirmation conſtitutes rights holden of the ſuperior, the firſt confirmation makes the firſt right, tho' it confirm a poſterior infeftment from the vaſſal, as is clearly determined in the caſe of double confirmations holden of the King, *Parl.* 1578, *cap.* 66. which is not introduced but declared by that act, and holdeth alike in other confirmations.

It doth oft-times fall to be doubtful, whether a confirmation makes an infeftment public or not, when ſeiſin is taken upon a precept of ſeiſin in a diſpoſition, which diſpoſition contains obligements for infeftment, *de ſe et a ſe*, by confirmation;

[ii] *Harcus*, N° 516. [k] *Harcus*, N° 517. [kk] See below II. 4. 23. *et* 36. *pr.*

confirmation; but the precept of ſeiſin relates not ſpecially to either obligement, and ſeiſin is taken thereupon, and is afterwards confirmed: the queſtion comes, whether this be only a confirmation of a baſe infeftment, to exclude forfeiture or recognition, or if it doth make the infeftment publick, it *is generally* conſtructed as a publick infeftment, as was found, *July* 15. 1680, Biſhop of *Aberdeen*. In this caſe, the confirmation was after the death of the obtainer thereof, and ſo could not relate to the precept, as *de ſe* to be holden of the diſponer *. Such an infeftment was found baſe without confirmation, and publick after; ſo that it could not then be made uſe of as from the granter; but only as from the ſuperior, *July* —— 1687, *Deans*.

XXIX. Infeftments upon appriſing or adjudication, when formally perfected, do require charters to be granted by the ſuperiors of the appriſed lands, or other real rights, the tenor whereof is already ſet down in this title, and precepts and ſeiſins thereupon, which have little peculiar differing from other infeftments, as to their tenors and effects, but that their *reddendo* is ordinarily general, when the appriſer or adjudger cannot prove or inſtruct the tenor of his author's right; and therefore do bear ſuch duties and ſervices, as were contained in the author's right, which the ſuperior may be charged to renew and make ſpecial, ſo ſoon as the author's rights are produced; and if they be not ſo renewed, they are underſtood as ward-holdings: but for renovation thereof, the appriſer or adjudger will get letters of horning ſummarily upon the allowance of the appriſing or adjudication, which will not be excluded, altho' the ſuperior have already granted infeftments in general terms, as aforeſaid, but he muſt renew the ſame according to the ſpecial tenor of the author's right produced, and that without any new compoſition; yea, the appriſer's heirs upon ſupplication, will obtain letters of horning ſummarily for renewing the ſame, and ſo will his ſingular ſucceſſors, *but they muſt pay a year's rent for their entry*, whether their title be appriſing or adjudication againſt the former appriſer or adjudger; in which caſe he may make uſe of letters of horning, upon the allowance of his own appriſing; and tho' his title be a voluntary diſpoſition, he will get letters of horning, as ſucceeding in the place of the former appriſer or adjudger, to renew and make ſpecial the former infeftment to his author, upon payment of a year's duty [l]. But appriſings and adjudications being legal diſpoſitions, and conveyances of the author's infeftment, we ſhall ſay no further of them in this place, but leave them to the next book [m], where they are conſidered amongſt legal diſpoſitions. We ſhall only add here, that before the year 1624, appriſings were left at the Great ſeal, by warrant from the Lords, whence precepts were iſſued thereupon, againſt the ſuperiors to infeft; which if they obeyed not, charters were granted by the King to ſupply their vice: but ſince, they are retained by the appriſer, and he may have letters of horning ſummarily charging the ſuperiors to grant charters and precepts of ſeiſin, as is aforeſaid **.

XXX. This alſo is ſingular in appriſings and adjudications, that a real right of fee is conſtitute thereby, by a charge of horning againſt the ſuperior, without charter or ſeiſin [mm]: for ſuch appriſings or adjudications are declared effectual by the act of Parliament 1661, *cap.* 62. ordering the payment of debts betwixt creditor and debtor: for after that charge, no infeftment upon voluntary diſpoſition, or upon any other appriſing or adjudication, can be granted by the ſuperior, preferring any other vaſſal to the appriſer, or adjudger, whom he hath unwarrantably refuſed to enter, if the appriſer or adjudger inſiſt in his appriſing or adjudication for poſſeſſion; but he may forbear to make uſe of the appriſing or adjudication,

* This appears unintelligible. It is not found either in the MS or firſt edition. The confirmation was obtained by the heir of the perſon infeft on the diſpoſition *a ſe* and *de ſe*.

** By act 20. *Geo.* II. *cap.* 50. it is declared, That heirs, purchaſers or diſponees, ſhall, upon producing to the Lord Ordinary on the bills, their ſpecial retours or conveyances containing procuratory, be intitled to a warrant for letters of horning againſt the ſuperior for new infeftment, in the ſame manner as adjudgers.

[l] See below II. 4. 32. [m] Below III. 2. 13. *et ſeq.* [mm] See below III. 2. 24.

cation, and if he lie long out without further diligence, he will be preſumed to have relinquiſhed his appriſing or adjudication, and poſterior rights and diligences will be preferred: but if he enter into poſſeſſion, no poſterior infeftment or diligence will exclude him, altho' he inſiſt no further but the charge of horning: and it hath not occurred to be determined, how long that right will ſubſiſt without infeftment; but it hath been found, that the ſuperior will not be excluded from the caſualities of ſuperiority by his former vaſſal, if he hath not been in the fault, in refuſing to enter when the appriſer or adjudger offered him a charter with a year's rent of the land or annualrent of the ſum adjudged or appriſed; this was in the caſe of ward, *Feb.* 9. 1669, *Black* [n]. Neither was a ſuperior found to have intereſt to exclude an appriſer from poſſeſſion, till he paid a year's rent, but that he might poſſeſs during the legal, if he inſiſted not for infeftment [o], which inſinuates, that after expiring of the legal, the ſuperior might hinder the appriſer, or adjudger to continue in poſſeſſion till he take infeftment, and pay a year's rent; but during the legal, the appriſing or adjudication is but as a legal aſſignation to the mails and duties, ſo that the appriſer cannot be forced to take infeftment till the legal expire, and the land become irredeemably his own, and then he is to pay a year's rent; in this caſe there was no charge upon the appriſing, *Dec.* 3. 1672, *Hay*. Albeit in the caſe of *Johnſtoun*, *July* 22. 1665, the appriſer having charged the ſuperior, tho' he did not then obey, yet appearing in the proceſs of mails and duties, he offered now to receive the appriſer; and therefore the appriſer was excluded till he paid the year's rent, which being under conſideration of the Lords, in the ſaid caſe of *Hay*, they reſolved to give the appriſer his option within the legal to take infeftment or not, ſo that the charge doth only hinder others to preveen, but doth not exclude the ſuperior from any caſuality of the ſuperiority, falling by his former vaſſal, unleſs he had been *in culpa*, refuſing the appriſer's entry, inſiſting orderly to be entered: which is a great advantage, both to debtors and creditors, not to have the acceſſion of a year's rent, till the antient rights may be diſcovered, and that it may appear whether the appriſing becometh an abſolute right.

XXXI. The main diviſion of infeftments in relation to the holding, is in ward, blench, feu, burgage and mortification. An infeftment-ward hath its denomination from ward, which is the chief caſuality befalling to the ſuperior thereby: it is the moſt proper feudal right we have; and therefore, wherever the holding appeareth not, or is unclear, there ward-holding is underſtood; it is ordinarily expreſſed by "rendering ſervice, uſed and wont:" and if the *reddendo* be not expreſs in name of blench, or feu-farm, tho' it bear payment of ſome duty, yet ward is inferred, as by a charter, bearing, *ſex denarios nomine canæ*, with a taxed marriage: ſo alſo it was inferred by a *reddendo*, bearing a particular duty, payable at Whitſunday and Martinmas, *cum ſervitiis in curiis noſtris et alibi debitis, et conſuetis*, *Hope*, *de feudi renovatione*, *Williamſon contra Thomſon* [p]. Of old the main importance of a ward-holding, was indefinite ſervice to be performed by the vaſſal to his ſuperior, and eſpecially in war; but that being now little in uſe, the main effect of it is, the ward and marriage of the vaſſal, of which hereafter.

XXXII. Ward lands according to the nature of proper feudal rights, might not be alienated by the vaſſal's granting any ſubaltern infeftment thereof: otherwiſe, not only the ſubaltern infeftments were void, but the vaſſal granter thereof his own infeftment became void by recognition, *as a deed of ingratitude*; yet by act of Parliament 1457, *cap.* 71. all feus to be granted by the King, Prelates, Barons, or freeholders, are allowed and declared not to fall in ward, as being but heritable aſſedations, as the act bears, paying to the ſuperior during the ward, the feu-duty; providing the lands be ſet to a competent avail, without prejudice to the King, which is *interpreted to be* the retoured duty, *Parl.* 1584, *cap.* 6. The ſame

[n] See below II. 4. 36. 3. II. 4. 32. [o] See below IV. 35. 25. [p] See below III. 5. 37.

ſame is repeated, *Parl.* 1503, *cap.* 91. and extended not only to ſubaltern infeftments feu, but alſo of annualrents, ſo that it be without diminution of the rental, which in lands holden of the King by ſecular men, is the retoured mail, and in the King's property, and in kirk-lands is the full rental, they ſhould happen to be at the time of the ſubaltern infeftments, which therefore the feus may not diminiſh, and the annualrent may not be ſo great as to exhauſt the land, that the rental remain not free: this laſt act was temporal for that King's life, and therefore the extention as to annualrents ceaſeth. Tho' the firſt act expreſſeth, that the King will ratify all feus granted by the King's immediate vaſſals, yet the act bears, "that the King" thereby "will give good example to the reſt," *viz.* to other ſuperiors; and therefore, a feu of ward-lands granted by a vaſſal, holding ward of a ſubject, before the act of Parliament 1606, was found valid, tho' without the ſuperior's conſent, *June* 24. 1668, *Stuart* of *Torrence*.

This privilege was taken away as to all ſuperiors and their vaſſals, except the vaſſals of the King, who only might grant ſubaltern infeftments of their ward-lands, *Parl.* 1606. *cap.* 12. whereby all ſuch ſubaltern infeftments of their ward-lands are declared null by exception or reply, unleſs the ſuperior's conſent were obtained; and therefore, the ſuperior's conſenting in the diſpoſition by a vaſſal to a ſub-vaſſal, was found to exclude the vaſſal's ward ſo far as concerned the ſub-vaſſal, tho' it was a redeemable feu, *July* 1. 1672, Earl of *Eglingtoun*. The ſame was extended to the vaſſals of the King and Prince, who were thereby alſo excluded from ſetting of feus of ward-lands to ſub-vaſſals, *Parl.* 1633, *cap.* 16. but the vaſſals of the King and Prince were reſtored to their former privilege, and the ſaid act 1633 wholly repealed, *Parl.* 1641, *cap.* 58. which is now reſcinded, *Parl.* 1661, *cap.* 15. Yet the lands ſet in feu, during the time of theſe ſeveral acts now repealed, are valid. So *now* ward-lands holden of the King or Prince, may not be ſet in feu, nor of any other ſuperiors, (except Biſhops and their chapters, for theſe might ſet feus for a feu-duty equivalent to the retour, *Parl.* 1621. *cap.* 9. but this act was only temporary for three years) and therefore ſubaltern infeftments granted by vaſſals, if of the moſt part of the ward-lands, infers recognition thereof in the ſuperior's hands [q]: but if within the half, they are not null as to the vaſſal, but are null as to the ſuperior, and exclude him from no caſualities of his ſuperiority, as ward, *&c.* But as the half may be ſub-ſet, ſo any other right leſs than the value of the half, is ſuſtained; as an infeftment of warrandice, *Had. March* 6. 1611, *Cathcart contra Campbell*. The like holds of infeftments of liferent, but if the diſpoſition or infeftment be granted to the vaſſal's apparent heir *in linea recta*, it infers not recognition, becauſe the ſuperior is not prejudged by change of his vaſſal; but recognition was found incurred by a diſpoſition and infeftment to the vaſſal's brother, tho' his apparent heir for the time, ſeeing there remained hope of iſſue in the diſponer, and ſo his brother was not *alioqui ſucceſſurus*, *Spotiſ. recognition*, *King's Advocate and his ſon contra the Earl of Caſſils and Lord Collane* [r].

Feus of ward-lands granted by the King's ward-vaſſals, after the act of Parliament 1457, and before the act of Parliament 1633, were found not only to be free from the ward, liferent-eſcheat, or recognition of the King's vaſſals; but alſo that the ſub-vaſſal's feu did not fall by his ſuperior the King's vaſſal's forfeiture, becauſe the act of Parliament expreſſeth a confirmation of ſuch feus, which therefore needs not be paſt in exchequer, without which there is no doubt but ward and non-entry are excluded: and by a confirmation in exchequer, forfeiture would be excluded without queſtion, even after the act of Parliament 1633, and therefore the ratification and approbation of feus by the act 1457, when it was in vigour, muſt alſo ſecure againſt forfeiture of the granter of the feu, as was found, *Feb.* 12. 1674, and *Jan.* 23. 1680, Marquiſs of *Huntly contra Gordon* of *Cairnborrow*, whoſe feu being granted after the act of Parliament

[q] See below II. 11. 14. *et* 15.

[r] See below II. 11. 17. *et* 18.

ment 1456, and before the act 1606, was ſuſtained againſt a donatar of his ſuperior's forfeiture. The like tho' the feu was renewed upon reſignation, *in favorem, after the act* 1633, not being *ad remanentiam*, *Nov.* 16. 1680, *Campbell* of *Silver-craigs*.

XXXIII. Infeftments blench are ſuch, whoſe *reddendo* is a ſmall eluſory rent, as being rather an acknowledgment of, than profit to the ſuperior; and therefore ordinarily it beareth, *ſi petatur tantum*, as a roſe, a penny money, or the like, and theſe are not counted blench rights, unleſs they bear, "in name of blench "farm"; or if they bear not, *ſi petatur*; or if it be a yearly growth or ſervice, it is not due, and may not be demanded at any time, unleſs it be demanded within the year, *or before or* at the term, as a ſtone of wax, or a pound of pepper, *Feb.* 16. 1627, Lord *Semple*. Where the like is obſerved to have been *found* before *in a caſe* where the *reddendo* bore, *ſi petatur tantum*, *Had. June* 18. 1611, *Biſhop of St. Andrews contra L. Tarſons*. So blench duties of lands holden of the King or Prince, are declared only due, if they be aſked yearly, *Parl.* 1606, *cap.* 14. Yet ſeeing by act 14. of Parliament 1600, the King is not to be prejudged by neglect of his officers; who ought yearly to call for his blench duties, whereof many are conſiderable; therefore the exchequer continues to exact the King's blench duties, tho' not demanded within the year. There is another part of the act excluding all liquidations of blench duties in ſpecie; which therefore ſhould be ſo exacted, tho' not within the year, unleſs the vaſſals voluntarily offer a price. In theſe blench farms there is no ward and marriage befalling to the ſuperior, in which it differs mainly from ward.

XXXIV. Infeftments feu are like to the *emphyteoſis* in the civil law, which was a kind of location, having in it a penſion, as the hire, with a condition of planting and policy, for ſuch were commonly granted of barren grounds; and therefore, it retains ſtill that name alſo, and is accounted and called an aſſedation or location in our law: but becauſe ſuch cannot be hereditary and perpetual, all rentals and tacks neceſſarily requiring an iſh; therefore theſe feu-holdings partake both of infeftments, as paſſing by ſeiſin to heirs for ever, and of locations as having a penſion or rent for their *reddendo*, and are allowed to be perpetual, for the increaſe of planting and policy. But about the nature of *emphyteoſis*, ſee § 3. *Inſt. de loc. cond. tit. ff. ſi ager vectig. et tit. C. de jur. emphyt.*

XXXV. In what caſes feus are allowed of ward-lands, hath been now ſhown, in other caſes they are ordinarily allowed, where they are not prohibited; ſo we ſhall only need to ſpeak of caſes, wherein they are prohibited and void; and that is, *firſt*, in the patrimony of the crown, which is annexed thereto, and cannot be ſet feu by the King, after the act of Parliament 1633, without conſent of Parliament, *either* by their act of diſſolution, *or particular conſent or ratification*, bearing, "great, ſeen and reaſonable cauſes of the realm, by ſentence and decreet "of the whole Parliament, *Parl.* 1455, *cap.* 41. *P.* 1503, *cap.* 90. *P.* 1597, *cap.* "247." But ratifications, which paſs of courſe in Parliament, without report from the articles, will not ſupply the diſſolution of the annexed property, or validate infeftments thereof, even tho' the ratification bear a diſſolution: upon which ground, the Earl of *Mortoun*'s right to the Earldom of *Orkney* was reduced, *Feb.* 25. 1669, *King's Advocate*. Neither can the annexed property be diſponed by the King, but only in feu, even before the act 1633, except by excambion without diminution of the rental, *Parl.* 1597, *cap.* 234. And all infeftments, tacks, penſions, gifts, and diſcharges granted before lawful diſſolution in Parliament, or after diſſolution, yet contrary to any of the conditions of the ſame, are declared null of the law, by action or exception, as well as to bygones, as in time coming, *Parl.* 1597, *cap.* 240. which is confirmed and extended to feus, not only to be granted of lands, but to feus granted of the feu-farm-duties, which was a device invented to elude the law, *Parl.* 1597, *cap.* 243.

XXXVI. *Secondly*, Feus of the annexed property, after diſſolution, may not be ſet with diminution of the rental, the feu-duty not being within the new retoured duty, *P.* 1584, *cap.* 6. And that it may appear whether the rental be diminiſhed

miniſhed or not, before they paſs the ſeals, they muſt be preſented to the treaſurer and comptroller *, and regiſtrate in his regiſter, and the ſignature ſubſcribed by him, otherwiſe they are null, *Parl.* 1592, *cap.* 129, And ſuch feus ſet without conſent of the comptroller, by his ſubſcription, regiſtrate in his regiſter, are again declared null, *Parl.* 1593, *cap.* 175. But the comptroller's office hath been of a long time adjoined to, and in the ſame commiſſion with the treaſurer's office, or commiſſion of the treaſury; and now no infeftment paſſeth the ſeals, till the ſignature of it paſs the exchequer, wherein the treaſurer being alſo comptroller, or the commiſſioners of the treaſury ſign the ſignatures.

What lands and others are annexed to the crown, appeareth by the ſeveral acts of Parliament made thereanent, conſiſting mainly of forfeited eſtates and kirk-lands, after the aboliſhing of the Popiſh religion; which becauſe they were preſumed to have been moſt part mortified by the Kings of *Scotland*, therefore the intent of the granting ceaſing by the aboliſhing of Popery, they returned to the Crown, as the narrative of the act of annexation of the temporality of benefices, *Parl.* 1587, *cap.* 29. bears; and therefore benefices of laick patronages, as having proceeded from theſe patrons, are excepted by the ſaid act: and tho' after the reſtitution of Biſhops and their chapters, the act of annexation, in ſo far as concerned their lands, was reſcinded, *Parl.* 1606, *cap.* 2. yet Biſhops being aboliſhed, *Parl.* 1640. *cap.* 6. their lands were again annexed to the Crown, *Parl.* 1649, *cap.* 38. whereby all erection of kirk-lands in temporal baronies or lordſhips, by which the King *may* interpoſe any perſon betwixt himſelf and thoſe who were formerly vaſſals of kirkmen, are prohibited and declared null; which act is reſcinded in the general act reſciſſory, 1661, *cap.* 15. and now revived, *act* 29. *Parl.* 1. *Seſſ.* 2. K. *Will.* and Q. *Mary*.

XXXVII. Feus of kirk-lands by Prelates, or other beneficed perſons, being granted by conſent of their chapters, with all requiſite ſolemnities, were eſteemed legal ſecurities, without any particular confirmation by the King or Pope, there being no ſtatute nor conſtitution obliging the ſubjects thereto, *Parl.* 1593, *cap.* 190. as appears by the narrative of the ſaid act. Yet it was the cuſtom, that *either* the King's or Pope's authority was interpoſed to all feus of kirk-lands; therefore all feus not confirmed by the King or Pope, before the 8th of *March* 1558, or being (*granted*) thereafter, not confirmed by the King, are declared null by exception, *Parl. Aug.* 1584, *cap.* 7.[s] the reaſon hereof was, becauſe in *March* 1558, the reformation of religion began to be publickly profeſſed in *Scotland*, and the beneficed perſons became hopeleſs to preſerve their rights of their kirk-lands, and therefore endeavoured to dilapidate the ſame: but this was found not to extend to an infeftment of an office, as the office of forreſtry, tho' it had lands annexed thereto, and a threave of corn out of every huſband-land of the abbacy, ſeeing the ſtatute mentioned only feus of lands, and this was but like a thirlage, *Jan.* 20. 1666, Lord *Rentoun*. It is alſo declared in the *ſaid* 7th act, *Parl.* 1584, that the old poſſeſſors were to have their confirmation, for payment of the quadruple of their ſilver rent, or the double of their farm; providing they ſought the ſame within a year after the publication of that act, otherwiſe they were to pay the eight fold of the ſilver rent, and the triple of the farm, and the King was thereby obliged to grant confirmation to the old poſſeſſors upon theſe terms; [and being ſo confirmed, the ſame could not be queſtioned upon alledged diminution of the rental, or converſion in money, or any other cauſe of nullity, invalidity or leſion, or by any law, canon, or ſtatute, except improbation only] **. And it was declared, that confirmations by the King, of poſterior feus ſhould not prejudge the anterior feus granted by Prelates, and their convents, with their common ſeals and ſubſcriptions, at any time, being granted with conſent of the King's predeceſſors, under their privy ſeal, tho' without farther confirmation

* This act only mentions the comptroller.
** This laſt ſentence is not found in the act here quoted, *P.* 1584. *c.* 7.
[s] See *Craig* II. 4. 19.

firmation by the Kings or Popes, *Parl.* 1593, *cap.* 190. (The reaſon hereof was, becauſe in the time of the Reformation, moſt of the evidents of kirk-lands were deſtroyed; and therefore the ancient poſſeſſors were preſumed by their very poſſeſſion to have right: and for clearing who were the ancient poſſeſſors, and what were kirk-lands, it is declared by act of ſederunt, 16th of *December* 1612 *, that ten years poſſeſſion before the Reformation, or thirty years poſſeſſion thereafter, without interruption, ſhould be ſufficient to ſtand for a right of kirk-lands, the ſame being poſſeſſed as ſuch; and *the* feu-duty being paid to kirk-men before the Reformation, or to the King, or others having right from them after the Reformation; therefore it was ſo decided, 5th of *July* 1626, Laird of *Kerſe*, tho' much ſtronger probation, of being part of a temporal barony for longer time, was alledged in the contrary, *Hope, poſſeſſion, Earl of Home contra Earl of Buccleugh.*) This act is correctory of the former act 1584; for tho' confirmations were not obtained, as is there preſcribed, under a nullity, yet by this act, if the King's conſent (*had been*) obtained by his ſubſcription and privy ſeal, the feus are ſafe.

Feus granted by Prelates were null, except they were expede by the conſent of their chapters, or convents, *P.* 1593, *cap.* 190. Feus granted by the beneficed perſons, as of themſelves they ought to have been without diminution of the rental, ſeeing the property thereof was mortified to the kirk, and the incumbents were but as liferenters, and adminiſtrators, *ſo it* was alſo expreſsly declared, and ſtatuted, that any diminution of the rental, or change of victual for money, or any other diſpoſition, making the benefice in a worſe eſtate than at the kirk-mens entry, ſhould annul the feu, *Parl.* 1585, *cap.* 11 **.

XXXVIII. Infeftments in burgage are theſe which are granted to the burghs, by the King, as the common lands or other rights, of the incorporation, and that for burgal ſervice, in watching and warding within their burghs, *&c.* Theſe can have no caſualities, becauſe incorporations die not, and ſo their lands can never fall in ward, or in non-entry. Theſe infeftments in burgage are held by the incorporation, immediately of the King for burgal-ſervice, watching and warding within burgh, *&c.* And the particular perſons infeft are the King's immediate vaſſals, and the Bailies of the burgh are the King's Bailies: and to the effect that ſuch infeftments may be known, it is declared, that all ſeiſins of burgage-lands ſhall only be given by the Bailie, and common clerk thereof; otherwiſe the ſamen is declared null, which ſeems to have given the riſe to the exception in the act of Parliament, anent regiſtration of ſeiſins, that it ſhould not extend to ſeiſins within burgh, *Parl.* 1567, *cap.* 27.

XXXIX. Infeftments of mortified lands are thoſe which are granted to the kirk, or other incorporation having no other *reddendo* than prayers and ſupplications, and the like: ſuch were the mortifications of the kirk-lands, granted by the King to kirk-men, or granted by other private men to the Provoſt, and prebendars of college-kirks founded for ſinging; or to chaplainries, preceptories or alterages, in which the patronage remained in the mortifiers. *Theſe could have no caſualities which were mortified to the church, which dieth not, but abideth as an incorporation; but only thoſe which befel by right of patronages either to private perſons in the caſes aforeſaid, or to the King in caſe of Prelacies, or others his patronages.*

XL. Of all theſe mortifications there remains nothing now, except the manſes and gleibs of miniſters, which manſes and gleibs are rather allodial than feudal, having no expreſs holding, reddendo or renovation; yet are eſteemed as holden of the King in mortification: and therefore the liferent of the incumbent, by being year and day at the horn, falls to the King [t].

Manſes

* See this act of ſederunt in *Spotiſwood*, voce kirkmen, p. 190.

** By act 32. P. 1690, and act 11. P. 1698, the ſmaller vaſſals of kirk-lands, holding of the King, are relieved as to the dues payable on paſſing charters and entering heirs.

[t] See above, § 4. *h. t.* See below II. 4. 63.

Manſes and gleibs did belong to parſons, vicars, and other kirk-men before the Reformation, after which they were prohibited to ſet the ſame feu, or in long tack, without the royal aſſent, and the miniſters were ordained to have the principal manſe of the parſon, or vicar, or ſo much thereof as ſhould be found ſufficient, whether the ſaid gleibs were ſet in feu, or long tack before or not, unleſs a ſufficient manſe be builded by thoſe who have right to the feu, or long tack; *Parl.* 1563, *cap.* 72. which was explained, *Parl.* 1572, *cap.* 48. that the manſe, either pertaining to the parſon, or vicar, moſt eweſt to the kirk, ſhall belong to the miniſter, and four acres of land lying moſt eweſt to the ſaid manſe, to be deſigned by the Biſhop, or ſuperintendent, at the viſitation, by advice of any two of the moſt honeſt and godly of the pariſhioners: for want of this ſolemnity, a deſignation was found null, becauſe it bore not two honeſt men by name, required to join with the preſbytery, or their commiſſioners, tho' it bore that all the elders of the pariſh were preſent, and conſented, but named none, *Spotiſ. kirk-men, miniſter of Aſlington contra Tweedie.* And tho' parſons, or vicars manſes, may be deſigned to be the manſe of a miniſter, yet no other houſe can be deſigned, tho' it were *built upon the gleib* [u] *before the deſignation*, but the pariſhioners muſt build one, *Feb.* 11. 1631, miniſter of *Innerkeithing*.

If there be no manſe, nor gleib of old extending to four acres of land, then the deſignation is to be made of parſons, vicars, abbots, or priors land, and failing thereof, of Biſhops lands, friers lands, or any other kirk-lands within the pariſh, ay and while the four acres be completed, with freedom of foggage, paſturage, fewel, feal and divot, *Parl.* 1593, *c.* 165. *P.* 1663, *c.* 21. By which there is a clear order of deſignation; Firſt, of vicars and parſons manſes moſt eweſt; and failing thereof, of parſons or vicars lands; failing theſe, of abbots, priors, biſhops and frier-lands, or any other kirk-lands, as chaplainries and prebendaries: which order was found to be obſerved, 13th of *July* 1636, *Halyburton* miniſter. And therefore a deſignation of a manſe, or gleib out of abbots lands was annulled, becauſe there were parſons lands in the pariſh, tho' they were builded with houſes, and feued; for which the feuars were obliged to acquire a gleib, *July* 23. 1629, *Nairn.* The like, tho' the lands were all feued before the ſaid act of Parliament, *Jan.* 25. 1665, parſon of *Dyſart*. Where there is not arable land near the kirk, the gleib is to be deſigned of paſture lands, ſufficient for ſixteen ſoums graſs, moſt eweſt to the kirk, *Parl.* 1606, *cap.* 7. *Parl.* 1621, *cap.* 10. The deſignation of manſes and gleibs, where they are not deſigned, or not a full quantity, or are become unprofitable by inundation, or other extraordinary accident, are ordained to be out of the kirk-lands moſt eweſt to the kirk, according to the order in the act 165. *Parl.* 1593, Burrows town kirks being always excepted; yet a gleib was found competent to a miniſter of a burgh, having a land-ward part of his pariſh, *Spotiſ. kirk-men*, *Mr. Ruch contra Keir*; *Dec.* 17. 1664, *Paterſon contra Watſon.* The deſignation of gleibs was committed to preſbyteries, *Parl.* 1644, *cap.* 31. which is declared to be by three miniſters, and three elders, *Parl.* 1649, *cap.* 31. revived, *Parl.* 1663, *cap.* 21. whereby deſignations were referred to the Biſhop, or ſuch miniſters as he ſhall appoint, with two or three of the moſt knowing in the pariſh: in which acts the power of deſignation is extended, not only to kirk-lands, but where theſe are not, to other lands arable, or graſs, eweſt to the kirk, provided that the heritor thereof may offer other ſufficient lands and graſs, within half a mile of the kirk and manſe *. And by the act 1649, there is added to the gleib paſturage for a horſe and two cows, which is found to be regulated as the gleib before, which is alſo revived, *Parl.* 1663, *cap.* 21. with this alteration, that if there be not kirk-lands near the manſe, or are *all* arable lands, the heritors ſhall be liable to pay yearly to the miniſter twenty pounds *Scots*, for

* The act 21. P. 1663, obliges the heritors to pay the miniſter *L.* 20 *Scots*, if there are no kirk-lands in the pariſh, or none fit for paſture adjacent to the kirk; but gives no expreſs power to deſign gleibs out of other lands where there are no kirk-lands.

[u] F. in an abbay.

his horſe and kines graſs, and this act is declared to be as if it had been made in *March* 1649, as to deſignations after 1649: that Parliament being reſcinded without reſervation contained in the act reſciſſory, as is in the act reſciſſory of the other Parliaments, "ſaving all private rights done thereby." But there is no warrant in any of theſe acts to deſign temporal lands, where there are any church-lands; and therefore a deſignation was reduced, becauſe temporal lands were deſigned, and kirk-lands paſt by, albeit the miniſter had been poſſeſſor *decennalis et triennalis*, which gave him a preſumptive title, becauſe his deſignation, which was the true title, was produced, *Feb.* 6. 1678, Lord *Forret*.

A gleib deſigned, was found to carry a proportional part of the common paſturage following to the lands deſigned, *Feb.* 2. 1630, *Hamilton*. Deſignation of a gleib was ſuſtained, tho' it bore not the ſame to have been four acres meaſured, in reſpect it bore, "that the poſſeſſors ſervants hindered the meaſuring;" and therefore it was deſigned according to the deſigner's eſtimate, *July* 5. 1626, *Kers*. And was ſo ſuſtained, tho' there were lands nearer the kirk and manſe, which were Biſhop's lands, ſeeing they were encloſed as a part of the King's park, *Feb.* 13. 1629, Lady *Dumfermling*. A deſignation was ſuſtained, tho' there was only a notary's inſtrument without the ſubſcription of three miniſters deſigners, *December* 17. 1664, *Paterſon:* here the miniſters deſigners their teſtificate under their hand, was ordained to be produced before extract. A gleib being deſigned was ſuſtained, tho' it was an united kirk, *the other* kirk having *a* gleib before the union, *Jan.* 22. 1631, *miniſters of Innerkeithing*. A deſignation was alſo ſuſtained, tho' it proceeded upon warning out of the pulpit, or at the kirk-door, after divine ſervice, in reſpect of the cuſtom ſo to do, tho' ſome of the moſt conſiderable heritors were out of the country, *Jan.* 28. 1668, *miniſters of Haſſanden*. It was alſo ſuſtained, tho' done but by two of the three miniſters, named by the Biſhop, without a *quorum*; unleſs weighty reaſons upon the matter were ſhown to the contrary, *Feb.* 7. 1668, *miniſter of Cockburnſpeth*. Manſes and gleibs being deſigned, as ſaid is, the feuars, poſſeſſors and tackſmen have relief off the remanent pariſhioners, having kirk-lands *pro rata*, *Parl.* 1594, *cap* 202. which was extended to a vicar's manſe *and gleib* being deſigned; and the other kirk-lands (a part whereof were mortified to, and holden of a college, but were kirk-lands) did bear burden, *Feb.* 12. 1635, *Cock*. But where old gleibs of parſons are deſigned, there is no relief by other kirk-lands, except thoſe, who had feus of other parts of the ſame gleib, ſeeing by the foreſaid ſtatutes, the feuars of old manſes and gleibs, are to ſuffer deſignation, or to purchaſe new manſes and gleibs; ſo that theſe old manſes and gleibs do not infer relief *. This relief is not *debitum fundi*, affecting ſingular ſucceſſors, as was found, *June* 24. 1675, *Snow*. But when the deſignation is of temporal lands, the whole heritors of temporal lands are to contribute for a recompence thereof proportionally, *Parl.* 1649, *cap.* 31. revived, *Parl.* 1663, *Seſſ.* 3. *cap.* 21. gleibs are teind-free, *Parl.* 1578, *cap.* 62. The like *whether* they are arable or graſs, *Parl.* 1621, *cap.* 10. And a gleib was found teind-free, tho' lately mortified, voluntarily without deſignation or proceſs; and tho' not mortified to a pariſh-church, but a chapel, ſeeing divine worſhip was accuſtomed to be therein, *June* 9. 1676, *Burnet*.

XLI. There is another diviſion of infeftments, into theſe which are granted to one perſon and his heirs, and to more perſons and their heirs, which are of divers ſorts; ſometimes as conjunct infeftments, and ſometimes conceived in favour of fathers, and after their deceaſe, to children or relations therein nominated.

Conjunct-infeftments are called conjunct fees, whereby the fee is diſponed jointly to more perſons and their heirs, which may be to three or more perſons, who by the infeftment become all fiars jointly and equally; whence there ariſeth a communion by which they do poſſeſs the fee *pro indiviſo*, until diviſion thereof

* The contrary was found, *Hope, manſe and gleib, January* 16. 1616.

thereof be made; which doth not comprehend an infeftment to an incorporation, as to a town or college, or to the uſe of the poor, who do not thereby become joint fiars, but have only a ſhare of the benefit, according to the diſtribution appointed. Theſe infeftments are not conceived to heirs, ſeeing incorporations are perpetual and die not, neither doth the publick uſe thereof fail; therefore ſuch infeftments require no renovation; and therefore ſuperiors will not eaſily be induced to accept reſignations from their vaſſals in favour of incorporations and publick uſes, by which all the caſualities of their ſuperiority ceaſe; or to grant confirmations thereof, having the ſame effect; nor can they be compelled to grant ſuch infeftments upon the vaſſal's bonds, granted of purpoſe, that adjudication may be uſed thereupon, that thereby the ſuperior may be compelled to receive the incorporation; yea, tho' without deſign, an incorporation ſhould become creditor to a vaſſal in a debt truly borrowed, either from the incorporation or their cedent: the queſtion is, whether an adjudication thereupon might force the ſuperior to receive the incorporation for a year's rent? *Craig*'s opinion is in the negative; and I have not heard ſuch a caſe come to be debated. And tho' cuſtom hath obliged ſuperiors to receive man and wife in conjunct-fee, which abate their caſualities, during the life of two perſons, the conſequence would not be good, to ſtretch it to an incorporation that never dies; tho' the act of Parliament introducing appriſings and adjudications, be general in favour of all creditors. It were more juſt, that incorporations ſhould pitch upon a perſon, and aſſign their debt to him, expreſsly to the effect that the lands might be adjudged to him and his heirs, for the uſe and behoof of the incorporation, or ſuch other uſes as were deſigned, which would be effectual againſt all ſingular ſucceſſors, eſpecially if the truſt were expreſſed in the ſeiſin; but the ſuperior would have all his caſualities by the death, neglect, or delinquency of the truſtee and his heirs: however I ſhall not pre-determine myſelf or others in the caſe, but leave it to publick determination *.

Conjunct fees, by the cuſtom of *England*, are always ſo underſtood, that the ſurvivers have the whole benefit, ſo long as any of them are alive; but we do only extend this ſurvivancy to conjunct infeftments to huſband and wife, which bears ordinarily to the longeſt liver; but tho' that were not expreſſed, it would be underſtood as implied, and generally it reſolves in the wife but as a liferent, and the huſband is underſtood to be fiar, unleſs it be evident, that the right was originally the wife's, and a liferent only deſigned for the huſband; and therefore, if no heirs be expreſſed, or only generally their heirs, the huſband's heir is underſtood in heritable rights, *Nam potior eſt conditio maſculi*; and the wife is only liferenter, but with greater power than by a ſeparate liferent, *June* 24. 1663, *Scrymzour*. And a wife having charged upon a bond granted "to her "huſband and her, and the longeſt liver," was found not to have right to uplift the ſum, or to inſiſt therefore, without concourſe of the man's heir, or his being called; that if the ſum were inſecure, it might be conſigned to be re-employed to the wife in liferent, and to the heir in fee, *December* 10. 1661, *Kinroſs*. Yea, a clauſe in a bond, bearing, "a ſum borrowed from a huſband and wife, "and payable to the longeſt liver of them two in conjunct fee, and to the heirs "betwixt them and their aſſignies; whilks failing, to the heirs and aſſignies of "the laſt liver," was found to conſtitute the huſband fiar, and the wife liferenter, albeit ſhe was laſt liver; whereby her heirs of line (failing heirs of the marriage) became heirs of proviſion to the huſband, and liable to his debts, *Jan.* 23. 1668, *Juſtice*; *July* 12. 1671, *Gairns*. And a clauſe in a contract of marriage, obliging the huſband to take the conqueſt "to him and his future ſpouſe, and "the heirs betwixt them; whilks failing, the heirs of the man's body; whilks "failing, the wife's heirs whatſoever," was found not to conſtitute the wife fiar, but

* This point was determined *July* 24. 1713, *univerſity of Glaſgow*, and a ſuperior, notwithſtanding the prejudice he might thence ſuſtain, was found obliged to enter an univerſity, which had acquired right to an adjudication for debt.

but liferenter, and the huſband fiar; whereby, failing heirs of the marriage and of the man's body, the wife's heirs of line were heirs of proviſion to the man, *Feb.* 20. 1667, *Cranſtoun*; for by this clauſe of conqueſt, it is evident, the means were to come by the man. Yet an obligement by a man, bearing, "that whatſoever lands or ſums of money he ſhould purchaſe, during the life of him and his future ſpouſe, (their preſent debts being firſt paid) that the wife ſhould be ſecured therein in conjunct fee; and in caſe of no iſſue, or children, the one half thereof to be diſponed as the wife ſhall think fit," was found to make the conqueſt divide betwixt the heirs of the man and the wife, and that her power to diſpone the half was not a perſonal faculty, but did make her fiar in that half, and took off the preſumption *of* the preference of the huſband, ſeeing no mention was made of the heirs of either party, *June* 27. 1676, E. of *Dumfermling* [r].

Conjunct fees to huſband and wife, and the heirs of the marriage, by contract of marriage, do imply a reſtriction upon the man, not to alter the ſucceſſion, without a neceſſary or juſt conſideration, and ſo do exclude deeds fraudulent, or merely gratuitous, which might evacuate the effect, as to the heirs of the marriage; ſo that if there were heirs of the marrige, and alſo heirs of another marriage, the father could not alter the ſucceſſion, in favour of the heirs of another marriage, becauſe of the intereſt of the wife, and the tocher ſhe brings: but it doth not hinder the father to give competent portions to the bairns of another marriage, *June* 19. 1677, *Murrays*. Neither did ſuch a clauſe, "of conqueſt during the marriage," exclude a competent liferent, conſtituted to a wife of a ſubſequent marriage, albeit there were bairns of the firſt marriage, *June* 16. 1676, *Mitchel*. Yet where there ſurvived no heirs of the marriage, a proviſion in a contract of marriage, "that ſuch a ſum as the future ſpouſes then had, and all they ſhould acquire during the marriage, ſhould be taken to themſelves in conjunct fee, and to the heirs of the marriage; whilks failing, the one half to the man's heirs, and the other half to the woman's heirs; which failing, to a third perſon," found to conſtitute the man fiar of the whole, and that he might provide both the firſt ſtock and all the conqueſt to his children of a poſterior marriage, which was found no fraudulent nor merely gratuitous deed, *Dec.* 1. and 21. 1680, *Anderſon* [s].

XLII. Infeftments to more perſons ſubordinate, are ſuch as are taken to parents, and after their deceaſe to ſuch children and other perſons named, whereby the parent is underſtood to be fiar and not liferenter, and the children or others to be heirs ſubſtitute, albeit both the father and the bairns named were infeft, *July* 23. 1675, L. of *Lamingtoun*.

XLIII. The third diviſion of infeftments, is in reſpect of the ſucceſſion, and they are either ſimple or tailzied. Simple infeftments are thoſe which are taken to heirs whatſomever; for by that expreſſion we expreſs the lineal heirs, who, according to law, would ſucceed in any heritable right: but tailzied infeftments are, where the lands are provided to any other than the heirs of line, as when it is provided to heirs-male, or heirs-male of the fiar's own body, or to the heirs of ſuch a marriage, or to the heirs of *Titius*; whilks failing, to the heirs of *Seius*, *&c.* Of theſe tailzies, there are many ſeveral ways, as the fiar pleaſeth to invent, and ordinarily in them all, the laſt member *or* termination is to heirs whatſomever of the laſt branch or perſon ſubſtitute, or the diſponer's heirs, and when that takes effect by ſucceſſion, the fee which before was tailzied, becomes ſimple.

A tailzie [t] muſt neceſſarily be a part of the infeftment, for no writ a-part can conſtitute a tailzie, tho' bonds or contracts of tailzie as perſonal or incomplete rights, may force the contracter or his heirs to perfect the ſame. They muſt alſo be conſtitute by the ſuperior, being a part of the infeftment granted by him, either

[r] See below III. 5. 51. II. 6. 10. 3. *h. t.*

[s] See below II. 6. 3. III. 5. 52.

[t] See below, §§ 3

either originally in the firſt conſtitution of the fee, or thereafter by reſignation or confirmation; and as a ſuperior is not obliged to alter the tenor of the firſt inveſtiture, or to accept a reſignation, or grant a confirmation in any caſe, except where it is provided by law, whereby he is neceſſitate to receive appriſers and adjudgers; ſo neither in that caſe is he obliged to conſtitute a tailzie, but only to receive the appriſer or the adjudger, *and* their heirs whatſomever; unleſs the debt and decreet, whereupon the ſame proceeded, be conceived in favour of heirs of tailzie; in which caſe, the appriſing or adjudication, and infeftment thereupon, muſt be conform; unleſs it be otherwiſe by conſent of parties; or at leaſt, if the appriſer or adjudger crave the infeftment to himſelf and the heirs of tailzie, the ſuperior ought not to refuſe it; for the appriſing or adjudication being aſſigned to a ſtranger, he behoved to be infeft, much more the alteration of heirs is allowable.

Tailzies alſo being conſtitute, are broken or changed by conſent of the ſuperior, accepting reſignation in favour of other heirs, whether the reſigner reſign in favour of himſelf, or his heirs whatſomever; or in favour of any other and their heirs: but moſt ordinarily by appriſings or adjudications the ſuperior is neceſſitate to receive another vaſſal and his heirs, tho' perhaps he be ſubſtitute himſelf as an heir of tailzie; as if it be provided, that failing other heirs there mentioned, the fee return to himſelf *. But infeftments holden of the King, have this privilege, that they are not refuſed, either upon reſignation or confirmation, as the fiar purchaſer pleaſeth: yea, it is declared by ſeveral ordinances of the Privy Council, that the King or his commiſſioners ought not to deny his confirmation upon the reaſonable expences of the party; which ordinances are repeated in an act of Parliament [tt]; and tho' the deſign thereof gave not occaſion to ratify the ſame, yet they are contained in the narrative, as motives of that ſtatute; and therefore are not derogate from, but rather approved. And tho' ſeveral Kings have revoked infeftments granted by them, from heirs of line to heirs male and of tailzie, yet the effect of ſuch revocations hath never been tried by ſuit or deciſion [u].

Conjunct infeftments to huſband and wife and their heirs, are *alſo* tailzies, and tho', if the heir of that marriage be a ſon, and of a firſt marriage, he may be both heir of line, and heir of the marriage, yet may he enter as heir of the marriage; and if the defunct had other lands provided to heirs whatſomever, he may renounce to be heir in theſe lands, to the effect they may be firſt burdened with his father's debt, and he or his lands provided to the heir of the marriage, can be but burdened in the ſecond place, *in ſubſidium* of what is wanting by the executors, or heritage befalling to heirs whatſomever. Much more are infeftments tailzied, which are granted to huſband and wife, and to the bairns of the marriage, whereby male and female come in *pari paſſu*. Bonds taken to parents, and after their deceaſe to ſuch a child *nominatim*, whereupon infeftment followeth, make a tailzied fee; but theſe are rather called heirs of proviſion; and thoſe are moſt properly called tailzied fees, where ſeveral branches are ſpecially named and ſubſtitute, one failing another. But ſeeing heirs of tailzie fall under conſideration in the tranſmiſſion of rights by ſucceſſion [uu], we ſhall inſiſt no further thereon in this place, but ſhall proceed to conſider the clauſes which are adjected in infeftments, not being of the ſubſtantials or ſolemnities thereof, and how far ſuch come in as parts of the real right, affecting ſingular ſucceſſors, and how far they are only perſonal, affecting alone the heirs of the ſuperior or vaſſal: and laſt, we ſhall conſider the effects of infeftments themſelves. And as to the firſt, beſide the ſolemnities requiſite in infeftments, there uſes to be many clauſes inſert therein, all which we cannot follow, but ſhall inſiſt in the moſt ordi-

* As to the effect of a clauſe of return in favour of the right heirs of the diſponer, in the conveyance of a landed eſtate to a ſecond ſon, ſee a deciſion *Feb.* 18. 1717, Duke of *Douglas*, *Dictionary*, vol. I. p. 308.

[tt] *P.* 1578, *c.* 66. [u] *P.* 1476, *c.* 70. *P.* 1493, *c.* 50 *et.* 51. [uu] III. 4. 33. *et ſeq.* III. 5. 17. 18.

nary and important; theſe are Union, Erection, Warrandice, Reſervations, Proviſions, Conditions, and Clauſes irritant.

XLIV. Union is the conjunction, or incorporation of lands or tenements, lying diſcontigue, or ſeveral kinds, unto one tenement, that one ſeiſin may ſuffice for them all; in which there is ſometimes expreſſed a ſpecial place where ſeiſin ſhould be taken; and when that is not, ſeiſin upon any part is ſufficient for the whole lands lying contiguous, (*which*) are naturally united, and need no union, ſo that ſeiſin taken upon any one of them, extendeth to the whole: but where they ly diſcontiguous, other tenements being interjected, there muſt be ſeiſin taken upon every diſcontiguous tenement, which muſt be all particularly ſo expreſſed in the inſtrument of ſeiſin, whereof one will ſerve for all the tenements; or otherwiſe, when they are tenements of ſeveral kinds, as lands, mills, fortalices and fiſhings; all which are ſeveral kinds of tenements, and require ſeveral ſeiſins, and paſs by ſeveral ſymbols or tokens, as lands by earth and ſtone, mills by the clap and happer; fortalices by the entry at the gates, and incloſing the perſon poſſeſſed, and excluding the granter of the poſſeſſion ſolemnly, conform to the charter or precept.

Union can be conſtitute originally by no other than the ſovereign authority, conceding the ſame, *Jan.* 16. 1623, *Aitken*. And therefore union being conſtitute by a ſubject, not having the ſame from the King, was found null by exception, at the inſtance of the poſſeſſors, tho' pretending no right, *Dec.* 16. 1628, *Lady Borthwick*. And when there is a place for the ſeiſin of the union, a ſeiſin taken elſewhere reacheth none of the lands lying diſcontigue, *March* 19. 1636, *L. of Lawriſtoun*. But if the lands united by the King be diſponed wholly together by the vaſſal to others ſubalternly infeft, the union ſtands valid, *July* 12. 1626, *Stuart and Douglas*; repeated *Jan.* 25. 1627, *Stuart*, which for the ſame reaſon ought to be extended to ſubaltern infeftments of an annualrent *out* of a barony or united tenement, which was found to extend to a mill, and to lands lying diſcontigue, tho' not taken in the place deſigned in the union, *Spotiſ. executors, Lady Ednem contra tenants of Ednem* *.

XLV. Erection is, when lands are not only united in one tenement, but are erected into the dignity of a barony; which comprehendeth lordſhip, earldom, *&c.* all which are but more noble titles of a barony, having the like feudal effects; and whenſoever the tenements are granted as a barony, union is comprehended as the leſſer degree, tho' not expreſſed; and therefore one ſeiſin carrieth the whole barony, and all mills and fortalices thereupon, and fiſhings adjacent thereto. But erections can be only granted by the ſovereign authority, and are not communicable by the ſubaltern infeftments, tho' the union implied therein may be communicated *in the ſame way as an expreſs union without erection.* Erection was found to be inſtructed by the King's confirmation of a charter, deſigning the lands a barony, tho' they were not a barony before, but the half of a barony, wherein the baron infeft his ſon *in libera baronia*; which infeftment being confirmed by the King, did conſtitute it a full barony, whereby an infeftment of annualrent taken upon a part of the land, affected the whole, *Nov.* 16. 1630, *L. of Clackmannan*.

Erections of kirk-lands in temporal baronies or lordſhips, whereby the Lords of erection were interjected betwixt the King and the feuars, are prohibited, *Parl.* 1592, *cap.* 121. and *Parl.* 1594, *cap.* 198. and the ſuperiority of all theſe lands are annexed to the crown, *Parl.* 1587, *cap.* 29. and *Parl.* 1633, *cap.* 10. the reaſon whereof is evident, that ſuch erections are prejudicial, both to the King, who loſeth his caſualities of the feuars, and to the people, who muſt accept another ſuperior inſtead of the King; and tho' they had formerly but ſubjects to their ſuperiors, yet church-men were much more eaſy than ſecular perſons,

* This deciſion is not to be found in *Spotiſwood*. A deciſion betwixt the ſame parties is obſerved by *Durie, July* 23. 1628, but it was there only found, that ſeiſin of an annualrent out of a barony, tho' not taken at the place appointed in the charter of union, will notwithſtanding affect all the lands which lie contigue.

ſons, as requiring little ſervice, and being aſhamed to demand rigorous rates; but any man may obtain the lands he hath in property, holden immediately of the King which were kirk-lands, erected in any dignity the King pleaſeth to grant.

There are many exceptions in the acts of annexation of the temporality of kirk-lands, and in the acts againſt erections, by which the kirk-lands excepted are validly erected; and all the erections are ſo far allowed, as to give the Lords of erection right to the feu-duties, or fruits of the property of kirk-lands feued, till they be redeemed by payment of ten *years purchaſe*, and the infeftments granted to the vaſſals *medio tempore* are valid; but the caſualities ought ſtill to belong to the King *.

It hath been ſometimes queſtioned, Whether the union and erection of lands be diſſolved, and looſed by an infeftment of a part thereof, from the vaſſal, holden of the ſuperior by reſignation or confirmation. *Craig* [u] is for the affirmative, confirmed by the reſemblance of a ſheaf of arrows, bound with one ligament; for if one arrow be pulled out, all become looſe, and ſo the union of the whole is diſſolved, unleſs the ſuperior give the new infeftment, but prejudice of the reſt. But tho' ſuch caſes frequently occur, whereby infeftments of diſcontiguous lands would only be valid, as to the contiguous lands upon which they were taken; yet in no competition or other proceſs, hath it been obſerved by any to be drawn in queſtion or decided, ſo that we have ever reſted in the negative: and the conſequence from that reſemblance is not ſufficient; but on the contrary, he who unites many diſcontiguous lands, unites every part of them to every part, ſo that the taking off of one part diſſolves only itſelf, the reſt remaining united. But union or erection doth not change the juriſdiction of the lands united, as to the ſhires and bailliaries where they naturally lie [uu].

Baronies and united tenements, when they are originally granted, ought to expreſs the ſeveral tenements, according to their proper deſignations, and ſo expreſsly unite them: but when theſe are acknowledged to have been baronies, or otherwiſe united, or are named, or deſigned as ſuch by thoſe who have power to unite, then the common name of the united barony or tenement, is ſufficient to carry all that is holden and reputed, as parts and pertinents thereof; which was extended to lands, as parts of a common deſignation, tho' ſome particulars were named, and the lands in queſtion had alſo proper names, and were expreſſed in the ancient infeftments, the right in queſtion being an appriſing, *March* 23. 1622, *Gallowſhiels* **. Union and erection are as qualities of the real right, and paſs unto ſingular ſucceſſors, who become vaſſals to the King or Prince; but ought not to be extended to ſubaltern infeftments, as is evident in baronies ***.

XLVI. Warrandice is either real, when infeftment is given of one tenement in ſecurity of another, or perſonal, when the ſuperior obligeth himſelf to warrant the infeftment. As to the warrandice in diſpoſitions and reſignations, it is unqueſtionably perſonal, and cometh not within the infeftment; but tho' it be granted by the ſuperior in the infeftment, yet it is but a perſonal obligation, nowiſe cohering *to*, nor carried with the real right, and therefore the ſingular ſucceſſor of the ſuperior or author, is not obliged in the warrandice ****, neither doth the diſpoſition or infeftment from the vaſſal, carry to his ſingular ſucceſſor the right of the warrandice, unleſs it be aſſigned ſpecially, or generally in the aſſignation of the rights and evidents.

Warrandice

* The power of redeeming the feu-duties of church-lands erected, which was given to the Crown by act 10. P. 1633, is renounced by act 11. P. 1707.

** In this caſe the lands were united by a ſubject ſuperior. It was afterwards found, that union could only be made by the King, *Jan.* 16. 1623, *Aitken.*

*** A contrary doctrine is ſupported by deciſions; ſee above, § 44. and 45. *h. t.* Union may be communicated by a ſubaltern infeſtment, erection cannot.

**** Tho' the obligation of warrandice be inſerted in the infeftment of the vaſſal's land, it cannot undoubtedly on that account affect any ſeparate real right belonging to the ſuperior.

u *Craig* II. 7. 19. uu *Craig* II. 7. 20. *Parl.* 1503. *c.* 93.

Warrandice is a common obligement, both in infeftments and other rights, and it is ſometimes expreſſed, and then it is regulated according to the tenor of it, whether it be abſolute warrandice, or from fact and deed, or *only* from future or voluntary fact and deed. But oft-times when warrandice is not expreſſed, it is implied; as rights are to be warranted, which are granted for an equivalent cauſe onerous: but in *the* caſe where the diſpoſition was only of all right the diſponer had, the cauſe *onerous* inferred not abſolute warrandice, but only from the diſponer's future voluntary deed, *Hope, warrandice, Lord Sanquhar contra Creighton.* Abſolute warrandice is alſo implied, where the diſpoſition or infeftment bears (*vendidit*) becauſe that imports an equivalent price, *Spotiſ. warrandice, Stuart contra Fivie.* But not ſo, if it were expreſſed under the terms of alienation, which is common to both gratuitous and onerous diſpoſitions.

Warrandice from the future fact and deed of the diſponer and his heirs, is implied in pure donations, *Hope, warrandice, Veitch contra Dauling, Schaw contra Durham,* and was extended to a legacy *rei alienæ ſcienter legatæ, June* 16. 1664, *Murray**: but ought not to be extended to future neceſſary deeds on cauſes preceeding the gratuitous diſpoſition, which the diſponer is, or may be compelled to fulfil; neither to any anterior deed; becauſe, he who diſponeth freely, is preſumed but to diſpone ſuch right as he hath, but poſterior inconſiſtent deeds are fraudulent. It is *Craig*'s opinion [w], that tho' warrandice from fact and deed be expreſſed, it doth not extend to prior deeds: and that in any caſe, if the cauſe of the diſpoſition be for ſervice done, for gratitude, or merit, that warrandice is implied; much more, if for future ſervice, or for a feu-duty, or rent: yet if beſides theſe, there be not an anterior cauſe in money, or value, ſuch diſpoſitions cannot be accounted onerous; for former merit or gratitude, infer no civil obligation, and ſo no burden, which could receive legal compulſion; and as to annual preſtation in future ſervices, or duties, when there is eviction, the vaſſal is free of theſe duties, and hath no loſs; and therefore they ought to import no more warrandice, but from future voluntary fact and deed; but whatever warrandice be expreſſed, it muſt be accordingly obſerved.

The effect of warrandice is, the up-making of what is warranted, in ſo far as it is evicted, and the ordinary procedure in it is, when any ſuit is moved whereon eviction may follow, intimation is made to the warrander of the plea, that he may defend; and if eviction follow, and diſtreſs thereby, declarator of diſtreſs, and action of warrandice for relief is competent. Alſo it is effectual for decerning the warrander to free the thing warranted of that which will undoubtedly infer a diſtreſs, tho' it hath not actually done it. In this caſe execution was ſuperceded for a time, that therein the ground of the diſtreſs might be purged, *July* 1. 1624, *L. Frendraught*; *the like July* 17. 1666, *Burnet*; *Feb.* 17. 1672, *Smith of Bracco.* Yea, warrandice will take effect where there is an unqueſtionable ground of diſtreſs, tho' the fiar tranſacted voluntarily to prevent the diſtreſs. And tho' no intimation be made of the plea inferring diſtreſs, yet the warrandice taketh effect, unleſs the warrander had a relevant defence, and could inſtruct the ſame, *Nicol, Glendinning contra Gordon.*

Warrandice hath no further effect than what the party warranted truly paid for the right, whereby he was, or might be diſtreſſed, tho' leſs than the value of the right warranted, *July* 1. 1634, *Glendinning.* The like upon re-payment of the ſum given out, and the annualrent thereof, *Hope, warrandice, L. Craiklaw contra Lo. Harris*; *Jan.* 26. 1669, *Boil of Kelburn contra Wilkie*; *February* 28. 1672, *E. of Argyle contra L. of Aitoun.* This will not hold in warrandice of lands, as to which lands of equal value or the whole worth of what is evicted, as it is the time of the eviction, is inferred; becauſe the buyer had the lands with the hazard of becoming better or worſe, or the riſing or falling of rates; and therefore is not obliged to take the price he gave. Neither is warrandice a full ſecurity,

* See below III. 8. 41. This was rather a queſtion of intention than of warrandice.

w II. 4. 1. *et* 2.

ſecurity, being but a perſonal obligement; and many times the price is not known: and if the warrandice be not abſolute, the purchaſer's hazard was the greater: but in warrandice of perſonal or redeemable rights, the matter is ordinarily liquid, and there is no deſign of hazard but an abſolute relief. But warrandice hath no effect *upon diſtreſs* where there is colluſion, *Nicol, warrandice, Aikenhead contra Blackwood*; *or when the diſtreſs ariſes* by being holden as confeſt, *March* 3. 1639, *Murray*, or by ſuppreſſing the warrander's right, and receiving conſiderable ſums therefor, whereby the right warranted fell in conſequence, *Feb.* 18. 1679, L. of *Wedderburn* *. Neither where eviction falls thro' default of the party warranted, when having a diſpoſition of ward-lands, with double infeftments, he infefts himſelf baſe without *having firſt obtained* the ſuperior's conſent, and thereby the lands recognoſced, *Had. Feb.* 1. 1610, *Maxwel contra Mowbray*. Neither was it inferred by the forfeiture of the diſponer's apparent heir, ſeeing the *diſponee* omitted to obtain the King's confirmation, which would have excluded the forfeiture, *Hope, warrandice, Hamilton contra L. of Nidderie.*

It is not ſo clear either in reaſon or practice, whether warrandice takes effect upon any other ground than what is, or may be a ground of eviction, to take away the right of the party by whom the warrandice is granted judicially; as when lands are taken away by inundation, or are become barren: or when a right aſſigned with warrandice becomes ineffectual, becauſe the debtor is not *ſolvendo*; or when any accidental or extrajudicial diſtreſs or damage befalleth to the party warranted, thro' occaſion of the ground of warrandice, tho' not by legal eviction. *Secondly*, Whether warrandice takes place, when the right warranted is taken away or burdened, by a ſubſequent law. *Thirdly*, Whether warrandice in general will extend to *ward, relief, &c. or to* the forfeiture of the warrander's own ſuperior.

As to the firſt, warrandice *ſeems only to* relate to the point of right, and not to the matter of fact (unleſs the ſufficiency of a thing be warranted, which will not extend to any viſible or notour defect) and therefore will not reach to accidents, the hazard whereof lies always upon the acquirer and the proprietar: yea, a clauſe of warrandice that lands ſhould be worth ſo much yearly rent, was not extended to deſolation by famine, *March* 10. 1636, Lady *Dunipace*. It was alſo found, that a cautioner being conveened, and through occaſion of compearance was made priſoner in a ſhip taken prize, had thereby no intereſt upon the clauſe of warrandice to diſtreſs the principal for this accidental damage, *Maxwel* **. So that unleſs ſomewhat more be concurring than the naked warrandice, either by the value of the onerous cauſe, for which the right is granted, or tenor of the aſſignation, it reacheth not the ſufficiency of the debtor, or the like points of fact, which is *Spotiſwood*'s opinion, *tit. aſſignation*. And it was lately found, that where a creditor had given a blank aſſignation to a cautioner, who had paid him with abſolute warrandice, that as to the cautioner, to whom it was gratuitous for the creditor to give ſuch a warrandice, *it* imported not the ſufficiency of the *principal* debtor, *June* 16. 1664, *Hay*. It was alſo found, that abſolute warrandice in an aſſignation, bearing that the ſamen ſhould be good, valid and effectual, was not to be extended to the ſolvency of the debtor; but only that the debt could not be excluded by any legal exception, either from the cedent's deed or otherwiſe, as if the writ aſſigned had been falſe, the cedent not being acceſſory, or the debt null, or declared a publick debt, *Nov.* 24. 1671. *Barclay*, which quadrates with *l.* 4. *ff. de hæreditate et actione vendita*, where *venditor nominis tenetur præſtare debitum ſubeſſe, debitorem vero locupletem eſſe non tenetur præſtare.*

* In this caſe the warrandice was only from fact and deed, and the eviction was occaſioned by the warrander's colluſion in ſuppreſſing his preferable rights; the warrandice was therefore found incurred. The deciſion does not belong to this place.

** This deciſion not found.

2*d'y*, As to diſtreſs by ſubſequent laws, when theſe are by way of declarator of an antecedent right, it is equivalent to a judicial eviction: but when the law is ſtatutory, introducing a new burden, as taxes, augmentations of miniſters ſtipends, &c. It was *Craig*'s opinion [x], which he reports as the judgment of the Seſſion, that in ſuch caſes, the warrander ſhould be liable *in quantum lucratus eſt*. But cuſtom ſince hath cleared the contrary, that warrandice is never extended to ſubſequent ſtatutory laws, but that theſe are always upon the purchaſer's hazard: and therefore a general clauſe of abſolute warrandice was never extended to a burden (*of a miniſter's horſe and cow's graſs*) impoſed by a ſubſequent law, tho' there was an anterior abrogated law to that ſame effect, *July* 12. 1667, *Watſon*. Neither was it extended to the making up of a gleib, tho' it was by virtue of a prior law, but the deſignation was after the diſpoſition; becauſe it was a burden the warranded might know, being notour that deſignation muſt be made of the land in queſtion, *July* 1. 1676, L. *Auchintoul* *. Yea, abſolute warrandice in a Lady's liferent, which is moſt favourable, was found not to extend to an augmentation of a miniſter's ſtipend thereafter, tho' grounded upon a prior law, *March* 27. 1634, *Lady Dumfermling*. But where a clauſe of warrandice did bear, that a rental of a Lady's liferent ſhould be ſo much worth yearly, it was found effectual to make up an abatement of the rental by a miniſter's ſtipend modified thereafter, *July* 28. 1635, *Lady Cardroſs*. Or to the making up a reader's ſtipend impoſed by a poſterior law. For in theſe caſes it was the ſpecial tenor of the clauſe to uphold the rental, which would have been effectual not only as to eviction *in jure*, but as to diſtreſs *in facto* by inundation, devaſtation, or the like.

The intent of abſolute warrandice being only againſt legal eviction, it doth not extend to every burden that may affect the land, as to a ſervitude of ſize-fiſh, *Fotheringham of Pourie contra Lord Gray*, *Feb.* 11. 1692 **, or of paſturage, fewel, feal or divot, or to a thirlage of the land to the mill of the barony, paying the nineteenth corn, *June* 21. 1672, *Sandilands* [y]. Abſolute warrandice is ſometimes general, and ſomeimes ſpecial, againſt ward, relief and non-entry, &c. with a general clauſe, and all other danger, perils, and inconveniencies whatſoever, as well not named as named, &c. as to which, the general clauſe is not to be extended above the greateſt of the ſpecial.

But the queſtion ariſeth, 3*dly*, If ſuch clauſes will reach ſubſequent wards or marriages of the ſuperior, or to future forfeitures, or recognitions, non-entries, liferent-eſcheats, &c. It is certain that whatever of theſe burdens befal by the fault of the warrander, he muſt be liable therefor; abſolute warrandice being much ſtronger than warrandice from fact and deed, which reacheth not only to facts of commiſſion, but even to omiſſion of duties; and therefore, if the warrandice be but by the author, and not by the ſuperior, theſe ſubſequent diſtreſſes will not reach the author, unleſs the clauſe bear expreſsly, "ſuch diſtreſſes paſt, preſent, or to come;" and ſo, tho' the fee were extinct by the forfeiture, or recognition of the ſuperior, or burdened by his non-entry, or remaining at the horn; theſe occurring after the diſpoſition will be upon the hazard of the acquirer, and not the author diſponer: but if the warrandice be in the ſuperior's charter, burdening himſelf, it will be extended to all ſubſequent diſtreſſes thro' his fault, and ſo to recognition, liferent-eſcheat or non-entry, but it will not extend to the forfeiture or recognition, or other fault of the ſuperior's ſuperior: neither will it extend to the ward, or the avail of the marriage of the ſuperior bound in warrandice, falling thereafter, unleſs it be ſo expreſſed; for no provident man is preſumed to guard againſt theſe, unleſs it be ſo expreſſed; and therefore, there is little advantage by ſpecial clauſes of warrandice; for the general clauſes reach all evictions from anterior cauſes, yea, the effect is the ſame, tho' there were no clauſe

* The contrary was determined *Feb.* 20. 1683, *Bonnar*, obſerved by *Falconer*, N° 51.
** This deciſion not found.
[x] *Craig* II. 4. 10. [y] See above I. 14. 7.

clauſe of warrandice expreſſed, if the right warranted be for cauſes onerous, *viz.* ſums of money, or equivalent value; unleſs by the ſpecial warrandice, future deeds inferring eviction, or which would not infer it *ex natura rei* be expreſſed. But warrandice is never inferred from infeftments from the King as ſupreme ſuperior, not acting *privato jure*, and tho' they were expreſſed, would have no effect; neither are the warrandices of infeftments by church-men effectual againſt their ſucceſſors in office; yea, expreſs warrandices of feus, or tacks of kirk-lands thereafter annexed to the Crown, after the ſaid warrandice, doth neither reach the granters thereof nor their ſucceſſors, *Parl.* 1587, *cap.* 111. The reaſon whereof is there rendered, becauſe the church-lands were annexed to the Crown by ſubſequent laws.

XLVII. Infeftments do frequently bear conditions, reſervations, proviſions and exceptions, which give great ground of debate, which therefore muſt here be cleared. There is no queſtion but infeftments may either be pure or conditional, and ſome conditions are implied from the nature of the right, and are effectual, tho' they be not expreſſed: as in ward-holdings, the vaſſal cannot alienate without his ſuperior's conſent, which is as effectual as a reſolutive condition, whereby, if the major part of the fee be alienated, the whole becomes extinct, and returns to the ſuperior as he gave it.

XLVIII. Infeftments of warrandice imply this condition, that they ſhould take no effect, but in the caſe of eviction of the principal lands. Infeftments for relief of cautionry, imply this condition, that they ſhall have no effect till diſtreſs, and that they ſhall ceaſe by relief. Infeftments for ſatisfaction of ſums, imply this condition, that the ſums being ſatisfied, they are extinct, and the author's infeftment revives and ſtands valid without neceſſity of renovation.

XLIX. Infeftment given for a particular office, and bearing not aſſignies or ſubſtitutes, as to be an enſign-bearer, advocate or chaplain, with lands and annualrents annexed, does imply this condition, that the heir be capable to exerce theſe offices; and therefore by his inability they ceaſe, unleſs they be granted to aſſignies, with power of ſubſtitution, in which caſe they may be performed by another.

L. Infeftments by excambion do imply this tacit condition, that if the one tenement excambed be evicted, there is recourſe to the other tenement with which it was excambed, for therein excambion or permutation differs from ſale. This recourſe is effectual, not only to the heirs, but to the ſingular ſucceſſors of both parties, whether by voluntary or judicial rights; and therefore regreſs was ſuſtained againſt an appriſing, prior to the eviction, *Nov.* 25. 1623, Earl of *Melroſs*, without neceſſity to inſtruct that the excamber had right when he changed, it being preſumed that he delivered his rights to the other party; and therefore an old charter from the King, bearing, "the lands to have been diſponed "*by his Majeſty* in excambion for the other party's lands, *receiver of the charter*," and expreſſing regreſs *to him and his heirs*, but without mention of aſſignies, yet was found effectual to a ſingular ſucceſſor, *July* 14. 1629, L. of *Wairdeſs*. In this proceſs it was found, that no perſon needed to be cited but the preſent proprietar of the lands excambed, and the heir, or apparent heir of the maker of the excambion, *July* 2. 1629, *inter eoſdem* [z].

LI. The law doth alſo introduce conditions in infeftments, which do not ariſe from their nature, as in feus, by the common feudal law, and by ſpecial ſtatute with us; whereby if the feu-duty be not paid by the ſpace of two years whole and together, that the feu ſhall be extinct and loſt, *Parl.* 1597, *cap.* 250. So the Roman emphyteuſis by three years not payment, became void, *l.* 2. *C. de jure emphyt.* It is therefore beyond doubt, that ſuch clauſes are effectual, whether expreſſed or not expreſſed in the infeftment.

LII.

[z] See above I. 14. 1. 6.

LII. It is alſo incontroverted, that liferents, one or more, may be effectually reſerved in infeftments, which will paſs therewith as a real burden to all ſingular ſucceſſors, and needs no other infeftment.

LIII. Infeftments are alſo ſometimes burdened with the exception of other infeftments, which exceptions, if they be in the diſpoſitive clauſe, as a burden upon the infeftment, they are effectual againſt ſingular ſucceſſors.

LIV. Infeftments are alſo frequently burdened with faculties or powers to affect or burden the lands, or others diſponed, and that either abſolutely, at the diſponer's pleaſure, or for ſuch ſums to children or creditors; which clauſes are frequent in the diſpoſitions by fathers to their eldeſt ſons, and are very amply interpreted againſt them and their heirs, tho' the way of burdening might have been defective; as by a baſe infeftment, not clad with poſſeſſion, or by bonds of proviſion, tho' no infeftment follow, as was found in the caſe of the relict of *Robert* E. of *Carnwath* *. And a diſpoſition by a father to his ſon, with a power to burden with ſuch a ſum, a bond granted thereafter to his daughter, without mention of that power, was found effectual againſt the ſon, in ſo far as was not ſatisfied with the father's moveables, *June* 24. 1677, *Hopringle:* tho' theſe might be more ſtrictly interpreted in the caſe of ſingular ſucceſſors, acquiring for onerous cauſes. And in the caſe of the creditors of *Mouſwal*, *Dec.* 11. 1679, who having diſponed his eſtate to his eldeſt ſon by his contract of marriage, reſerving a power to himſelf to burden it with ſuch a ſum to his bairns, having given them bonds of proviſion with a baſe infeftment, the ſame was preferred without poſſeſſion, by virtue of the reſervation, to the poſterior publick infeftments of the creditors for prior debts, ſeeing he had then an eſtate ſufficient for all his debts, and his bairns portions. *It* is no leſs certain, that all the clauſes contained in infeftments are not real burdens, affecting ſingular ſucceſſors, ſuch as warrandice, which only obligeth the warrander and his heirs, and is merely perſonal **; ſo then the difficulty remains, what clauſes inſert in infeftments are real burdens, effectual againſt ſingular ſucceſſors.

LV. Firſt then, if the infeftment bear a proviſion, that the perſon infeft ſhall pay ſuch a ſum, or do ſuch deeds to a third party, this will import but a perſonal obligement, and will not affect ſingular ſucceſſors. But the diſpoſitive clauſe being expreſsly burdened with payment of ſuch a ſum, or bearing, "that upon that condition the infeftment is granted, and no otherwiſe," ſuch a clauſe was found effectual againſt a ſingular ſucceſſor, bearing only a proviſion in the diſpoſitive words, "that the lands ſhould be affected with ſuch a ſum," which was ſuſtained againſt an appriſer, *Nov.* 7. 1666, *Canham.* Here there was a clauſe irritant in the diſpoſition, but it was not in the charter.

LVI. Proviſions or conditions in infeftments, impoſſible or unlawful, if they be conceived as ſuſpenſive clauſes annexed to the diſpoſition, they annul the ſame: but if they be proviſions otherwiſe adjected, tho' they be in the terms of a clauſe irritant or reſolutive, they are void as not adjected.

LVII. Proviſions alſo inconſiſtent with the nature of the right, are ineffectual, as if it were provided that the vaſſal ſhould not owe fidelity to his ſuperior, *Feud.* 2. *t.* 3. *fin.* or that the right ſhould be valid by the charter without ſeiſin, theſe proviſions are inconſiſtent and null.

LVIII. It is much debated among the feudiſts, about clauſes *de non alienando*, with an irritancy or reſolutive clauſe, or that the fiars ſhould contract no debt, by which the fee might be alienated, or the tailzie changed; and they are generally for the negative, that clauſes prohibiting contracting of debt, or ſimply not to alienate, are inconſiſtent with property, albeit they may be effectual if ſo qualified, that no alienation be made, or debt contracted to affect the fee, or alter

* This deciſion not found.

** This cannot be conſidered as a proper example of the difficulty to diſtinguiſh, what clauſes in infeftments are real burdens, and what are not. The only doubt ariſes with regard to clauſes conceived as obligations upon the receiver of the right; but a clauſe of warrandice is an obligation upon the granter only. See above, § 42. *b. t.* and the note.

ter the ſucceſſion, without conſent of the ſuperior, or ſuch other perſons; but that being abſolute, they cannot be effectual againſt ſingular ſucceſſors; whereas theſe limited prohibitions reſolve but in interdictions, and being contained in the ſeiſins regiſtrate, they are equivalent to interdictions, publiſhed and regiſtrate. Tho' many ſuch clauſes have been in tailzied infeftments, yet none of them have come to be debated, but that which was in the tailzie of the eſtate of *Stormont*, tailzied to *Annandale*'s heirs-male of his body; whilks failing, to *Balvaird* and his heirs, with a clauſe not to annailzie, or to contract any debt, or do any deed, whereby the lands might be taken from the heirs of tailzie, otherwiſe the contraveener ſhould *ipſo facto* loſe his right; and the next perſon who would be heir, ſhould have right; which being at length contained in the original ſeiſin, and all the ſubſequent ſeiſins, was found effectual to annul the right of *James* Earl of *Annandale*, who contraveened, and of all his creditors who appriſed for his debt, *Feb.* 26. 1662, Viſcount of *Stormount* [a], *In this deciſion, which did paſs with great difficulty, the Lords being near equally divided, ſpecial conſideration was had, that the clauſe irritant* de non alienando, *was expreſsly ſet down in the firſt and ſubſequent ſeiſins of heirs, whereby creditors were certiorated of their hazard, if they ſhould lend their money, that they could expect no ſecurity therefor by that eſtate, ſeeing thereby the borrower's right became void; and therefore ſuch clauſes, or any other clauſes irritant, or conditions that might evacuate infeftments, or deeply burden the ſame, when they are not particularly expreſſed in the ſeiſin, may not only be quarrelled by anterior creditors, but alſo by poſterior creditors, as latent and fraudulent clauſes to enſnare creditors, who having no mean to know ſuch clauſes, do contract and lend ſums of money to perſons whom they ſee ſtanding infeft in conſiderable eſtates of land.* By act 22. *Parl.* 1685, clauſes irritant in tailzies are approven as effectual againſt creditors and ſucceſſors, being once produced before the Lords, and approved by them, and the original tailzie being regiſtrate in a ſeparate regiſter for that purpoſe, and being repeated in all the ſucceſſors ſeiſins, which if they omit, it ſhall infer a nullity of their right, but ſhall not prejudge creditors ſo contracting *bona fide*; which weakens the former tailzies with clauſes irritant.

And generally, all real burdens of lands contained in infeftments, tho' they give no preſent right to thoſe in whoſe favour they are conceived, nor cannot give them any fee of the lands, yet they are real burdens, paſſing with the lands to ſingular ſucceſſors, tho' they bind them not perſonally, but the ground of the land by appriſing or adjudication, as if lands be diſponed with the burden of an annualrent forth thereof, to ſuch a perſon and his heirs, this will not conſtitute the annualrent, but may be a ground of adjudging an annualrent out of the lands [aa]. In all theſe caſes, purchaſers by voluntary diſpoſition, are preſumed and ought to ſee their author's rights, at leaſt a progreſs of forty years, whereby they may know ſuch clauſes, and conſider them in the price, or otherwiſe ſecure themſelves againſt them.

Clauſes *de non alienando*, or *non contrahendo debitum*, are moſt infavourable and inconvenient, eſpecially when abſolute; for firſt commerce is thereby hindered, which is the common intereſt of mankind; ſecondly, the natural obligations of providing wives and children, are thereby hindered, which cannot lawfully be omitted; thirdly, it is unreaſonable ſo to clog eſtates, deſcending from predeceſſors, and not to leave our ſucceſſors in the ſame freedom that our predeceſſors left us, whereby, tho' they have the ſhadow of an eſtate, yet they may become miſerable, as if they ſhall happen to fall into captivity, or in any tranſgreſſion that would infer a conſiderable fine, againſt which no clauſe can ſecure; then being diſabled to borrow, they behoved to be denounced to the horn, and thereby their liferent-eſcheat fall to their ſuperior, which no ſuch clauſe can prevent; and therefore, if any man have ground to ſuſpect the frugality of his ſucceſſor, he may provide a part of his eſtate by a tailzie, diſabling that ſucceſſor to contract

[a] See above I. 14. 6. Below IV. 18. 6. 7.

[aa] See below II. 10. 1. and IV. 35. 24.

debt without the conſent of ſuch perſons in which he confides, leaving ſome part of his eſtate to his diſcretion: for ſuch a clauſe irritant being in the ſeiſin, publiſhed by regiſtration, may be ſuſtained as equivalent to an interdiction; ſuch clauſes are alſo much more tolerable in lands acquired by the fiar's own induſtry, wherein if there be inſert a tailzie with a clauſe *de non alienando*, to be inſert in the original, and all ſubſequent ſeiſins, and bearing "proviſions for the "wives of ſucceſſors, not exceeding ſuch a proportion of the fee, and for chil-"dren only to affect ſuch a proportion of the free rent:" or if perſons having no near relations of value, prefer others of their name or kin to their eſtates: or in caſe of mutual tailzies, ſuch clauſes limited as aforeſaid, may be much more tolerated. But clauſes of that nature have never been attempted, but in proper tailzies where *there* are diverſe nominate branches, which are neither heirs of line, nor heirs-male to one another, and where the main deſign is to preſerve the tailzie; for when all the branches are of far relation, the preference of the firſt is not much above the reſt; and therefore, the other branches have by ſuch clauſes *jus acquiſitum*, and are not ſimply heirs, but partly creditors to the firſt branch; and therefore, tho' there were no clauſe irritant, they might reduce alienations merely gratuitous or fraudulent, eſpecially when done, not by the heirs of line, or heirs-male of him who conſtitute the tailzie: for theſe are always in every tailzie in the firſt place, and while the fee continues in them, it is rather a ſimple fee than tailzied; as it becomes again, when all the branches of the tailzie fail.

The perpetuities of eſtates, where they have been long accuſtomed, have ſufficiently manifeſted their inconveniency; and therefore, devices have been found out, to render them ineffectual: only the *Majoratus* of *Spain* hath been moſt reaſonable and ſtable, that the King nobilitating a perſon of merit and fortune, either by the King's gift, or his own right, that eſtate can neither be alienated or burdened, but remains alimentary for preſervation of the dignity of that family. But theſe perpetuities in *England* are now eaſily evacuated; firſt, by warrants to ſell, purchaſed in Parliament, which paſs without much difficulty; and if they become frequent with us, it is like we will find the ſame remedy; they are alſo evacuated by a ſimulate action of fine and recovery, whereby the purchaſer pretends, that he is unwarrantably diſpoſſeſſed of ſuch lands by the preſent fiar, who colludes and is ſilent, having received a price or other conſideration, ſo that theſe ſentences, tho' colluſive, muſt be irrevocable. In tailzies the heirs-male, or heirs of line of every branch, being the iſſue of the firſt perſon of that branch, do ſucceed (*but failing theſe the eſtate often goes to remote branches*); and therefore there is a good caution by the law of *England*, that after the poſſibility of iſſue is extinct, the preſent fiar can do no more as to the fee, but what a liferenter could do; for the next branch being ordinarily altogether ſtrangers to that fiar, little care will be taken to preſerve the fee.

In the tailzie of *Stormount*, the whole eſtate was not comprehended, and it was diſtinctly provided, that in caſe any of the heirs of tailzie for the time ſhould contraveen, that the right ſhould be devolved on that perſon who would ſucceed, if the contraveener were dead: but in ſuch tailzies, formerly it was not ſo clearly ordered, being only provided, that the contraveener ſhould loſe his right, and the next heir of tailzie ſhould have place, whereby it remained dubious, whether the next branch of the tailzie were meaned, ſo that the contraveener loſed his own intereſt, and all deſcending of him; or whether he loſed the intereſt of all deſcending of that branch; or whether he loſed only his own perſonal intereſt; wherein the deſign of the conſtituter of the tailzie might be dubious enough.

LIX. To ſum up this important ſubject of tailzies, let us conſider the effects thereof, according to the ſeveral ordinary tenors of the ſame, and how far the fiar or his heirs of tailzie is bound up thereby; we muſt then diſtinguiſh betwixt tailzies having clauſes not to alter, burden or alienate: and thoſe that are ſimple without any expreſs reſtrictive clauſe. *Secondly*, Betwixt tailzies made freely, and thoſe that are made for onerous cauſes. *Thirdly*, Betwixt thoſe that have clauſes

reſolutive

reſolutive or irritant, and thoſe that have only ſuch clauſes by way of obligation, proviſion or condition.

As to the firſt caſe, it is a general rule, that *quiſque eſt rei ſuæ moderator et arbiter*, every man may diſpoſe of his own at his pleaſure, either to take effect in his life, or after his death, and ſo may provide his lands to what heirs he pleaſeth, and may change the ſucceſſion as oft as he will, which will be completed by reſigning from himſelf and his heirs in the fee, in favour of himſelf, and ſuch other heirs as he pleaſeth to name in the procuratory, whereupon reſignation being accepted by a ſuperior, and new infeftment granted accordingly, the ſucceſſion is effectually altered; yea, any obligement to take his lands ſo holden, will oblige the former heirs to enter, and to denude themſelves for implement of that obligement, in favour of the heirs therein expreſſed; and if the ſuperior refuſe to accept the reſignation, or to give confirmation, there will follow an adjudication for implement of the diſpoſition, which is ordinary, and thereupon the ſuperior muſt receive the adjudger; ſo that the firſt conſtituter of a tailzie, or any heir ſucceeding to him, may change it at their pleaſure, unleſs the tailzie be for an onerous cauſe; as when tailzies are mutual, then the firſt conſtituters of the mutual tailzie cannot alter the ſame, altho' their debts may affect the ſame; yet no fraudulent or gratuitous deed can alter or evacuate ſuch tailzies; and therefore, a mutual contract betwixt two brethren, obliging them, that what lands they ſhould ſucceed to, or acquire, ſhould be taken to the heirs of their body; whilks failing, to the brother and the heirs of his body, *&c.* tho' thereafter either brother took their lands, otherwiſe to their heirs whatſomever, whereby ſiſters having ſucceeded to one of theſe brothers, they were decerned to denude themſelves in favour of the other brother, *Jan.* 14. 1631, *Sharp*. But this was declared not to hinder the fiar for the time to ſell for a rational cauſe, only without fraud to evacuate the tailzie. But if the cauſe onerous be of leſs import, than to grant and continue a tailzie, it will import no more than once perfecting the infeftment by ſuch a tailzie, whereby the hope of ſucceſſion ariſeth to theſe parties, in whoſe favour the fiar is obliged to take the tailzie; but he was not found obliged to continue the ſame, but that he might alter it thereafter, without refounding the money he got for granting it, being but of that value, as was equal only to the hope of ſucceſſion, which behoved to be underſtood of alteration *ſine dolo*, *July* 15. 1636, *Drummond*.

Heirs of proviſion by contracts of marriage, are in part onerous, *ſuch proviſions* being granted for a tocher, and the intereſt of the wife concerned; therefore they cannot be altered by the huſband at his pleaſure, but do exclude all fraudulent, or merely gratuitous alterations, as hath been ſhown § 41. *fin. h. t.* But if there be an expreſs obligement not to alter the tailzie, albeit that will not give title to the heirs of blood of the preſent fiar, to quarrel his deed or alteration; yet it will give intereſt to any other branch of the tailzie, whether to the perſon nominated or his heirs, to quarrel and reduce ſuch alterations; tho' it will not exclude alterations by appriſing or adjudication, for debts truly borrowed by the fiar: and therefore, a tailzie of a ſum of money, lent in theſe terms, "to be "paid to the creditor and the heirs of his body; whilks failing, to the father "and the heirs of his body; whilks failing, to a perſon named and his heirs and "aſſignies whatſomever," with a proviſion, "that the creditor and his heirs "ſhould do no deed hurtful to the tailzie, nor the debtor ſhould not pay without conſent of the heir of tailzie named," was found to give intereſt to that perſon as heir of tailzie, to declare that the ſum was unwarrantably uplifted, or paid, without his conſent, or order of law, by conſigning it to be employed in the ſame terms; and that tho' he was heir of tailzie to the uplifter, that he was not obliged to fulfil his deed, or warrant his diſcharge, being contrary to the terms of the tailzie, as to which terms he was creditor; reſerving always to lawful creditors, how far they could affect the ſum for the fiar's debt, *Feb.* 3. 1674,

Drummond

Drummond [d]. And a clauſe in a bond, whereby a woman obliged herſelf to reſign lands "in favour of herſelf and the heirs of her body, whilks failing, to the "heirs of her father," and obliging herſelf to do nothing contrary to that ſucceſſion, whereupon inhibition was uſed before her marriage, was found effectual againſt her and her huſband whom ſhe married thereafter, and diſponed the lands to him and his heirs, as being a voluntary deed, without an equivalent cauſe onerous, albeit the father's heirs behoved to be the woman's heirs of tailzie, *Jan.* 28. 1668, *Binnie*. Yet theſe reſtricting clauſes without irritancy, tho' conceived as proviſions or conditions, if they be not in the inveſtiture, albeit they be in prior obligations, diſpoſitions or contracts, there is no pretence thence to affect the fee as a real burden [e]; and even tho' they be contained in the inveſtiture, ſeeing clauſes irritant uſe to be added thereto, they are underſtood to be but perſonal obligements, whereupon no diligence having followed, they cannot be effectual againſt ſingular ſucceſſors, whether by legal or voluntary diſpoſitions: except in the caſe of reduction on the act of Parliament 1621, againſt fraudulent alienations.

LX. Property being thus conſtituted by infeftment, it is to be conſidered what are the particulars it comprehends and implies, tho' not expreſſed; wherein this is a general rule, that lands being diſponed with part and pertinent, all is carried thereby that falls under the denomination of the lands diſponed, *a cælo ad centrum*, and all that in the time of the diſpoſition was accuſtomed to follow it, not only as ſervitudes, but even diſcontiguous parcels of land, which were not known as *diſtincta tenementa*, or parts of any other tenement, except what the law reſerves, or the expreſs proviſion of the ſuperior. The law reſerves all thoſe things which are called *regalia*, or *jura publica*, which the law appropriateth to Princes and ſtates, and exempteth from private uſe, unleſs the ſame be expreſsly granted and diſponed by the King; and if the ſuperior be a ſubject, if he have any of theſe *regalia* from the King, they remain with his ſuperiority, unleſs he expreſsly diſpone them to his vaſſal; and the ſuperior may have them from the King, either expreſsly in a tenement holden of the King, or tacitely when lands are erected by the King to him in a barony, or any higher dignity, whereby many of theſe *regalia* are comprehended, *baronia* being *nomen univerſitatis*; yet that will not comprehend all; as firſt, mines and minerals of gold and ſilver, or lead of that fineneſs, that three half-pennies of ſilver may be fined out of the pound of lead, which mines are declared to belong to the King wherever they can be found, *Parl.* 1424, *cap.* 12. But mines of iron, copper and lead, of leſs fineneſs, belong to the proprietar, *and* are not accounted with us *regalia*, tho' in ſome other countries they be *. *Secondly*, Neither do treaſures found in the ground belong to the King's vaſſals, tho' their lands be erected in baronies, unleſs they were expreſſed. A treaſure is money hid in the ground, the owner whereof is not known [ee]. *Thirdly*, Tho' all proprietars have the privilege of fowling within their own ground, yet ſwans are particularly reſerved to the King; and therefore, the privilege to kill ſwans is not carried under the name of barony, unleſs they were particularly expreſſed. *Fourthly*, Confiſcated goods are not carried even under the name of barony, unleſs they be expreſſed.

LXI.

* By an unprinted ſtatute of the 12th Parliament *Ja.* VI. 5th *June* 1592, it is enacted, "That mines and metals, in ſo far as they are part of his Majeſty's property annexed, or any otherwiſe, ſhall be diſſolved, to the effect the ſame may be ſet in fee; and that *it ſhall be lawful to his Majeſty*, and his ſucceſſors, to ſet in feu-farm to every Earl, Lord, Baron, and other freeholder within the realm, all and whatſoever mines of gold or ſilver, lead, copper, tin, and other whatſoever mettals or minerals, which may be found within their own lands or heritages, for payment to his Majeſty of the tenth part of the gold, or other minerals which ſhall be found within his lands or heritages, free and without any deduction."

In an action of declarator at the inſtance of the Earl of *Hopeton*, againſt the officers of ſtate, 12th *Jan.* 1750, it was found, that, agreeable to the language of our ſtatutes, the words, "it ſhall be lawful for his Majeſty," conſtituted a right in favour of the freeholders, and impoſed on the Crown an obligation to confer upon each proprietar the mines within his eſtate; and that the Crown could not grant them to any other.

[d] See below III. 5. 18. [e] See above, § 43. 2. *h. t.* [ee] *L.* 1. *C. de theſaur. l.* 31. § 1. *ff. de acq. rer. dom.*

LXI. Yet there are other *regalia*, which are carried under the name of barony, tho' not expreſſed: as juriſdictions and courts, fortalices, ſalmond-fiſhing, foreſts, and hunting of deer; and ports with their petty cuſtoms, eſtabliſhed by the King's grant, or long poſſeſſion, for repairing and upholding theſe ports: which therein differ from creiks and ſtations, which are natural; but ports are builded artificially, and need frequent reparation.

LXII. Juriſdiction and courts are comprehended in barony, in ſo far as concerns civil juriſdiction and blood-wits, or leſſer crimes, but will not reach to capital puniſhment, unleſs the ſame be expreſſed, as it uſes to be when the privilege of pit and gallows are expreſſed, or out-fang and in-fang thief, which ſeems to extend to the puniſhing of no more crimes but theft; and thoſe who have only in-fang theft, can only puniſh thieves taken in the fact. And tho' courts be expreſſed, they will extend to nothing criminal, no not to blood-wits, unleſs theſe be expreſſed; but only to civil debates requiſite for the proprietar, as to determine differences among his tenants, neighbourhood, multures, and ſmaller matters; or to conſtitute a baillie, who may judge betwixt the proprietar and his tenants, as to his rents duties and ſervices; and alſo may determine differences among his tenants. But all juriſdiction is cumulative with, and not excluſive of the ſuperior's juriſdiction, ſo that there is place of prevention. The firſt attacher, if he proceed, is preferred: and if the ſuperior and vaſſal attach together, the ſuperior is preferred, unleſs cuſtom or preſcription have excluded the ſuperior, which ordinarily takes place.

LXIII. The courts of vaſſals, tho' they be barons, and have the privilege of capital puniſhment, are not of the ſame extent and importance, as the ſentence of the judges ordinary of the kingdom; ſuch as Sheriffs, Stewarts, Baillies of royalty, regality and burghs. For *firſt*, the extent of their juriſdiction is not ſo ample. *Secondly*, The juriſdiction of all barons and freeholders, was of old ſubordinate to the Sheriffs and other judges ordinary, within whoſe juriſdiction the lands lay, *Parl.* 1503, *cap.* 95. And then there was place for falſing of doom, or appeal to the ſheriff-court, who was to warn the parties upon fifteen days, and make the ſuiters of the ſheriffdom ward thereupon. Whereby it appears, that the free-holders of the King, who owed ſuit to the ſheriff-court, at leaſt an inqueſt of them, were to concur with the Sheriff in diſcuſſing the appeal from the baron or free-holder: but now theſe appeals, or falſing of dooms from any court to another, have been antiquated, and wholly in deſuetude ſince the introduction of advocations, which is a far more excellent remedy; for thereby cauſes are not ſtopped at the choice or humour of parties: but the reaſons of advocation are ſpecially conſidered by the Lords, whether they be relevant, and have ſuch inſtructions as can be expected before diſcuſſing; and the ſubjects are further ſecured by the late act of Parliament [ee], that poinding cannot proceed without a charge be given and expired, which in all decreets, proceeding upon citation, requires fifteen days: in which addreſs may be made to the Lords. *Thirdly*, Decreets of barons have no execution by horning, which goeth of courſe upon the decreets, precepts and executions of other judges ordinary; ſo that all the execution upon their ſentences, is only poinding, or corporal puniſhment. As to which, if there be any proceſs for capital puniſhment, the Lords will very eaſily grant advocation, as they do advocate cauſes from inferior judges, not only upon incompetency, but upon intricacy and importance: ſo there being nothing more important than the life of man, they would eaſily advocate ſuch proceſs, wherein barons ſhould not proceed ſummarily to execution. But both they and other inferior judges ordinary, ſhould after ſentence at leaſt abide terms of law by the ſpace of fifteen days, that the Lords may give remedy by advocation, or ſuſpenſion of execution *: for tho' the Lords have not criminal juriſ-

* By act 11*mo Geo.* I. *c.* 26. no ſentence of any court to the ſouth of the river *Forth*, importing capital or corporal puniſhment, can be executed within 30 days after it is pronounced, and to the north of the *Forth* within 40 days. By act 3*tio Geo.* II. *c.* 32. corporal puniſhments, leſs than death or demembration, may be inflicted 8 days after ſentence to the ſouth of the *Forth*, and after 12 days beyond the *Forth*.

[ee] Act 4. P. 1669.

diction they do ordinarily advocate, and by the ſame reaſon may ſuſpend criminal proceſs, till the King's pleaſure be known; but they ordinarily advocate, to the effect the ſame may be remitted to competent and unſuſpect judges; ſo that if there were any doubtfulneſs in the caſe, the Lords would remit the cauſe to the juſtices. *Fourthly*, The courts of barons or free-holders are not courts of record, in which writs uſe to be regiſtrate.

LXIV. As the courts of barons and free-holders have theſe reſtrictions more than the inferior judges, ſo they have this advantage ordinarily, that all the profits and iſſues of their courts belong to themſelves; whereas ſheriffs, ſtewarts and bailies of royalty are countable to the King, ſeeing theſe are the King's courts: but bailies of regality are not countable; becauſe, tho' they be the King's courts, yet the King hath gifted the profits of the court by the erection of the regality. If then an infeftment contain courts, the profits thereof are carried therewith, tho' not expreſſed; but ordinarily they bear *cum curiis earumque exitibus*. And therefore the amerciaments of courts, or their other iſſues, or their privilege on the breakers of arreſtments, looſing their tacks to their maſters within their baronies, are not comprehended within publick confiſcations reſerved to the King.

LXV. Fortalices are alſo *inter regalia*, and are not carried by the fee, unleſs expreſſed, or at leaſt the lands be erected in a barony. By Fortalices are underſtood, all ſtrengths built for publick defence; whether that appear by common fame or reputation, ſuch as all the King's caſtles, whereof many are now in private hands, as proprietars, or heritable keepers thereof, or conſtables of the ſame; ſuch are the caſtles of *Dunſtafnage*, *Carrick*, *Skipneſs*, and others belonging to the Earl of *Argyle*; the conſtabulary of *Forfar*, belonging to the Earl of *Strathmore*; the conſtabulary of *Dundee*, *&c.* And when theſe caſtles are diſponed, either in property or cuſtody, the infeftments thereof carry therewith, not only the bounds of the caſtle, but the dependencies thereof, as gardens, orchards, parks, meadows, and other ground poſſeſſed by the King or keeper, for the uſe of the caſtle, and all rents, annuities, juriſdictions and privileges thereunto belonging; which may be inſtructed by their charters, their court-books, or other writs or inſtruments, and even by witneſſes, proving long poſſeſſion: ſo, tho' an infeftment of conſtabulary *bore* only in general, *officium conſtabularii cum feodis et divoriis ejuſdem*, yet it was found to extend to the proclaiming and riding of fairs, anterior to the conſtitution of the office, and exercing criminal juriſdiction in the town, where the fairs were held, during theſe fairs, but not to extend to other fairs recently granted by the King, or to any juriſdiction at other times, *July* 18. 1676, *Earl of Kinghorn*. The like was done in the proceſs betwixt *Lord Hattoun and the Town of Dundee*, *Dec.* 9. 1679, wherein multitudes of witneſſes were examined upon either part. And the emoluments, privileges, and juriſdiction of the conſtabulary, were decerned according to the probation; and particularly, twenty ſhillings Sterling yearly, for which the Town of *Dundee* counted in Exchequer, as belonging to the conſtable, which was found to belong to the office, albeit there was a diſcharge thereof granted to the Town by *Scrimzour*, conſtable of *Dundee*, which was not found effectual againſt Lord *Hattoun*, his ſingular ſucceſſor in the office, by appryſing.

LXVI. The caſe is more doubtful as to other fortalices, which are not reputed to have been the King's caſtles. *Craig*'s opinion is, [f] that all ſtrong holds are preſumed to have been built for publick defence, and not for private ſafety: wherein *turris pinnata* is comprehended, having turrets or rounds upon the angles: from whence ſhot may be directed alongſt all the walls. And therefore much more may caſtles with bartizens or bands, that is, ſtrong and high walls ſurrounding the caſtle: or if the caſtle be built upon a place naturally ſtrong, which may give ſuſpicion to the King to be an occaſion of rebellion, and not to be patent and acceſſible

[f] *Craig* II. 8. 3.

acceſſible at his pleaſure; and moſt of all, if there were regular fortifications of ſtone or earth: certainly ſuch fortreſſes or fortifications, whereby places are made of that ſtrength, which is accuſtomed to ſecure againſt publick enemies in war, may not be built without the King's warrant; and if otherwiſe built, may be demoliſhed; and the builder puniſhed: but long poſſeſſion preſumes a warrant. And as ſuch fortalices may be preſumed to have been at firſt the King's, from the very inſpection of the fortalice, and its proper uſe; ſo long poſſeſſion may take off that preſumption, and that they have been built mainly for private uſe in times of trouble, with the King's conſent. But we need not inſiſt in theſe queſtions, ſeeing towers and fortalices do now paſs in courſe in charters: Yet, tho' theſe were expreſſed, if it appear the fortreſs hath belonged to the King, and can be comprehended in the annexed property, the right of them will only reſolve into an heritable keeping: ſo that the King in time of war or inſurrections, may make uſe of ſuch ſtrong holds, and put garriſons therein, ſeeing keeping doth not exclude the King's own neceſſary uſe: neither will the expreſſing of fortalices generally, impower the vaſſal to build ſuch ſtrengths as are proper for publick war; becauſe the clauſe can only import ſuch fortalices as then were built. But I ſee no ground to extend fortalices to all houſes, with battlements, or with turrets, or rounds, which can only infer private ſafety againſt robbers, plunderers, or flying parties, but nothing proper for a ſiege, or publick defence of a kingdom: and therefore theſe may paſs as houſes or pertinents. And as to that ground *Craig* adduces, That it is treaſon to hold any fortalice againſt the King, or to deny him, or thoſe commiſſioned by him, acceſs, by armed force: and yet delivery of any other private right may be refuſed to the King without hazard; whence he inferreth, that the King muſt have greater right and intereſt in all ſuch fortalices than in other things: this conſequence is not good; for that which infers treaſon, is the holding out of the houſe, and denying acceſs to the King by armed force, which will be treaſonable in any houſe, whether it have battlements or turrets or not; but cannot infer that all houſes with battlements or turrets, were built for publick defence, and did once belong to the King; which recent cuſtom doth further clear, there being nothing more ordinary, than to build houſes with turrets or rounds upon the angles, without warrant, quarrel, or ſuſpicion; theſe being rather for ornament than for ſtrength.

LXVII. Foreſts are likewiſe *inter regalia*, being places deſtinate for deer, for the King's uſe and pleaſure in hunting, which cannot be extended generally to woods, but only to ſuch where deer have been kept: for certainly woods are *partes fundi privati*, and are not *inter regalia*, in any nation, but foreſts for keeping of deer remain *inter regalia*, altho' the wood ſhould fail: and where-ever deer are kept as proper, and others debarred from hunting there, it is preſumed to have been a foreſt proper to the King. And tho' the lands being *in baronia*, may carry the privilege and office of foreſtry, which gives the baron right to hunt, kill, and make uſe of the deer: yet he will be but held as keeper or foreſter, which will not exclude the King to hunt and kill the deer for his own proper uſe; for the property of the foreſt will never be underſtood, if it be not very expreſsly granted.

Foreſts have great privileges, and peculiar cuſtoms; for whereas no man is obliged to herd his cattle off other mens ground or corns, or to be anſwerable for the ſkaith they do, longer than in hayning-time, while the corns are upon the ground: ſo if any man have a mind to keep his neighbour's goods off his ground, he may do it; but he muſt herd his ground, and may turn off his neighbour's goods without wronging them, but *could* not put them in poynd-fold, before the act of *Parl.* 1686, *cap.* 11. appointing winter-herding; yet generally if any man's goods be found in foreſts, they become eſcheat, and are confiſcated two thirds to the King, and one third to the foreſter: and if any baron or landed-man, have hained woods, or foreſts of their own, they may eſcheat all goods that *are* found therein to their own uſe, *Parl.* 1535, *cap.* 12.; where, private

vate foreſts of ſubjects are only underſtood, ſuch as are incloſed with a ſufficient dyke: for the words of the ſtatute bear, *Hained woods or foreſts*, which cannot be hained without incloſure; but the King's foreſts are large tracts of ground, which neither have been, nor can be incloſed: and therefore all the neighbouring heritors and poſſeſſors, muſt either herd their goods off theſe foreſts, or loſe them. Upon this account it was, that the King having by a ſignature under his hand, granted a foreſtry to the Laird of *Faſcally*, the Exchequer, before paſſing thereof, deſired the Lords of Seſſion to conſider and report what by law was the privilege, conveniency, or inconveniency of foreſts: and they having heard the obtainer of the foreſt, and the neighbouring heritors, did declare the privilege of a foreſt to be as aforeſaid, *June* 24. 1680, Marquis of *Athol*. Whereupon the exchequer did repreſent to the King the inconveniency to grant new foreſts. Of old the comptroller had the inſpection of the King's parks and foreſts; and it was lawful to the comptroller, or any having the King's warrant, to intromit with all goods in the King's foreſts, not put in by the comptroller and thoſe having power from him, and to apply the whole to the King's uſe, *Parl.* 1592, *cap.* 130. *Parl.* 1584, *cap.* 214. And by the former ſtatute, *Parl.* 1535, *cap.* 12. the foreſter or keeper is prohibited to put in the foreſt any cattle belonging to himſelf: ſo that if the keeper firſt ſeize upon goods in the foreſt, he hath the third; but if the comptroller, or thoſe having warrant from the King, do firſt ſeize, the keeper hath no ſhare. And there are many more cuſtoms and privileges of the King's foreſts and chaſes in *England*, where the foreſter or keeper hath only the branches of trees, and the bark thereof, and ſuch as are fallen or decayed: and as *Skeen* obſerves, that he may take a tree as high as his head; but now our heritable keepers have much more privilege, and may make uſe of the wood and deer, ſo as not to deſtroy either, and with a reſervation of both for the King's proper uſe.

LXVIII. The hunting or killing of deer ſeems to be *inter regalia* with us, except thoſe who have them within proper incloſures; for otherwiſe the King's foreſt having no incloſure, the deer by ſtraying abroad, would eaſily be deſtroyed; and therefore, tho' every man may hunt them off his ground, by which they will be forced back to ſome foreſt, yet they may not kill them.

LXIX. Salmon-fiſhing is alſo *inter regalia*, and therefore paſſeth not ordinarily as pertinent, and ought to be expreſſed in the infeftment; yet in ſome caſes ſalmon-fiſhing hath been found conſtituted without ſpecial expreſſion, but only by the common clauſe, *cum piſcationibus*, and long poſſeſſion, *June* 29. 1593, *Leſly* of *Creik*; in which caſe it was found, that ſalmon-fiſhing is only *inter regalia*, as it is a caſuality *fluminis publici*, ſuch as are navigable rivers; wherein there is a common uſe of paſſage and tranſportation; *ſee alſo March* 26. 1628, *Maxwel*: in like manner, where lands are erected into a barony, or any other dignity, ſalmon-fiſhing may be carried by the common clauſe, *cum piſcationibus*; as when it bears fiſhing in ſalt and freſh water, tho' without mention of ſalmon-fiſhing, *Hope, fiſhing, L. of Glenurchy contra Campbel.* So an infeftment to a burgh-royal, bearing, *cum piſcationibus et piſcariis*, with immemorial poſſeſſion, was found to give them right to a ſalmon-fiſhing and cruives, tho' none of them were expreſſed, *Jan.* 26. 1665, heritors of *Don*; *Jan.* 13. 1680, *Brown* of *Nuntoun*. It was alſo found conſtitute by the infeftment of a ſheriff-ſhip, and forty years poſſeſſion *of three days fiſhing yearly*, tho' the infeftments bore only emoluments in general, *Dec.* 13. 1677, E. of *Murray*. It was alſo found conſtitute by a Biſhop's charter of lands, *cum piſcariis*, bearing a reddendo of ſalmon, tho' the Biſhop's right from the King was not produced, but preſumed, and being a dignity, perfected by long poſſeſſion of his vaſſal, *Jan.* 13. 1680, *Brown* of *Nuntoun*. And likewiſe long poſſeſſion by the ſpace of 40 years, was found to give right to a ſalmon-fiſhing upon both ſides of the water, and drawing the ſame upon both ſides, tho' the infeftment bore, but fiſhing upon one ſide, *Hope, fiſhing, L. Monymuſk contra Forbes of Barns.* So a clauſe *cum piſcationibus* was found to be a title

title for preſcription *in baronia*, and that forty years uninterrupted poſſeſſion conſtitutes the right of ſalmon-fiſhing, *Feb.* 7. 1672, *Fullerton*. It is more dubious what the meaning of the clauſe, *cum piſcationibus* ſimply, or of fiſhing in ſalt water, can import, ſeeing there are common freedoms of every nation to fiſh in the ſea, or in brooks or rivers for common fiſhes; and therefore needs no ſpecial conceſſion from the King or other ſuperior; but the uſe thereof may be firſt, that it may be the title or foundation of preſcription of ſalmon-fiſhing, not only in freſh water, but in the ſea, at the water-mouth where they are frequently taken: and alſo, that in other fiſhings, if a preſcription run of interrupting and hindering others to fiſh whatſoever ſort of fiſh, it will conſtitute a property thereof, which could not conſiſt without this clauſe or the like, as a title; neither could it be comprehended as *annexis*, or *connexis* of lands, or as a ſervitude, being a diſtinct right, having ſo little reſpect to land.

LXX. There is a ſpecial way of fiſhing by cruives or zairs, both in freſh water and ſalt, all which cruives are abſolutely prohibited to be ſet within rivers, in ſo far as the tide flows, as being deſtructive to the frey of all fiſhes, *Parl.* 1424, *cap.* 11. renewed *Parl.* 1477, *cap.* 73. *Parl.* 1581, *cap.* 111. And as to other cruives in freſh water, they are alſo prohibited by the ſaid laſt ſtatute, except ſuch as are infeft in cruives, lynes, or loups, within freſh water, who are to enjoy the ſame according to their rights, keeping Saturday's ſlop, and the due diſtance betwixt the hecks, the diſtance of which hecks by the ſaid act of Parliament 1477, *cap.* 73. is expreſſed to be three inches conform to the ſtatute made by King *David*; but the act of Parliament 1489, *cap.* 15. expreſſeth the diſtance to be five inches, conform to King *David*'s act; and in both theſe ſtatutes, beſides the diſtance aforeſaid, Saturday's ſlop is appointed, and likewiſe that the mid-ſtream, by the ſpace of five foot, be alway free; and that no cruives be made uſe of in forbidden time of year, when ſalmon may not be taken, which is declared to be from the feaſt of the aſſumption of the virgin *Mary*, (13th *Aug.*) unto the feaſt of St. *Andrews* in winter, (30th *Nov.*) *Parl.* 1424, *cap.* 35.

Few debates have occurred concerning cruives, notwithſtanding the great notice thereof by ſo many of our Kings; one did lately occur, and was fully debated *in præſentia*, betwixt the heritors of the water of *Don* and the town of *Aberdeen*, which was mainly decided on *January* 26. 1665. The caſe was thus: the town of *Aberdeen* having changed a cruive-dyke to another place within their own bounds, and built the ſame there again of new; whereupon the heritors, who had right to the ſalmon-fiſhing upon the water of *Don*, above theſe cruives, raiſed a declarator againſt them, wherein, after large diſputes concerning Saturday's ſlop, and the mid-ſtream, and the diſtance of the hecks, and the height of the cruive-dyke, and whether it ought to be built ſlopping or perpendicular, and whether it might be changed to the prejudice of the heritors; the Lords found, that the town of *Aberdeen* might change the cruive-dyke, keeping it within their own bounds, and having no more dykes but one; but found, that ſeeing they had a cruive paſt memory without interruption, which had determined the height and frame thereof, they found that the new dyke behoved to be built in all things conform to the old, and with no more detriment to the ſaids heritors fiſhing, than was formerly before the water had pooled at the old dyke; and ſo it was not determined how high a cruive-dyke might be, or whether it behoved to be ſlopping or not, where preſcription had not determined it, which is very ſeldom: it was alſo found, that the diſtance of the hecks ought to be three inches, conform to the ſaid act of King *James* III. *Parl.* 1477, *cap.* 73. and not five inches, according to the act of King *James* IV. *Parl.* 1489, *cap.* 15. which mentions five inches, which the Lords found to be a miſtake in the tranſcribing, or printing of the act of Parliament, in reſpect that both this and the former act relates to the ſtatute of King *David* as the pattern thereof, which

mentions but three inches *, and that hecks of five inches wide will be of no uſe, nor hold in any ſalmon; the Lords alſo found, that the Saturday's ſlop behoved to be obſerved, not only in one cruive, but in all the cruives of the dyke, and that by pulling up the hecks of each cruive by the breadth of an ell, to continue from Saturday at ſix o'clock, till Monday at ſun-riſing; and the Lords found, that part of the ſtatute concerning the mid-ſtream, to be indeed diſtinct from Saturday's ſlop; but to be in deſuetude, in all the cruives of the kingdom, and that it is not repeated by the act of King *James* VI. *Parl.* 1581, *cap.* 111. and therefore found the ſame not obligatory, notwithſtanding that in the late act of Parliament 1661, there is an act ratifying all the old ſtatutes concerning cruives, which was alledged to revive that point of the mid-ſteam, which the Lords did not reſpect as a general law, albeit the confirmation did run in theſe terms; becauſe it paſt the Parliament without notice, as an ordinary confirmation, at the impetration of theſe purſuers, and did not paſs the articles, and was not appointed to be printed as a publick law, *July* 29. 1665, *inter eaſdem partes*.

LXXI. Mills are not carried as part and pertinent, becauſe they are eſteemed as *ſeparata tenementa*, requiring a ſpecial ſeiſin, unleſs the lands be *in baronia*; for then infeftment in the land carries the mills thereon: yet a mill being built upon a liferenter's land, after her infeftment, bearing *cum molendinis*, was found to belong to the relict, tho' mills was not in the diſpoſitive clauſe; nor was ſhe in conjunct-fee of a barony; but ſhe was not found to have right to the aſtricted multures of any lands, but of her liferent lands, *February* 16. 1666, Lady *Otter*.

LXXII. The privilege of brewing being deſigned for publick uſe, for common hoſtlaries, the inſpection thereof is committed to the judges ordinary, magiſtrates of burghs, Sheriffs, Baillies and Barons, who are appointed to ſettle hoſtlaries in convenient places, and to viſit their meaſures if they be ſufficient, and the goodneſs of their ale, *Parl.* 1535, *cap.* 18. And the ſaid magiſtrates to burgh or landward, are ordained to ſee reaſonable prices taken for meat and drink in hoſtlaries, with power to deprive them of their privilege, if they tranſgreſs; ſo that a barony carries that privilege, tho' not expreſſed; but infeftments of other tenements carry it not, unleſs it be expreſsly granted by the King immediately, or by progreſs; that is, that all the ſuperiors interveening betwixt and the King, have that privilege, *July* 25. 1626, *Stuart*; but *in poſſeſſorio* the proprietar's infeftment bearing *cum brueriis*, will be ſufficient, and preſume the progreſs, unleſs that privilege be craved to be reduced, wherein the ſuperiors muſt be called **.

LXXIII. All other intereſts of fees are carried as part and pertinent, tho' they be not expreſſed; and albeit woods and lochs uſe oft to be expreſſed, yet they are comprehended under parts and pertinents; and therefore the maſter of the ground hath not only right to the water in lochs, but to the ground thereof, and may drain the ſame, unleſs ſervitudes be fixed to water-gangs of mills, or other works, and the ground of the loch, and all that is upon it, or under it, is a part of the fee: but if the loch be not wholly within the fee, but partly within or adjacent to the fee of another, then, unleſs the loch be expreſſed, it will be divided among the fiars whoſe lands front thereupon.

The parts of fees are only expreſſed in bounding-charters, but in all others the parts are only known by the common reputation of the neighbourhood, what they comprehend under the deſignations expreſſed in the infeftments, and by poſſeſſion, as part and pertinent of the lands deſigned in the infeftment, whether they have but one common deſignation, as ſuch a barony or tenement;

* The ſtatute of King *David* is not extant.

** It was found, that a feuar might brew, or uſe any other manufactory, tho' not infeft *cum brueriis*, *Dec.* 24. 1681, Sir *Patrick Niſbet*.

nement; or if there be an enumeration of their parts, by diſtinct names, which doth not exclude other parts, tho' belonging to none of the parts enumerated: there is only this difference, that expreſs infeftments are preferable to thoſe, which alledge but part and pertinent, much more if it be alledged to be *ſeparatum tenementum*, requiring a diſtinct infeftment; and yet preſcription, as part and pertinent, will exclude an infeftment as a ſeparate tenement: but where there are march-ſtones ſet, it is a great convenience to preſerve peaceable poſſeſſion; and tho' it cannot be proved when theſe marches were ſet, yet their being reputed as march-ſtones, will be ſufficient to defend at any time, within preſcription: but lands are oft-times ſo large, comprehending muirs and mountains, that march-ſtones cannot be ſet; for remeid whereof, the Lords of Seſſion, by an act of ſederunt, 1580, ratified in *Parl.* 1587, *cap.* 42. "ordained all moleſtation "in property or commonty, *in poſſeſſorio*, to be before Sheriffs, Baillies of regality, "and other inferior ordinary judges, where the lands lie, and for that effect, the "Lords will direct letters of cognition to proceed upon fifteen days warning, by "an inqueſt of perſons who beſt know the matter, the moſt part thereof being "landed men, having at leaſt four ploughs of land, or three hundred merks of "irredeemable rent, and the reſt ſubſtantious famous yeamen of the ſame pariſh; "and failing thereof, of the pariſh neareſt adjacent; and if both parties have cog-"nitions raiſed, before litiſconteſtation on either, the half of the aſſizers ſhall be "taken of theſe ſummoned for either party, or in caſe there be not a ſufficient "number of them habile, the judge ſhall ſupply the ſame, and the odd man to be "choſen by lot: which inqueſt ſhall viſit the ground, and ſhall return their ver-"dict upon oath, both upon the claims and exceptions of the parties: and in caſe "the judge ordinary be ſuſpect, or that the lands lie in divers juriſdictions, the Lords "are to appoint unſuſpect judges, to be paſt under the quarter ſeal." There are only excepted the actions belonging to the members of the college of juſtice, which are to be before the Lords; yet the Lords are accuſtomed to grant commiſſions to ſome of their own number, where queſtions ariſe concerning the parts or marches of tenements, to viſit the ground, and there to receive witneſſes, *hinc inde*, both as to poſſeſſion and interruption, which the Lords do adviſe and determine without an inqueſt.

Parts of tenements *in poſſeſſorio*, are ſuſtained by the preſent peaceable poſſeſſion for ſome time; for ſeven years peaceable poſſeſſion will ſuſtain the right of the whole till reduction: and forty years poſſeſſion as part and pertinent, is ſufficient *in petitorio*, for the point of right, and will exclude an infeftment expreſs, yea tho' it be an infeftment as *diſtinctum tenementum*, *Nov.* 17. 1671, *Young*; but will not extend to bounded infeftments, which have no title to preſcribe any thing without the bounds. If there be interruptions, and that either party hath had ſome poſſeſſion, the expreſs infeftment will be preferable, and any lawful interruption will preſerve an infeftment of a ſeparate tenement; but if neither party be expreſsly infeft in the lands in queſtion, interruption by either party will not exclude preſcription, becauſe there is not a prior ſpecial right valid of itſelf, without poſſeſſion; and therefore, if both parties have had mutual or promiſcuous poſſeſſion, each poſſeſſing when they could, and turning off the other, that part of the land ſo poſſeſſed, will continue as a promiſcuous commonty, which frequently falls out about the marches of large tenements, and was ſo determined betwixt the Lord *Strathoord* and Sir *Thomas Stuart* of *Gairntully* *; if neither party have an expreſs or ſeveral infeftment, diſcontiguity will not exclude part and pertinent, tho', if the queſtion be with him to whom the land is contiguous, leſs probation will prefer him. *Craig* [g] relates a caſe in his time betwixt the Earl of *Angus* and *Home* of *Polwart*, where diſcontiguity did not exclude part and pertinent, not being known as a diſtinct tenement.

Pertinents comprehend all the natural fruits; for corns are accounted as moveable, and as no part of the ground, as hath been ſhewed [gg]. And alſo all ſervitudes;

* This deciſion not found.

[g] *Craig* II. 3. 24.

[gg] Above II. 1. 2.

tudes; ſo a ſervitude of paſturage, in another heritor's wood, was ſuſtained as a pertinent by long poſſeſſion, *Spotiſ. Jervitude, L. of Knockdolian contra tenants of Partick.* And part and pertinent being expreſſed in a minute of ſale, it was found to carry common paſturage in a muir, which was a commonty to a barony, whereof the lands ſold was a part, *Feb.* 14. 1668, *Borthwick.* And in the caſe betwixt the Laird of *Haining* and the town of *Selkirk*, decided *Feb.* 15. 1668, a barony of the King's *cum pertinentibus et cum paſcuis et paſturis*, was found to carry common paſturage in the muir of the barony, and that the laſt forty years poſſeſſion did preſume the like poſſeſſion in the feuars from the obtaining their feus; and that interruptions by the town, whoſe infeftment was but general, *cum communiis*, did not exclude the paſturage of the feuars, who had alſo made interruptions againſt the town.

LXXIV. *Craig* [h] debates this queſtion, whether wood and coal be parts of the ground, or only pertinent as fruit thereof; for if theſe be parts of the ground, conjunct-fiars or liferenters will have no ſhare thereof, nor donatars of ward, non-entry, or liferent-eſcheat; ſo that the queſtion is very important, wherein he relates two deciſions, one betwixt the Lord *Seatoun* and his mother, who being ſerved to a terce, was found to have right to the third of a coal-work, conſtantly going for ſale in the defunct's time; and another betwixt *Ramſay* of *Dalhouſie* and *Mary Ballantine* his predeceſſor's relict, in relation to a wood which the fiar was found to have the only right to ſell; and his opinion is "that both are parts of "the fee, and that no conjunct-fiar, tercer, ſuperior, or his donatar, hath any "intereſt therein, as being no part of the fruits;" he purſues the ſame queſtion as to wadſetters, who are infeft in fee, but under reverſion, to whom he attributes a greater intereſt, that they may make uſe of the coal as their author did, yet only for their proper uſes: and as to an appriſer, he relates [i] the caſe of Sir *James Hamilton*, who having appriſed the eſtate of *Camnethen*, and cut down all the woods, he was found to have no right to the woods during the legal; for then the appriſing was not ſatisfiable by intromiſſion: ſo that during the legal, they had nothing but the fruits, for which they were not countable: but now the caſe is altered by the act of Parliament 1621, *cap.* 6. whereby the appriſer's intromiſſion, in ſo far as exceeds his annual, is imputed to the principal ſum; and therefore he may continue in the profit of coals and woods, as his debtor was accuſtomed.

But as to liferenters by terce, by diſtinct liferent, or by proviſion, where the huſband himſelf did not preſerve the wood to be ſold together, as *ſylva cædua*, but cut parts of it for his own and his tenants uſe, for reparation of their houſes, liferenters and tercers may do the ſame. And where woods are divided in ſo many haggs, that they yield a yearly profit, in that caſe the heritor hath rather uſed them as fruits than as parts; ſo that liferenters, tercers and donatars, may claim the ſame: yea, if a coal be a conſtant going coal, without apparent hazard of exhauſting, it is like conjunct-fiars, tercers, or donatars will not be excluded therefrom, not exceeding the meaſure and method accuſtomed by the fiar: but otherwiſe coal is to be conſidered only as a part, and is carried as a part, tho' not expreſſed, nor in barony; as *Craig* in the fore-cited place obſerveth, to have been decided betwixt the Sheriff of *Ayr* and *Chambers* of *Gadgirth*. And a party firſt infeft in land with the pertinents, without mention of coal, was preferred to an expreſs infeftment only of the coalheughs of that land, *Jan.* 30. 1662, Lord *Burley* [k].

LXXV. Let us now expreſs the meaning of the ſpecialities, ordinarily inſert in infeftments; as, *cum domibus, ædificiis, &c.* comprehends all houſes and buildings, as dykes of yards or parks, which tho' dry of uncemented ſtone, cannot be altered by the ſeller, after the vendition. And there is a new privilege for encouragement

[h] *Craig* II. 8. 17——20. [i] *Craig* II. 8. 27. [k] See below II. 4. 35.

couragement of incloſing, that where the incloſure falls to be upon the march of any other inheritance, the other heritor, tho' making no incloſure, ſhall be at equal expence of that part of the dyke which marcheth both, *Parl.* 1661, *cap.* 41. which was ſuſtained, tho' the march was a ſtripe of water, being ſometimes dry, *July* 21. 1669, E. of *Crawfurd*. But how far this clauſe will be extended to fortalices, hath been now ſhown. And tho' charters do frequently bear manor-places, yet both is carried under the name of part and pertinent. As to the clauſe *cum molendinis, multuris et eorum ſequelis*, mills have been ſpoken to already § 71. But as to multures, they are to be conſidered among ſervitudes real [kk].

LXXVI. *Cum aucupationibus, venationibus, piſcationibus*, ſignify privilege to kill fowls, fiſhes, and wild beaſts, upon the fiar's own ground, from which he may debar others indirectly, by hindering them to come upon his ground, except upon the publick high-ways, (or ſuch private ways only in favour of thoſe to whom they are granted,) which is ſeldom done, but ordinarily permitted; yet if lawborrows were uſed, they might infer a contravention; but by this clauſe the vaſſal hath no property in the wild beaſts, fowls or fiſhes, which belong to none, but become proper to thoſe who take them, except fiſhes incloſed in ponds, deer in parks, or fowls in vollaries; for theſe are proper, only by excluding of others to come upon their ground, the vaſſal having the ſole occaſion of taking ſuch as are found there: neither doth this clauſe extend generally, for thereby ſwan or deer may not at all be killed or taken, nor ſalmon, or their fry, unleſs that power be expreſſed, or that the land be in a barony: nor can fowl or hares be taken in the time or manner prohibited by law; and albeit ſome do adject fiſhing in ſalt water, and in freſh, yet that imports nothing, no man being excluded from ſailing and fiſhing upon the ſea, which even in lochs and creiks is publick to all the kingdom or nation; albeit other nations may be excluded from fiſhing, ſo far as any bounds can be perceived in the ſea; for in ſo far kingdoms and nations have appropriated the ſea, and made it publick, peculiar to themſelves, as to fiſhing and profits thence ariſing, tho' paſſage cannot juſtly be denied upon the land, as upon the ſea, except to enemies: yet ſalmon-fiſhing in ſalt water and freſh, gives not only privileges within rivers, but at water-mouths in the ſea. And the words *cum petariis, turbariis, &c.* ſignifies the privilege of fewel, by peats and turfs in moſſes and muirs.

LXXVII. *Cuniculis, cunicularíis*, cunnings and cunningares, *Craig* [l] doubteth whether theſe may be made indifferently by all vaſſals, except a privilege be derived from the King, becauſe of the great damage the cunnings do to the neighbourhood: but there is with us no reſtraint, but upon the contrary, a command that every Lord and Laird make cunningaries, *Parl.* 1503, *cap.* 74.

LXXVIII. *Cum columbis, columbariis*, doves and dovecotes, tho' they are carried as pertinents, yet they are reſtrained by act of Parliament 1617, *cap.* 19. to ſuch as have ten chalders of victual in rent or teind within two miles of the dovecote, and theſe can build only one dovecote there. *Cum fabrilibus, braſſinis, &c.* are ſmiddies and kilns for making of malt. *Geniſtis, &c.* are whins or broom. *Sylvis, nemoribus, virgultis, lignis, &c.* are ſeveral kinds of woods or timber. And *cum lapidicinis, lapide & calce*, are all kinds of ſtone and quarries thereof.

As for courts and their iſſues, we have ſpoken thereto already § 64. and likewiſe of blood-wits.

LXXIX. *Cum libero introitu et exitu*, doth not only ſignify the paſſage by the high-ways, but ſuch other paſſages as are neceſſary and convenient for the fiar, thro' the ground of the ſuperior, or any other, where ways are not conſtitute by conceſſion or preſcription.

LXXX. *Herezelds* alſo being the beſt aught, as the beſt horſe, ox or cow of the tenant dying upon the ground, is introduced by cuſtom derived from the *Germans*, as the word of their language expreſſing the ſame, evidenceth; which ſignifieth

[kk] Below II. 7. 15. *et ſeq.*

[l] *Craig* II. 8. 22.

nifieth the gratuity left by the labourers of the ground to their maſter, and which is now due by cuſtom, whether left or not; and therefore, rather from cuſtom, than from the nature of the fee. And we have neither rule nor example for paying it by any, but by the labourers of the ground, ſo that tho' it be not expreſſed, it is not reſerved to the ſuperior, but belongs to the vaſſal, as *Skeen, voce Herezeld*, obſerveth; but whereas he ſeemeth to make a herezeld only due, by tenants poſſeſſing four oxen-gang of land, to their maſters going to the war, ſuch poor tenants poſſeſſing only four ox-gate of land or leſs, not being able by reaſon of poverty, to go in perſon with him; yet the conſtant cuſtom layeth herezelds moſt upon tenants poſſeſſing more lands, and generally upon all who are not cottars, (not paying immediately to the maſter, but to his tenant dwelling upon the ground) and there is no difference whether he be a mailer or farmer, and is only due at the tenant's death. So the herezeld was found due to the Lady liferenter, tho' the defunct had the room in ſteel-bow, *Hope, herezeld, Lady Tochrig contra Baird.* But not where the defunct tenant was warned and decerned to remove, *Hope, ibid. Callendar contra his tenants.* And *Craig* [m] obſerveth, that a herezeld being taken, the tenant's ſucceſſor is not to be removed for a year, and was ſo found, *March* 20. 1629. *Affleck.*

LXXXI. Steel-bow goods ſet with lands upon theſe terms, that the like number of goods ſhall be reſtored at the iſſue of the tack, do not paſs by diſpoſition of lands, as pertinents thereof, unleſs they were expreſſed, but do remain as moveables arreſtable, *Dec.* 4. 1638, Lady *Weſtmorland*; *Jan.* 28. 1642, *Dundaſs*: and ſo they fall under ſingle eſcheat, and cannot be taken from the tenant till his tack run out, *Dec.* 6. 1628, *Lawſon.*

TITLE IV.

Superiority and its Caſualities; where, of Non-entry, Relief, Compoſitions for Entries, Ward, Marriage, and Liferent-eſcheat, &c.

I. *The ſuperior's* dominium directum.

II. *How property is eſtabliſhed in the King.*

III. *Superiors may exerce all acts of property, except againſt their vaſſals.*

IV. *How the property coming in the perſon of the ſuperior, is eſtabliſhed.*

V. *Superiors cannot interpoſe one betwixt them and their vaſſals.*

VI. *How far ſuperiors need to inſtruct their title. Of ſub-vaſſals, and the confuſion thereby occaſioned.*

VII. *Superiors have perſonal action againſt intromitters with the rent of the land, for their* reddendo.

VIII. *They have alſo real action for the ſame, by poinding of the ground.*

IX. *Juriſdiction of ſuperiors.*

X. *Superiority carrieth to heirs and ſingular ſucceſſors, all bygone caſualities not ſeparated by gifts or decreets.*

XI. *Superiors of kirklands need not inſtruct a conſent to the ſurrender.*

XII. *Superiors muſt receive appriſers or adjudgers, or pay the debt* ſalvo jure ſuo.

XIII. *They muſt receive the King's donatar upon preſentation* gratis.

XIV. *They muſt receive ſub-vaſſals whom the immediate vaſſal refuſeth to enter.*

XV. *How far ſuperiors may extend gifts of their own ward againſt their vaſſals.*

XVI. *Superiors need not accept reſignation or confirmation, and if they do, it is* ſalvo jure ſuo.

XVII. *Superiority falling to more perſons, the eldeſt heir, or greateſt intereſt, only receives the vaſſals.*

XVIII. *Non-entry falls when infeftment is not renewed by every vaſſal's heir or ſingular ſucceſſor, or upon reſignation.*

XIX. *Non-entry*

[m] *Craig* II. 8. 32.

XIX. *Non-entry falls by reduction or nullity of infeftments or retours.*

XX. *Burgage falls not in non-entry, as to the burgh or particular persons.*

XXI. *The effect of the general declarator of non-entry.*

XXII. *The effect of non-entry, after citation in the general declarator.*

XXIII. *Exceptions against non-entry, as to the feu-duty or retoured mail.*

XXIV. *Exceptions against non-entry, as to the full rent.*

XXV. *Whether non-entry after ward requires declarator.*

XXVI. *Relief, the original thereof.*

XXVII. *The custom of* England *and* France *as to relief.*

XXVIII. *The quantity of relief with us.*

XXIX. *Relief, by what action recovered.*

XXX. *Whether relief is due tho' the heir be entered, if the fee be burdened with conjunct fee, or liferent.*

XXXI. *Relief in that case stops not the heir's seisin.*

XXXII. *Compositions for the entry of apprisers or adjudgers.*

XXXIII. *The original of ward.*

XXXIV. *The effect of ward as to the heir's person.*

XXXV. *The effect of ward as to the fee.*

XXXVI. *The restrictions of ward.*

XXXVII. *The avail of marriages of heirs.*

XXXVIII. Craig's *description of the avail of marriages.*

XXXIX. *The single avail is not penal, and ariseth from the nature of ward-holding, or by the investiture in feus* cum maritagio.

XL. *The avail of marriage is* debitum fundi, *and an adjudication thereon is preferable to all debts or deeds personal.*

XLI. *It doth not affect the heir personally, but only the fee.*

XLII. *The avail of marriages ariseth not from the want of the superior's consent to the marriage.*

XLIII. *The true cause of the avail of the marriage is not the superior's being tutor to the vassal's heir.*

XLIV. *The cause of the avail of the marriage is not for preventing the vassal to marry with the superior's enemies.*

XLV. *The true and adequate cause of the avail of marriage.*

XLVI. *The avail of the marriage at first was the tocher the vassal got.*

XLVII. *The single avail of marriage now is modified to two years free rent of the vassal's whole estate, and the double avail to three years or thereby, not compting the tocher.*

XLVIII. *Whether the vassal's heir may renounce the fee, to evite the avail of the marriage.*

XLIX. *There is one only avail due, tho' the vassal have many ward-holdings, and that to the King, if he be one of the superiors, or otherwise to the eldest superior, and he only is liable for the heir's maintenance.*

L. *Taxed marriage by the King excludes the avail to other superiors.*

LI. *The Prince hath no prerogative in the avail of marriage, but the King hath of the principality when there is no Prince.*

LII. *The King acquiring a superiority, not being annexed to the Crown, hath no prerogative.*

LIII. *Why there is no avail of marriage, if the apparent heir was marriageable, and married in his father's life, unless there be precipitation and fraud.*

LIV. *Whether the superior can claim more marriages than one by the death of one vassal.*

LV. *What if a major succeed as apparent heir, at what time of the heir's age the avail of his marriage may be declared in relation to the extent of his estate.*

LVI. *The termination of ward in men and women.*

LVII. *Whether the marriage falls by the death of the appriſer during the legal, or of the debtor.*

LVIII. *The double avail is not due, when either the heir or the perſon offered, is agreed in marriage with another.*

LIX. *The double avail is not due when a perſon is offered with diſparagement, and in what caſes that occurs.*

LX. *The formalities requiſite for obtaining the double avail, and the objections thence ariſing.*

LXI. *The riſe of liferent-eſcheat.*

LXII. *It extends to all kinds of liferents.*

LXIII. *Liferent of fees not having infeftment, or not owing fidelity to a ſubject, belongs to the King.*

LXIV. *Liferent-eſcheat of ſub-vaſſals, to whom they belong.*

LXV. *Liferent-eſcheat, how not excluded by voluntary infeftments.*

LXVI. *Liferent-eſcheat, how excluded by appriſing for debts anterior to the rebellion.—It is affected by all real burdens.*

LXVII. *Liferent-eſcheat extends not to burgage or mortification.*

LXVIII. *But extends to miniſters ſtipends.*

LXIX. *Liferent-eſcheat made effectual by declarator.*

HAVING now ſhown what is the intereſt of the vaſſal in the fee, it will be the more eaſy to find out what the ſuperior by his right of the ſuperiority retaineth; for what is proper to the fee, and is not diſponed to the vaſſal, is reſerved to the ſuperior, and it is either conſtitute as belonging to the ſuperior conſtantly, or caſually.

I. The conſtant right of the ſuperior ſtandeth mainly in theſe particulars; Firſt, ſuperiority itſelf is *dominium directum*, as the tenantry is but *dominium utile*, as before is ſhown, and therefore the ſuperior muſt be infeft as well as the vaſſal, and that in the lands *or* tenement itſelf, *ſimply* without mention of the ſuperiority, which followeth upon the conceſſion of the fee in tenantry, tho' ſometimes, through the ignorance of writers, infeftments bear expreſsly to be "of the ſupe-" riority *only*."

II. The ſovereign authority, as the common fountain of all rights of the ground, needs no infeftment, but hath his right founded *in jure communi*, and is not feudal but allodial; *yea, the King's right* jure coronæ *is a ſufficient title to lands, either in ſuperiority or property without ſeiſin, Spotiſ. non-entry, Sir Mungo Murray contra vaſſals*; *Durie, June* 25. 1629, *inter eoſdem*. And when the right of lands fall to the King, by the caſualities of his ſuperiority, as by forfeiture, recognition, baſtardy or laſt heir, if the lands be holden immediately of the King, they are *ipſo facto* conſolidate with the ſuperiority, and the declarators required thereanent, do not conſtitute, but declare the King's right, without prejudice of what is conſumed *bona fide*: but where they are not holden immediately of the King, the right thereof is perfected by gift and preſentation, whereby the immediate ſuperior is obliged to receive the donatar by infeftment, like to that of his former vaſſal; yet the King's right by *the* caſuality, tho' it be not perfected, is real and effectual againſt all ſingular ſucceſſors, whereby (deeds of treaſon and recognition being facts ordinarily proved by witneſſes) purchaſers cannot be ſecured by any regiſter; and therefore muſt ſecure themſelves by the King's confirmation, or *novo-damus*. But where the King ſucceeds in any fee, to a ſubject, as to property or ſuperiority, before he can alienate the ſame, he muſt be ſerved heir in ſpecial thereunto; ſo King *Charles* I. was ſerved heir to Queen *Anne* his mother in the lordſhip of *Dumfermling*, in which King *James* infeft her in fee, to her and her heirs, by a morning gift, the firſt day after his marriage with her; and *Charles* II. was ſerved heir to *Charles* Duke of *Lennox*, in the earldom of *Lennox*: in which ſervice, the Chancellor and fourteen of the Lords of Seſſion, were the inqueſt, the youngeſt Lord being left out, becauſe there could be no more but fifteen: but the King needs no infeftments upon ſuch retours; *but* if he acquire any lands holden immediately of himſelf, the inſtru-

ment

ment of reſignation muſt be regiſtrate; and if holden of a ſubject, there ariſeth no real right to a donatar till he be infeft upon the King's preſentation, and his ſeiſin regiſtrate, by both which the certainty of land-rights is preſerved.

III. Secondly, Superiority carries a right to all actions following the land, againſt any other than the vaſſal; for ſeeing ſuperiors are infeft in the lands, they can only be repelled from ſuch actions, by the rights granted to their vaſſals, but by no others; and ſo may remove poſſeſſors who can ſhow no right; this was found, tho' the ſuperior's infeftment bore him only to be infeft in the ſuperiority of the lands, *Nov.* 19. 1624, Laird of *Lagg*. Yet if an apparent heir produce his predeceſſor's right, it will defend him, except as to ward,or non-entry; or if a ſingular ſucceſſor, tho' not received, produce his author's right, it will have the like effect.

IV. If a ſuperior become fiar by ſucceſſion, or acquiſition, for eſtabliſhing the property in his perſon, he may either be infeft upon his own precept or the King's, *Nov.* 26. 1668, daughters of Mr. *Robert Morton*.

V. But a ſuperior cannot interpoſe one betwixt himſelf and his vaſſals, by infefting another in the lands to be holden of himſelf; for ſuch an infeftment was found null by exception, *Jan.* 30. 1671, *Douglaſs* of *Kelhead*: but ſuperiors muſt receive and infeft their ſub-vaſſals upon the refuſal, or incapacity of the vaſſal, and may at any time thereafter receive the immediate vaſſal, or his ſucceſſor, or another, if the immediate vaſſal's right be extinct, or acquired by the ſuperior; which is no unwarrantable interpoſition, *or* repelled as contrary to the nature of the feudal contract and right; it being (*only*) inconſiſtent that the ſuperior ſhould both give his ſuperiority to another, and claim it himſelf, *dans et retinens nihil dat*, and if that were allowed, interpoſed vaſſals might be infinitely multiplied, *Nov.* 26. 1672, E. of *Argyle*; in which caſe the late Marquis of *Argyle* being forfeited, *M'Leod*, who was *Argyle*'s vaſſal, was retoured and infeft in the lands, as holden immediately of the King, which did not hinder the King to interpoſe the Earl of *Argyle* as donatar to his father's forfeiture, ſeeing the King had done no deed to accept *M'Leod* as his immediate vaſſal, except that he was infeft by precepts out of the chancellary, paſſing of courſe.

VI. Superiors nor their donatars need not inſtruct the ſuperior's right; but the vaſſal muſt acknowledge it, or diſclaim him upon his peril; ſo it was found in the caſuality of a marriage, *Feb.* 25. 1662, *Arbuthnot*, which will not hold, if the right of ſuperiority be newly acquired, and no infeftment given to the vaſſal, or his predeceſſors by virtue thereof. The ſuperior's infeftment gives him intereſt to purſue reductions and improbations againſt all parties, even againſt his own vaſſals, who will be forced to produce their rights, under the certification, to be declared null, or falſe and feigned, tho', when they are produced, they may defend them °.

What hath not been allowed to the ſuperior, ſhould not be allowed to the vaſſal, which yet hath been frequently practiſed, *when* vaſſals make ſub-vaſſals without any different *reddendo*, but with the ſame *reddendo* by the ſub-vaſſal to the vaſſal, which is due by the vaſſal to his ſuperior, and that ſub-vaſſal doth frequently the like to his ſub-vaſſal, whereby there are a great many ſuperiors interpoſed between the firſt ſuperior and the proprietar, and thereby great confuſion is occaſioned, and much trouble and expence, when oft-times no more is intended than the tranſmiſſion of the property to be holden of the firſt ſuperior; as when lands are ſold, and an obligement granted for infefting the buyer, by charters from the ſeller *à ſe & de ſe*, the charter *à ſe* is of no effect till it be confirmed, and leſt another ſhould be firſt infeft upon a poſterior diſpoſition, the buyer infefts himſelf on the charter *de ſe*, and never inſiſts for a confirmation, but he or his ſells the ſame lands to another in the ſame way.

The cauſe of this confuſion is, that ſuperiors are not obliged to receive the ſingular ſucceſſors of their vaſſals, even tho' they ſhould offer a year's rent for their

° See below, § 21. 2. *h. t.*

entry: which privilege of ſuperiors, by law and practice, is now evacuated, becauſe ſuperiors may be compelled to receive ſtrangers upon appriſing or adjudication for a year's rent; yea, if the vaſſal diſpone the fee, and oblige himſelf to infeft, upon that obligement an adjudication is competent againſt the (*vaſſal, ſo as to oblige the*) ſuperior to grant the infeftment; which, tho' frequently practiſed, yet there is no expreſs law allowing the ſuperior a year's rent; there was indeed a law made for a year's rent, upon adjudication, when apparent heirs did renounce to be heirs, as well as upon appriſings, which doth not bear adjudications for implement of diſpoſitions [p].

Seeing then ſuperiors may be compelled to receive ſingular ſucceſſors by the courſe of law, it were far more convenient, both for ſuperiors and vaſſals, that a law were made, that upon the vaſſal's diſpoſition, letters of horning might be direct againſt the ſuperior to receive him for a year's rent of the price, upon production of the diſpoſition, whereby none would take ſuch ſubaltern infeftments *; and that if the diſpoſition were redeemable as a wadſet or annualrent, that the ſuperior ſhould only have the half of *a year's* annualrent of the ſum, becauſe his vaſſal is not totally excluded, and the other half whenſoever the reverſion became extinct.

It might alſo be ſtatuted with greater advantage to real rights, that none ſhould be capable to give ſubaltern infeftments, but the immediate vaſſals of the King, and that the proprietars by other ſubaltern infeftments, ſhould all be ordained to take charters of the King's immediate vaſſals, from whom at firſt all ſubaltern infeftments behoved to flow, with this proviſion, that if the ſubaltern vaſſals were obliged any further to their immediate ſuperiors, than they were to the firſt ſuperior, as if they obtained a greater feu-duty, or if a ward or blench vaſſal ſet the whole or a part of his fee in feu farm, the ſuperior being the King's vaſſal or his ſucceſſor, ſhould give to that ſubaltern interpoſed ſuperior an irredeemable annualrent equivalent to the excreſce which he had from his vaſſal, above what was due to the firſt ſuperior. By this means, there would be no ſub-vaſſal but the immediate vaſſals of the King, or of the kirk, or of colleges and incorporations holding immediately of the King, not only to the benefit of proprietars, but of ſuperiors, who by the multiplication of ſubaltern infeftments loſe the caſualities of their ſuperiority; ſeeing the proprietars ſeldom return to hold immediately of them, and frequently brook by preſcription upon any title from their immediate ſuperior, whereby the firſt ſuperiors are utterly unknown very often and ſecluded.

VII. Superiority carrieth a right to the ſervice and duty contained in the vaſſal's *reddendo*, and that not only perſonally againſt the vaſſal, upon any perſonal obligation, or contract in writ, but alſo by virtue of the intromiſſion, *or* meddling with the fruits and profits of the land; for all ſuch intromitters may be purſued, and diſtreſſed perſonally for the duties contained in the *reddendo*, which being granted to maſters of the ground, for their tack-duty againſt tenants, and all intromitters with the rents, is much more competent to the ſuperior, for his feu-duty or other ſervices in kind; how far this will be extended to blench-duty, hath been ſhown [pp]. And as to ſervices which are annual, as winning and leading peats, *&c.* theſe are not due, if they be not required yearly in *the* due time, whether they be due by vaſſals to their ſuperior, or *by* tenants to their maſter,

Jan.

* The remedy here ſuggeſted is now introduced by ſtatute 20. *Geo.* II. *c.* 50. whereby every heir or ſingular ſucceſſor is intitled to a warrant for letters of horning againſt the ſuperior for new infeftment, on producing to the Lord ordinary on the bills their retours, or conveyances, containing procuratories of reſignation, but they muſt offer to the ſuperior the uſual caſualities: and therefore the circuit of an adjudication, or in the caſe of heirs, of three precepts from the chancery, is now unneceſſary, unleſs where the ſuperior is a Peer, or out of the kingdom.

** In order to diminiſh the dangerous dependency of vaſſals and tenants upon ſuperiors in *Scotland*, it is provided by act 1. *Geo.* I. *c.* 54. that the annual rate of the ſervices called "perſonal attendance, hoſting, hunting, "watching and warding," due by any charter, *&c.* ſhall be paid in money, only the rate to be aſcertained by arbiters, or by the court of ſeſſion. And by act 20. *Geo.* II. *c.* 50. it is declared, that no tackſman ſhall be obliged to peform any ſervices, except ſuch as are expreſsly enumerated, and aſcertained by a writing ſigned by the parties, except mill-ſervices.

[p] See below, § 32. *h. t.* [pp] Above II. 3. 33.

Jan. penult. 1624, L. *Carnowſie.* So ſervice of harrage and carriage in a feu-duty, was found not due, but when demanded within the year, *June* 27. 1662, *Watſon* *.

VIII. But alſo the ſuperiority carrieth *a* right to the duty of the *reddendo* really againſt the ground of the fee, for which he hath action of poinding of the ground, againſt the vaſſal and all ſingular ſucceſſors to him, whereby he may appriſe the goods upon the ground, or the ground right and property of the lands, the ſaids duties being liquidate, upon re-payment whereof, the lands are redeemable as in other appriſings.

IX. Superiority carrieth the right of juriſdiction over the vaſſal's lands and inhabitants thereof, if the ſame be granted to the ſuperior in his own infeftment, either implicitely as being a barony, lordſhip or earldom; or expreſsly, having the power of courts and their iſſues; and tho' the ſuperior grant the ſame to the vaſſal, yet that is not excluſive of his own right, but cumulative therewith. How far ſuperiority carrieth the right of thirlage of the vaſſal's lands to their ſuperiors mills, when the vaſſals have not granted to them the privilege of mills and multures, will appear amongſt ſervitudes; of which hereafter, title *ſervitudes.*

X. Superiority carries all the caſualities thereof, requiring declarator to heirs and ſingular ſucceſſors, *hoc ipſo* that they have the ſuperiority eſtabliſhed in their perſon, and do not fall to the executors of the ſuperior, as to bygones before his death, unleſs gifted or liquidate by a ſentence [q], *Had. March* 5. 1611, *Douglas contra Crawfurd*; *Feb.* 19. 1635, *Cunningham contra Stuart*; *July* 11. 1673, *Fa contra Lo. Balmerino and L. Pourie.* But feu-duties, or any caſuality may be ſeparated from the ſuperiority, (*not only*) by ſentence (*but by*) aſſignation; and therefore a diſpoſition of the ſuperiority was found to imply an aſſignation to the bygone feu-duties, which being to the vaſſal himſelf, needed no intimation, and was valid againſt a ſingular ſucceſſor (*firſt*) infeft in the lands in ſuperiority, *December* 14. 1676, *Argyle.*

XI. A ſuperior of kirk-lands purſuing his vaſſal for his *reddendo*, was not excluded till he inſtructed that he conſented to the ſurrender, conform to the act 14. of the Parliament 1633, annexing the ſuperiority of kirk-lands to the Crown, (*and*) reſerving the feu-duties to the Lords of erection, who conſented to the ſurrender, which was preſumed *in poſſeſſorio*, *June* 27. 1662, *Watſon.*

XII. Superiors are obliged to receive appriſers or adjudgers for a year's duty, albeit the ſuperior alledge a better right than the appriſer; but the infeftment may bear *ſalvo jure cujuſlibet et ſuo*, *July* 4. 1667, *Shine.* Yet a ſuperior having received an appriſer, was not found excluded from any right to the property, tho' he made no reſervation thereof, ſeeing his receiving was neceſſary, *July* 19. 1664, hoſpital of *Glaſgow* [qq]. But a ſuperior being charged to receive an adjudger, was found to have his option, either to receive him for a year's rent, or to pay the ſum adjudged for, getting aſſignation to the adjudication, being redeemable by the vaſſal from the ſuperior, and without any year's entry to be paid at redemption, ſeeing the vaſſal was not changed, as is provided, *Parl.* 1469, *cap.* 36. *June* 10. 1671, *Scot* of *Thirleſtain.*

XIII. And a ſuperior is alſo obliged to receive a donatar upon the King's preſentation *gratis*, *and* without preſent payment of the non-entry duties, till declarator, and if he refuſes, he loſes his ſuperiority during his life, *June* 25. 1680, L. *Blair.*

XIV. A ſuperior muſt alſo receive his ſub-vaſſal, whom his immediate vaſſal refuſed to enter, without further inſtructing of the vaſſal's right, but by receipts of the feu-duty by *the immediate* ſuperior wherein the mediate ſuperior *ſupplet vicem*

* The argument which was pleaded in this caſe, as a ground of exception from harrage and carriage, was that the lands were kirk-lands, of which the ſuperiority was veſted in the Crown, by *c.* 14. *P.* 1633. and that tho' the ſuperior had right to the feu-duties till redeemed, yet all ſervices were reſerved to the Crown. What is here mentioned appears however to have been the true reaſon of the deciſion.

[q] See above II. 1. 4. 1. [qq] See below, § 36. 3. *h. t.*

cem of the immediate *ſalvo jure*, *June* 28. 1672, *Menzies*. Yet a ſuperior cannot exclude an appriſer or adjudger within the legal, from the rent of the lands, till he pay a year's rent, *Dec.* 3. 1672, *Hay* [r].

XV. And where a ſuperior, or any to his behove, did take the gift of his own ward, he was found to have no intereſt to extend it further againſt his vaſſal infeft with abſolute warrandice, than to a proportional part of the compoſition and expences, *Feb.* 15. 1665, *Boyd of Penkil* [s]. The like where the ward had fallen after the vaſſal's right; for if it had fallen before, the (*ſuperior*) could *have* had nothing (*for expences or compoſition*) *Dec.* 1. 1676, *Lo. Lindſay*.

XVI. Superiors are not obliged to receive upon reſignation, or by confirmation *, and having accepted reſignation, it did not exclude the marriage of the reſigner's heir, there being no infeftment upon the reſignation before the reſigner's death, *Nov.* 14. 1677, *Purves*.

XVII. Superiority falling to more perſons, doth not oblige the vaſſal to take infeftment of them all, but if heirs-portioners, of the eldeſt only, *July* 30. 1678, La. *Lus*. And by the ſame reaſon, if the ſuperiority fall to many ſingular ſucceſſors, by appriſing or otherwiſe, the vaſſal needs only take infeftment of the greateſt intereſt.

XVIII. The firſt and moſt common caſuality of ſuperiority is non-entry, whereby the fee being void, and no infeftment renewed thereof, through the vaſſal's neglect, being capable of entry thereto, the profits thereof belong to the ſuperior. By the common feudal cuſtoms there was not only an inveſtiture requiſite at the conſtitution of the fee, but it behoved to be renewed, either at the change of the vaſſal, or at the change of the ſuperior *Guidelinus*, *de jure nov. Part* 3. *cap.* 7. § 8. *Zoeſius*, *de feudis*; *cap* 12. § 4. But our cuſtom requires no infeftment at the change of the ſuperior, but only at the change of the vaſſal; for we require no oaths of fidelity, but fidelity itſelf is imported due without an oath: but elſewhere that oath is required, and being perſonal, it ought to be renewed, both at the change of the vaſſal and of the ſuperior. But with us there being no fee without infeftment, *nulla ſaſina*, *nulla terra*, therefore the vaſſal muſt have the infeftment renewed. The renovation of infeftments to heirs in *France* and *England* is not requiſite, but *mortuus ſaſit vivum*, as they expreſs it, by which a ſpecial retour perfecteth the heir's right in his fee, with a great deal of eaſe, which is not conſonant to the common feudal cuſtoms, whereby, if the vaſſal within year and day after his predeceſſor's death, require not to be entered by his ſuperior, and offer his fidelity, he forfeits his fee, *lib.* 2. *feudorum*, *tit.* 24. which ſeverity we uſe not, for the vaſſal loſeth not his fee by non-entry, nor (*even*) the whole fruits of it during that time: but our cuſtom is ſuch, (*that*) if by any means the fee be void, the vaſſal's right ceaſeth during that time, and the fee is in the hands of the ſuperior; and therefore, in retours, to that article of the brieve it is anſwered, "that the lands are in the hands of ſuch a man ſuperior:" and tho' the infeftment of the predeceſſor, againſt others than the ſuperior, be ſufficient to maintain the right and poſſeſſion of the vaſſal; yet as to the ſuperior it hath no effect at all, after ſpecial declarator, till the vaſſal enter. And therefore the fee may be thus void, firſt by the minority of the heir, whereby he cannot enter by reaſon of ward; but this is expreſſed by the name of ward; and *ſecondly by* non-entry, (*which*) tho' it may ſignify the fee's being void, whether neceſſarily or voluntarily, yet it is appropriated to the latter, and contra-diſtinguiſhed to ward.

XIX. *Or thirdly*, the fee becomes void by the reduction or nullity of the infeftment, or retour of any perſon formerly infeft, which is more rigorous, ſeeing the vaſſal had thereby a colourable title, and was *bona fide poſſeſſor*. *And ſeeing reductions uſe not to be drawn backward* ad praeterita, *this way of non-entry, tho' it be expreſſed in all gifts of non-entry, yet I have obſerved no late deciſions on it directly, only*

* They are now obliged to receive upon reſignations. See above, § 6. 4. *h. t.*

[r] See above II. 3. 30. [s] See below, § 23. *med. h. t.* and III. 2. 2.

ly reduction of retours was ſuſtained at the ſuperior's inſtance, to give him the benefit of non-entry, *July* 12. 1625, L. *Cathcart*: *Feb.* laſt, 1628, E. of *Nithiſdale*. Yet it is not determined, that the non-entry duties were competent from the beginning, but from the inſtruction of the nullity; therefore it muſt be conſidered what the nature of the right will import. *If non-entry had its riſe with us from ingratitude, or a penalty on the negligence of the voſſal, it could hardly take place in this caſe. For unleſs ſuch infeftments had proceeded upon the fraud or groſs ignorance of the vaſſal himſelf, it could hardly be called voluntary non-entry, which ſtood upon ſome informality, unknown to the vaſſal or his predeceſſors. But ſeeing the ground of our non-entry is from the nature of the right, which cannot conſiſt without infeftment: therefore by ſuch nullity it muſt follow, that while there was no infeftment, or which is all one, a null infeftment, the vaſſal had no intereſt. Neither will there be hazard of the rigour, becauſe it cannot be extended but to the retoured duty; and it is elided by all the ways that other non-entries are, and eſpecially by the ſuperior's homologation of the infeftment: yea, if the infeftment proceed upon his own conſent, tho' the other informalities might annul it, it ought not to be extended in his favour, who is obliged to grant ſuch infeftment; for it is not rare, that that which is null as to ſome perſons and caſes, may be valid as to others: and ſo this non-entry could take no place, but upon infeftments granted by the ſuperior, in obedience of precepts out of the chancellary on appriſings or adjudications, or upon refuſal of his vaſſals to receive his ſub-vaſſal, or if the nullity were in prejudice of the ſuperior, as when lands are retoured to leſs retour-mail than the due, or the feu-duties, or other duties in the* reddendo, *are diminiſhed; but if there be no infeftment at all, then non-entry will take place, tho' precept and charter be granted voluntarily, ſeeing ſeiſin was not taken thereupon.*

XX. Non-entry taketh place whenever the fee is void, whether it be holden ward, blench or feu; but that which is holden in burgage, or is mortified, requireth no renovation of the infeftment, becauſe ſocieties and incorporations die not, which is extended to the particular tenements within burgh, holden burgage, which are thereby holden of the King, and the magiſtrates of the burgh give the infeftment as his bailies.

XXI. The effect of non-entry is attained by a declarator of non-entry, the ſtyle whereof beareth "that the tenement is void, *ſince the death of ſuch a perſon* "*who died laſt infeft*, and ought to be ſo declared, and that the fruits and profits "thereof do belong to the ſuperior, by reaſon of non-entry:" yet becauſe the caſe of the vaſſal is favourable, decreet is only granted, declaring the non-entry, and finding only the feu-duties due in lands holding feu, *July* 19. 1631, E. of *Kinghorn*: or the retoured mails in lands holding ward or blench, which have any ſuch retour: or otherwiſe the whole duties of the fee are carried. The reaſon hereof is, becauſe feus are locations, and the feu-duty is the rent or penſion; and therefore *in favorabilibus*, that is interpreted to be the rent. So likewiſe in other lands, the retour was a valuation of the lands, as they were worth and paid at that time; the firſt whereof was called the old extent, and it is expreſſed by merk-lands, or pound-lands; the other is the new retour, which tho' it be different in divers ſhires, yet *it is moſt ordinarily the quadruple of the old, and therefore* being once a rent, in this favourable caſe, the general declarator reacheth no further. Yea, tho' there be no retour of the particular parcel of land in queſtion, yet if there be a retour of the tenement or barony, whereof it is a part, that common retour will be divided according to the preſent rent, and a proportion thereof ſtated upon this parcel, as its retour, as was found in the foreſaid caſe, E. of *Kinghorn*. The like, *Feb.* 5. 1623, *Ker*. Hence it is, that an annualrent, becauſe it hath no retour diſtinct, but is retoured, *Quoad valet ſeipſum*, therefore if it be in non-entry, it is carried by the general declarator; and the non-entry was found to carry the whole profit of the annualrent by exception, in a poinding of the ground without any declarator, *March* 23. 1631, *Somervel:* yea, tho' the annualrent be due by the ſuperior *to the annualrenter, as well not infeft as infeft*, yet it falls in non-entry, tho' it be ſtill due upon the perſonal obligement where there is any, as in the caſe

foreſaid: but now by an act of Parliament 1690, *cap.* 42. the general declarator of annualrents carries only a penny, or others expreſſed in the *reddendo.*

In this declarator the ſuperior producing his infeftment, needs not inſtruct the defender his vaſſal [t]; and tho' the lands in queſtion be not expreſsly in the ſuperior's infeftment, but claimed by him as part and pertinent, he needs not inſtruct the ſame to be ſo, unleſs the vaſſal diſclaim him as ſuperior in that part [u], *Spotiſ. non-entry, Lord Yeſter contra his vaſſals:* neither needs he inſtruct that the lands were void ſince the time libelled, becauſe that is a negative and proves itſelf, unleſs the vaſſal inſtruct that they were full.

The decreet of general declarator is not perſonal againſt the vaſſal, to pay the non-entry mails, *&c.* but is real againſt the ground of the tenement, for granting letters to poind and appriſe, and ſo the calling of an apparent heir is ſufficient. But if the apparent heir be not called, but a perſon notourly known to have no relation, it is a relevant defence competent to any party called, tho' deriving no right from that defunct, *Spotiſ. non-entry, Sir William Murray.*

XXII. Tho' *Craig* inſinuateth, that the action of ſpecial declarator is real, and the ground may be poinded for the whole duties, yet poſterior deciſions have upon good grounds cleared, that as to theſe, the ſuperior is but as the maſter of the ground, and as he *himſelf* is in the caſe of ward; and therefore the ground cannot be poinded, neither is any liable but the intromitters with the fruits, *July* 16. 1673, *Reohead contra his vaſſals.* Without this declarator of non-entry, the ſuperior or his donatar cannot enter in poſſeſſion of the void fee, and tho' he poſſeſs, he is comptable to the vaſſal for the mails and duties, *Hope, non-entry, Brown contra M'Culloch of Barholme*; *Febuary* 3. 1631, *Ogrie contra Murray of Halmyre.* But after declarator of non-entry is obtained, the ſuperior may enter in poſſeſſion any lawful way he pleaſeth, and may diſpoſe of the fruits and profits of the tenements, by himſelf or his donatar, as if he were proprietar, and may out-put and in-put tenants therein, and hath the full profits and duties thereof, which may be purſued as other ordinary actions; tho' it uſeth to be purſued under the name of ſpecial declarator, which takes the effect from date of the ſummons, whereupon the general declarator proceeded; becauſe the decreet of the general declarator is only for the bygone mails, as aforeſaid, and therefore reacheth not after the date of the ſummons, after which the whole mails and duties are due, not only in ward-holdings and blench, but alſo in feus; and ſo it was found, that before general declarator the feu-duty was only due, but that after general declarator the whole profits, *July* 19. 1631, E. of *Kinghorn*; *July* 25. 1666, *Harper*; *July* 11. 1673, *Faa.*

XXIII. Non-entry is excluded [w], firſt by the entry of the vaſſal and his infeftment, during the time thereof, even tho' the ſame was granted by him, who was *the* ſuperior's *heir*, after his predeceſſor was denuded four ages before, which muſt be in reſpect the new ſuperior's right was not known, as neither being regiſtrate, nor any intimation nor action thereupon, *Hope, non-entry, Arthur contra Laird of Blebo.* And if the vaſſal be infeft upon a charter from his predeceſſor, to be holden of the ſuperior, if the ſuperior confirm it, the infeftment is valid, and excludes the non-entry from the date thereof, and not from the date of the confirmation, being ſimple, *Hope, non-entry, Bartoun and Harvie contra Laird of Delſpro.* 2. Non-entry is excluded *pro tanto* by feus, terces of relicts, liferents of huſbands ſurviving their wives by the courteſy of *Scotland.* Theſe are *introduced* by law, and are *effectual* without the ſuperior's conſent. 3. It is excluded alſo by his expreſs conſent, by liferents or conjunct infeftments holden of him; for tho' the vaſſal may enter to the fee, yet the liferent excludes the profit, and therefore, during the ſimple liferent, the ſuperior cannot obtain declarator of non-entry. 4. By the ſuperior's conſent, it is alſo excluded by precepts of *clare conſtat*, which acknowledge the perſon *therein mentioned, that he* died laſt veſt and ſeized, as of fee, during whoſe time the non-entry cannot be claimed; and likewiſe, by receiving the

[t] See above, § 6. *h. t.* [u] See below II. 11. 29. [w] See below IV. 8. 7.

the vaſſal with a *novo-damus*, renouncing expreſsly non-entry, if it was granted by the ſuperior, before the right was tranſmitted from him to the donatar. 5. It is excluded by the ſuperior's tacite, or preſumed conſent, by granting ſubſequent infeftments, for the ſpace of forty years, *March* 19. 1629, E. of *Angus* and *Douglas*; *June* 25. 1629, Sir *Mungo Murray*; *Hope, non-entry, Arthur contra L. of Blebo:* for thereby it is preſumed that the non-entry is relinquiſhed, not being claimed nor reſerved all that time; which *Craig* [ww] obſerves to have been found upon infeftments, continued by the ſpace of 36 years; but the beſt term, as being ordinary and known in law, is 40 years; and this is not by reaſon of preſcription, which would only cut off profits of non-entry preceeding the 40 years, but this would take it away, during and after the 40 years. The like is very rationally obſerved by *Craig* [x], to be inferred by three ſubſequent ſeiſins, having the ſame preſumption as three ſubſequent diſcharges have, to infer exoneration of all bygones; but theſe muſt be of three ſubſequent heirs, and not by receiving three *ſubſequent* ſingular ſucceſſors. The non-entry returning to the vaſſal or his heirs, they cannot make uſe of it againſt the ſub-vaſſals, eſpecially if they be liable to warrant the ſub-vaſſals as to non-entry, or by abſolute warrandice generally; for thereby the right to the non-entry is *jus ſuperveniens auctori accreſcens ſucceſſori*; but the ſub-vaſſals muſt pay their proportion of the expences of the gift [y]. But non-entry is not excluded, becauſe it was gifted to the apparent heir of a ſuperior of a ſub-vaſſal, which ſuperior was obliged in warrandice to his ſub-vaſſal, ſeeing he was not heir, *Spotiſ. non-entry, L. of Craichlaw contra Gordon of Barnernie and Mackie* *. Neither is it excluded by any baſe infeftment, not being feu, tho' confirmed by the ſuperior, if it hold not of the ſuperior; for ſuch confirmations import only a paſſing from recognition, as is ſhown *above* [z]. *But* feus exclude non-entry *(if granted)* while they were allowed by the acts of Parliament, as is there alſo ſhown. Non-entry is not excluded by tacks ſet by the vaſſal, which tho' they ſtand as real rights againſt purchaſers by ſtatute, yet have no effect againſt ſuperiors, in prejudice of their proper caſualities. Neither is it elided by charters, or precepts granted by the ſuperior, tho' containing warrandice, till infeftment *be taken thereupon*, *March* 23. 1630, *Hay, unleſs in the charter there was a renunciation of non-entry*. Neither was it excluded by appriſing and charge thereupon, without offer of a year's rent of the land, or annualrent of the money, *Feb.* 3. 1681, *Ker*. Neither is it excluded becauſe the vaſſal was not *in mora*, being hindered by a queſtion of baſtardy againſt him, *Spotiſ. non-entry, M'Kelzeah contra Napier of Wrightſhouſes*. Neither doth the vaſſal's minority ſtop non-entry of lands not being ward, nor reſtore the minor as leaſed; for as it hath been ſhown, it is not the negligence of the vaſſal, but the nature of the right that infers non-entry: yet there is no doubt if it be by the ſuperior's fault, it will be a perſonal excluſion againſt him.

XXIV. Non-entry is moſt favourable, when extended to the retoured duties only: but as to the full rents, it is capable of many other exceptions, and doth not always run from the citation in the general declarator; as if a ſuperior raiſe his declarator, and alſo reduction of the vaſſal's ſeiſin, tho' he reduce the ſeiſin, he will not have the full rents till the decreet of reduction and declarator, *Nov.* 26. 1672, Earl of *Argyle*: yea, if the ſuperior do not inſiſt, but only uſe citation, which may be at the vaſſal's dwelling-houſe, and never come to knowledge; or the vaſſal's being a pupil without any tutor, it is not like the Lords would ſuſtain the whole duties from the citation, but from the time the vaſſal becomes contumacious. And E. *Queenſberry* having interpoſed *Kelhead* betwixt him and his vaſſals, who thereupon purſued declarator of non-entry, tho' *Kelhead*'s infeftment was found null, yet the diſpoſition was found to carry a gift to the caſualities of the ſuperiority: *but* the vaſſals were only found liable for the rent after the interlocutor

* This deciſion is not found in *Spotiſwood, Hope* or *Nicolſon*.

[ww] *Craig* II. 19. 17. [x] *Craig* II. 19. 16. [y] See above, § 15. *h. t.* [z] Above II. 3. 28.

32.

terlocutor ſuſtaining the diſpoſition as a gift of non-entry, *July* 16. 1675, *Kelhead againſt his vaſſals*: and where a tailzie was found to exclude a ſecond branch, ſo long as there was hope of a former branch, the lands were found in non-entry, as to the retoured mail, but not as to the full rent, ſeeing the heir did not forbear to enter through wilfulneſs, but of neceſſity, *July* 24, 1677, Lord *Melvill* and *David Melvill* his ſon. And where a ſingular ſucceſſor to the ſuperior purſued non-entry, *and* it was not ſuſtained till he produced his progreſs from the acknowledged ſuperior, the full duties were not found due from the citation, *Jan.* 18. 1681, E. of *Queenſberry* *. And *Craig* [zz] relates, that where the defunct died in battle for his ſuperior, non-entry ſhould have no place **. The general declarator of non-entry, is for the neglect of the vaſſal's heir to enter; but the ſpecial declarator is only for his contempt, being interpelled by the citation in the general declarator. But the *full rent* is only *due* where contempt appears, and ſo if there be different pretenders to the ſuperiority, the *apparent heir* may call them all to diſcuſs their rights: but tho' he do not, he will not loſe the full rents, while that competition laſteth; yet if the ſuperior be denuded by infeftment on a diſpoſition, or by an appriſing expired, the pretence of not knowing the new ſuperior will not be ſuſtained. In the caſe at the inſtance of the Duke and Ducheſs of *Hamilton* againſt Mr. *John Elleis*, *Feb.* 17. 1691, concerning the non-entry of the lands of *Eliſtoun*, albeit there was a decreet of general declarator *in foro contradictorio*, yet in the ſpecial declarator Mr. *John* was only found liable from the date of the decreet of the general declarator, becauſe his author's infeftment was granted by his ſuperior (*to be held of him and*) his heirs-male, who would have been *Abercorn*, the Ducheſs being only heir of line. And in the purſuit the Duke and Ducheſs againſt *Kettleſtoun*, *Feb.* 1692, the infeftment by E. *Marr*, Lord of erection, was not ſuſtained, yet the full duties were neither found due from the citation on the ſummons of general declarator, nor from the decreet, becauſe the author's infeftment was to (*hold of*) the heirs-male of the ſuperior, who was Earl *Abercorn*; but upon a decreet *in foro*, excluding *Abercorn*, the full duties were only found due ſince the production of that decreet ***. So much for excluding of non-entry: but we ſhall not here ſpeak of the common exceptions, which extinguiſh all rights, as preſcription, homologation, or the privilege of thoſe who are abſent *reipublicæ cauſa*; of which in their proper places.

XXV. As to the queſtion, Whether non-entry ſubſequent to ward whereby the ſuperior or his donatar is in poſſeſſion, requireth any declarator; *Craig* and *Skeen* upon the word *non-entry*, are for the negative; but ſince, *Had.* and *Durie* obſerve *March* 23. 1622, *Leſly contra Pitcaple*, that the Lords found, that where the ſuperior purſued both for the ward and ſubſequent non-entry, that he or his donatars, not being in poſſeſſion by the ward, behoved to declare the non-entry, which would only carry the retoured mails till declarator; but if the donatar was in poſſeſſion by the ward, he might continue by the gift for three terms thereafter [a].

XXVI. The next caſuality of the ſuperiority is, the *Relief* due by the vaſſal to the ſuperior, for his entering him in the fee, as the lawful ſucceſſor of the vaſſal. And tho' relief be only conſiderable in ward-holding, and uſes to be ſubjoined to ward: yet all fees which require renovation, are liable to relief; and therefore relief is here immediately ſubjoined to non-entry. Relief is generally treated upon by the Feudiſts, the original whereof *Cujace* aſcribeth to the conſtitution of the Emperor *Leo*, extant in the Novels [b], bearing it to be the cuſtom of ſeveral places, that the ſuperior ſhould have that year's rent, in which he

* As this deciſion is ſtated in Lord *Stair*'s collection, no judgment was given with regard to the time from which the full duties were due; that point was reſerved to be afterwards determined.

** The words of *Craig* are, "Si prædeceſſor in acie pro reipublicæ ſalute aut dignitate pugnans occubuerit."

*** Theſe deciſions not found.

[zz] *Craig* II. 19. 19. [a] See below, § 36. 8. *h. t.* [b] *Nov. conſt. Leonis, c.* 13.

he receives a new vaſſal in his clientel *, which therefore, by moſt of the feudal cuſtoms, is extended to ſingular ſucceſſors of the vaſſals, who in ſome places, pay for their entry the fifth part of the price of the fee, and a fifth of that fifth; whereby, if the price were 100 crowns, the compoſition for the entry would be 24 crowns.

XXVII. But by the cuſtoms of *England* and *France*, the heir of the vaſſal, if he be minor, pays no relief, but he and his fee are in the hands of the ſuperior, as in ward or cuſtody, whereby the ſuperior hath the whole profits, more than is fit for the education and entertainment of the minor vaſſal, which ceaſeth with his majority, and there is no relief due: but if the vaſſal's heir at his death be major, his fee is liable to his ſuperior for relief; which diſtinction is mentioned in the Engliſh *magna charta*, and the quantity of the relief by heirs in England, is in ward-holdings or military fees 100 pounds Sterling for an earldom, 100 merks for a barony, and 100 ſhillings for any other military fee, which is obliged to maintain one ſoldier; and if the fee be leſs, and liable only for a ſhare of the entertainment of a ſoldier, it is liable proportionally for relief.

Relief, by the cuſtom of France, is for a barony 100 franks, and for any other military fee 15. But if it anſwer not to the entertainment of one ſoldier, it pays for every acre 12 deniers; but if it be not a military fee, but that which the Engliſh call ſockage, the *reddendo* whereof is not military ſervice, but ſome other payment or performance, *that reddendo* is doubled the firſt year after the death of the vaſſal, the one half whereof is the relief, which is a real burden, for which the ſuperior may poind or diſtrinzie all goods upon the ground. But as to ſingular ſucceſſors, the moſt ancient feudal cuſtoms, making *fees* only to deſcend to the iſſue of the firſt vaſſal, whoſe collaterals had no right, but were like our kindly tenants, by the propinquity of blood; yet by the favour of the ſuperior, they were oft-times admitted in the fee, and were only liable for relief; ſo if the ſuperior did receive a ſtranger, upon the reſignation of his vaſſal, he was to pay a relief, which in ſome places was the fiftieth part of the price. And by the cuſtom of France, it is the thirteenth part: therefore, from the original of relief, the reaſon of its name may be conjectured; and thoſe who appropriate it to ward-holdings, interpret it to be called relief, from redeeming or relieving the fee out of the hands of the ſuperior: but relief being a general feudal name, and many nations not allowing the ſuperior the whole profits of the fee, in the minority of the heir, and giving a relief in the caſe of ſingular ſucceſſors, that derivation muſt be too narrow; and therefore it ſeems moſt quadrant to the common feudal cuſtoms, that relief ſhould import a ſubſidy or aid to the ſuperior.

We have the more largely conſidered the riſe and cuſtoms of nations concerning relief, becauſe, tho' it frequently occurs with us, yet it hath been always kindly tranſacted betwixt the ſuperior and vaſſal: and there is ſcarce a controverſy or deciſion obſerved about it by any ſince the inſtitution of the college of juſtice, ſo that we muſt reſt in the common cuſtom uſed bewixt ſuperior and vaſſal, the nature of this caſuality; and the opinions of ſome few of our lawyers who have written upon it, *Craig* [bb] handles the matter of relief, and ſaith, "By our antient cuſtom, there was no relief due after ward." But that it was the common opinion of lawyers at that time, that relief had only place in ward-holdings; and that it imported a year's rent of the fee, being the full profits thereof, when the ſuperior or his donatar were in poſſeſſion by the ward; but in other caſes only a year's rent, by the favourable accompt, that is one year's new retoured duty of the fee, as it is retoured by itſelf, or the ſhare of the retour of any barony or tenement, whereof it is a part. But *Craig*, with good

* This is copied from *Craig* II. 20. 30. The conſtitution of *Leo* only appoints, that no more ſhall be taken by the managers of hoſpitals, *&c.* at renewing the leaſes of their lands than one year's rent; what is here added with regard to the cuſtom of ſeveral places, is taken from *Cujacius*, and not from the conſtitution of *Leo*.

[bb] *Craig* II. 20. 30.

reaſon holds relief to be due at the renovation of every fee, to the heirs of the inveſtiture; for the duplication of the feu-duty in feus, is due at the entry of every heir; and that without an expreſs clauſe in the *reddendo*, by the feudal cuſtom, which is generally acknowledged: and even when the duplication is expreſſed, it doth ordinarily bear, *ſecundum conſuetudinem feudorum:* and Sir *Thomas Hope*, in his title of ward, is of the ſame opinion, in reſpect that the precepts iſſued out of the chancellary, for infefting of heirs, even in feus or blench-holdings, bear, *capiendo ſecuritatem*, for the double of the feu, or blench-duty.

XXVIII. As to the quantity of the relief, *Hope* in that title holdeth it only to be "the retoured duty, without exception, when the vaſſal or his donatar was in poſ-"ſeſſion". And Sir *John Skeen* in his treatiſe, *de verborum ſignificatione*, aſſerteth the ſame. It is alſo provided by act of Parliament 1587, *cap.* 74. "That the "full avail of the relief be taken and compted for in exchequer, by She-"riffs, Stewards and Baillies, without accepting any compoſition; and that char-"ges be directed againſt perſons, who have gotten precepts of ſeiſin, or the She-"riffs or their deputes, or both, to poind for the ſums contained in the book of "Reſponde;" which is a book of record in the chancellary, drawn off the precepts of ſeiſin to all heirs, and mentioning ſuch a Sheriff or Baillie where the lands ly, *reſpondere*, that is to count in exchequer for the ſums, which by the precepts of ſeiſin directed to him, he is ordered to take ſecurity for, which ſums would be liquid, and known according to the new retour, and the feu or blench duty, but could not be known otherwiſe than by a proceſs of liquidation, proving the full yearly rent of the fee, as to which the Sheriff might not compone or tranſact; and it is generally acknowledged, that when the full rent becomes due, there is no real execution, by poinding of the ground; but the ſuperior hath the full benefit of the fee, as when it is in ward; and therefore the relief, which is *debitum fundi*, muſt only be the retour-duty.

XXIX. Conform to this ſtatute it was found, that the relief might be recovered, either by real action of poinding of the ground, or perſonally againſt the vaſſal, who had taken his precept of ſeiſin out of the chancellary, tho' he had not taken infeftment thereupon, *March* 12. 1628, L. of *Lauriſtoun*; which was upon the perſonal ſecurity given to the Sheriff at the infefting the heir, otherwiſe it is only a real burden on the ground *.

XXX. If the fee be poſſeſſed by a relict conjunct fiar, the vaſſal's heir needs not enter during her life, for her conjunct fee doth exclude all caſualities during her life; or if it be in poſſeſſion of a huſband by the courteſy of *Scotland*: yet theſe will not exclude the fiar to enter to the property burdened with thoſe liferents, and it is oft-times neceſſary for him, to ſecure his creditors; in which caſe it is moſt favourable, that the ſuperior ſhould have a year's retoured duty, as he would have gotten it, after the conjunct fiar's death, at leaſt ſecurity for it to be paid after the conjunct fiar's death.

XXXI. The clauſe *capiendo ſecuritatem* will be in all precepts, notwithſtanding theſe liferents, and it will not ſtop the ſeiſin of the heir, till he pay the relief to the ſuperior, whether King or ſubject; but ſecurity by ſufficient caution muſt be received therefor.

XXXII. In place of the relief to the ſuperior by the vaſſal's ſingular ſucceſſor, we have a compoſition introduced by ſtatute 1469, *cap.* 36. whereby ſuperiors are obliged to receive appriſers for a year's rent of the lands appriſed [c]: for before that ſtatute, no ſuperior could be compelled to receive any other vaſſal than the heir of the firſt vaſſal provided by the inveſtiture: for tho' in diſpoſitions, lands are ordinarily diſponed to the purchaſer, his heirs and aſſignies; yet aſſignies

* It does not appear from the deciſion here quoted, that the vaſſal's heir had given any perſonal ſecurity to the Sheriff, nor does the heir in that caſe ſeem to have been infeft at the time he was perſonally charged by the Sheriff for the relief.

[c] See above, II. 3. 29 & 30.

aſſignies uſe not to be repeated in the charters, and the meaning of that clauſe in diſpoſitions hath been ſeveral times interpreted, that the diſpoſition may be aſſigned or transferred. But infeftment being once taken, aſſignies have no further intereſt [a]; and that clauſe doth not ſave recognition, when the ward-vaſſal infefts any other in the fee than his heir apparent, as was found in the caſe of the Lady *Carnegie*, *Feb.* 5. 1663. And tho' a diſpoſition have no mention of aſſignies, yet before infeftment, while it remains perſonal, it is aſſignable; and a ſuperior who granted a diſpoſition by a minute, was decerned to receive the aſſigny to the minute, tho' he was not in friendſhip with him, *Jan.* 29. 1673, *Ogilvie* *. This ſtatute was by cuſtom extended to adjudications *(except as to the year's rent)* being the ſame in effect, but different in form from appriſings; for the deſign of the ſtatute being to ſatisfy creditors by a judicial alienation of the debtor's lands, *ex paritate rationis*, it was extended againſt the debtor's apparent heir, who being charged to enter heir, did not enter, and therefore lands were adjudged from him, to which he might have entered, either for his predeceſſor's debt or his own; whereupon the ſuperior is decerned to receive the creditor-adjudger, whether for ſums of money, or for implement of diſpoſitions, and obligements to infeft. But the cuſtom allowed not a year's rent to ſuperiors for receiving adjudgers [e], *July* 21. 1636, *Grier contra L. of Colſburn*, till the year's rent was alſo extended to adjudications by act of Parliament, 1669, *cap.* 18. There is more reaſon for a year's rent to the ſuperior receiving adjudgers for implement of irredeemable diſpoſitions, and the like reaſon tho' they be redeemable [f], but not for receiving liferenters adjudging upon their diſpoſitions, becauſe thereby the vaſſal is not changed, and the ſuperior hath the acceſſion of the liferenter's eſcheat. The ſuperior hath the like compoſition for entering of adjudications now come in place of appriſings; but there is a great alteration by the act bringing them in *pari paſſu*, for thereby a charge againſt the ſuperior to enter is declared as effectual, as if infeftment had paſſed, and cuſtom hath required no further diligence than that charge, ſo that it will be to the detriment both of debtor and creditor to urge actual infeftment, during the legal, and no unjuſt prejudice to the ſuperior, ſeeing till then the adjudication is but *pignus prætorium*, and if it be redeemed or ſatisfied, the vaſſal is unchanged [g].

The Lords of Seſſion have always taken a latitude in the modification of the year's rent, eſpecially if the ſum appriſed or adjudged for, be ſmall, and the lands be great [h]: and they have allowed the appriſer or adjudger his option during the legal, to take infeftment or not, and yet not to be excluded from the rents of the lands, till he be ſatisfied, *Dec.* 3. 1672, *Hay*. But the appriſer runs that hazard, that if the debtor die before he be ſatisfied, if the land be holden ward, it will fall in ward, and relief by the debtor's death, and in non-entry; for there is no reaſon that the caſualities of the ſuperiority ſhould neither fall by the appriſer nor by the debtor [i]. But there is not the like reaſon, that the liferent-eſcheat of the debtor ſhould exclude the appriſer, if it fell after the appriſing and charge; for the liferent-eſcheat falls to the ſuperior with all the burdens which affected it by the vaſſal, even with the burden of his tacks; and therefore appriſing with a charge muſt be as effectual as theſe [k], *July* 24. 1632, *Rule* **. Likeas the ſuperior can have only one year's rent from all the appriſers or adjudgers. And now ſince appriſers and adjudgers within year and day come in *pari paſſu* where one needs only to be infeft or to charge, there is leſs reaſon to give an eaſy modification of the year's rent to the firſt appriſer or adjudger, inſiſting

* In the caſe here mentioned, tho' aſſignies were not expreſſed in the diſpoſitive clauſe of the minute, yet in an after clauſe it was declared that the lands ſhould be holden of the diſponer, by the diſponee and his heirs and aſſignies. See 24th *Dec.* 1673, *inter eoſd.*

** It was found, *June* 28. 1667, *Douglaſs*, That notwithſtanding a charge upon an appriſing, the vaſſal was not denuded; and that his liferent-eſcheat affected the lands. Theſe two deciſions are not contradictory. Tho' the liferent-eſcheat of the vaſſal does affect the lands, it is burdened with the appriſing and charge.

[a] See above II. 3. 5. 3. [b] See below, III. 2. 27. [c] See below, III. 2. 49. [d] See above, II. 3. 30. [e] See above, §. 6. 3. *h. t.* [f] See below, §. 66. *h. t.* [g] See above, II. 3. 30.

ing for infeftment, than before; becauſe one infeftment ſerves for all, and he who advanceth the ſame, gets relief off the reſt, before they have acceſs to the rents [l].

XXXIII. The prime caſuality of fees is ward*, which is not competent to all ſuperiors; for ward is only competent in fees holden in military ſervice, which have their denomination from this caſuality, being therefore called ward-holdings, and that not by the tenor of the inveſtiture, which ſeldom mentioneth ward, but by the Nature of it; for, when the fee is holden for military ſervice, or as the Engliſh better expreſs it, by knight ſervice, extending not only to following in war, but to council and aſſiſtance in peace, then, when the vaſſal is unfit for ſuch ſervice, the fee is open and remaineth in the hands of the ſuperior, or his donatar; and tho' this capacity might be in ſome ſooner *in ſome later*; yet it is fixed in men to their majority, at twenty one years complete; and in women, till they become fourteen years complete; for then they are capable of huſbands, who may do the ſervice required in the fee, *Had. Dec.* 20. 1609; and *Jan.* 27. 1610, *La. Kilbirnie contra the heirs of Fairlie.* What fees are holden ward we have cleared in the former title: it only now remains, that we hold forth the effect of this caſuality.

XXXIV. Ward reacheth the cuſtody of the perſon of the minor vaſſal, and of his lands holden ward, and hath its denomination rather from the former; for ward is as much as guard or cuſtody: the ſuperior or his donatar, is by the nature of this right, as a tutor to the vaſſal's heir; *Craig* obſerves, that he is preferable to all other tutors, except only the father of the heir whoſe fee deſcends *from* the mother, or ſome other perſon; and that he is obliged as other tutors, to purſue the rights of the heir *his vaſſal.* But the courſe of time having turned this right from its antient inſtitution, ſo that the ſuperior hath leſs enjoyment of ſervice, but more of profit of the fee, there is the leſs regard to the pupil's education, with, or by the ſuperior to the effect he might be fitted for his ſervice; and therefore other tutors, not only for the adminiſtration of the pupil's *other* means, but even for the cuſtody and education of his perſon, will be preferred [m].

XXXV. The main effect of ward then is, that thereby the ſuperior or his donatar have, during that time, the full fruits and profits of the fee, and may remove tenants, and do all other deeds that the proprietor might have done, and was accuſtomed to do; as to continue the profits of a wood, if there be conſtant cutting; as being divided in ſo many hags, that the firſt is ready by the *time the* laſt be cut; or of going heughs, as they were accuſtomed by the vaſſal; but he cannot cut more than the accuſtomed yearly hags of wood, or put in more coal-heughers than the vaſſal had at his death, and ordinarily before [n]; and he may remove and in-put tenants, and that without any preceeding declarator, or favourable accompt eſteeming the retour mail for the rent, as in non-entry; but he may immediately purſue actions for mails and duties, removing, *&c.* unleſs the ward be taxed, and then the ſuperior can have no more than the duties to which it is taxed: but for it, he hath not only the vaſſal, and all intromittors with the fruits, perſonally liable, but he may alſo poind the ground for the taxed duty.

XXXVI. Yet the extent of ward by the nature of the fee, cannot extend to the alienation, or conſumption of the ſubſtance of the fee, or any part or pertinent thereof, and this is cleared by the ſtatute, *Parl.* 1491, *cap.* 25. Whereby donatars muſt find caution not to *waſte or* deſtroy the biggings, woods, ſtanks, parks, meadows, or dovecoats, but to keep them in ſuch kind as they get them. Ward is alſo reſtrained by the ſtatutes confirming feus, of which formerly; and theſe ſtand valid againſt the ſuperior, during the ward; ſo do alſo all infeftments holden of him, either by reſignation or confirmation: but not infeftments to be holden of his vaſſal, unleſs confirmed by him; for albeit confirmations by the king, which paſs of courſe, do not take away the caſualities of ward, *&c.* of the kings

* By act 20. *Geo* II. *c.* 50. the Tenure of lands in Scotland by wardholding, and the caſualities of ward, marriage, and recognition are taken away.—An equivalent in favour of ſubject-ſuperiors is aſcertained by act of Sederunt February 8. 1749. By the ſame ſtatute, 20 *Geo.* II *c.* 50. the caſualities of ſingle and life-rent-eſcheat following upon denunciation for civil debt, and of marriage in feus *cum maritagio*, and clauſes *de non alienando ſine conſenſu ſuperiorum*, are diſcharged.

[l] See below, III. 2. 27. [m] See above I. 6. 15. [n] See above II. 3. 74. 2.

King's vaſſals, which affect the fee of the ſub-vaſſals [o]; yet the confirmation of other ſuperiors of ſub-vaſſals rights, doth take off from them the ward *, ſeeing the act 1606, *cap.* 12. doth only annul feus ſet by vaſſals, holding ward of ſubjects, without their ſuperior's conſent; which was ſo found that the ſuperior conſenting to a feu granted by his vaſſal to a ſub-vaſſal, albeit the feu was under reverſion, it was free of the ward and marriage of the vaſſal as to the ſub-vaſſal feuar, *which* did only affect the vaſſal's intereſt, *viz.* the feu-duty, reverſion and back-tack, *July* 1. 1672, E. of *Eglington*.

Ward is alſo reſtrained by the terce of wives, and liferent of huſbands by the courteſy of *Scotland*, both which are introduced by law, and are valid without the ſuperior's conſent. But rentals and tacks ſet by the vaſſal, have only this effect againſt the ſuperior or his donatar, that the tenants or labourers ſhall not be removed till the next *Whitſunday*, after the beginning of the ward, paying the old accuſtomed duty, *Parl.* 1491, *cap.* 26. *But* then, the ſuperior, or his donatar may remove them, notwithſtanding their tacks be unexpired, which therefore ſleep during ward, but revive againſt the ſetter and his heirs, and endure as many years after the ward, as they were excluded by the ward, *Haddingtoun*, *July* 4. 1611, *L. of Couter*, where alſo the terce was found relevant to exclude the ſuperior; yet ward is not excluded by annualrents holden of the vaſſal, *March* 21. 1629, *Weyms*. But now ſince the act of Parliament 1606, prohibiting feus without conſent of the ſuperior, theſe *do* not exclude the ward, or other caſualities of the ſuperiority, as to fees not holden of the King, which was even extended to the fees holden of the Prince, *Hope*, *ward*, *La. Cathcart contra vaſſals of Cathcart*. And after the act of Parliament 1633, extending the foreſaid act 1606 to ward-lands holden of the King and Prince; *no* feus then granted (*did exclude the ward or other caſualities*) till the year 1641, when the effect of that act was taken away, and ſo feus of lands holden of the King or Prince, were (*again*) valid till the reſciſſory act 1661, whereby the ſaid Parliament 1641 was reſcinded, *Parl.* 1661, *cap.* 15. So that now feus of lands holden of the King, Prince, or any other ſuperior, without their conſent, do not exclude ward or other caſualities of the ſuperiority, except ſuch feus as were granted the ſeveral times they were allowed by law [p]; but a charter upon an appriſing did exclude the ward, tho' no infeftment was taken thereupon during the vaſſal's life, as *Hope* obſerves, *title ward*, *Hamilton contra tenants of Newburgh*, becauſe the ſuperior's charter without ſeiſin, did import a gift of the caſualities, which might befal to the ſuperior [q]; and he there obſerves, that a ward was excluded by appriſing and infeftment thereupon, whereby the defunct was denuded, albeit it was to the behoof of his heir, L. of *Ley*.

During the legal, the ſuperior or donatar, as before the infeftment upon the appriſing, they might pay the appriſer, and take his right: ſo after they may redeem him and exclude him **, it being againſt reaſon, that by appriſing (ſuppoſe of a great tenement) for a ſmall debt, the ſuperior ſhould be ſimply excluded, and it may be upon deſign. If an appriſer infeft poſſeſs, his ward falls, and not the former vaſſal's, tho' the legal be not expired; but after the ward is fallen, tho' the ſuperior received an appriſer appriſing from the heir without proteſtation; yet it was found not to prejudge the ward by the death of the former vaſſal, *July* 19. 1664, *hoſpital of Glaſgow* [r]. But a ſuperior was not excluded from the ward by his vaſſal's death, becauſe an appriſer had charged him to enter him during that vaſſal's life, ſeeing that charge could not make the appriſer vaſſal, by whoſe death ward would fall, and thereby make the ſuperior loſe his caſuality by the death of both the old vaſſal and the appriſer, unleſs the ſuperi-

* The contrary doctrine is to be found above, II. 3. 28. but here the author ſeems only to treat of feu-rights granted by the vaſſal, and confirmed by the ſuperior.—The 1ſt edition adds theſe words, *if the right be feu only generally without mention of the ward*; ſeeing, *&c.*

** MS. G. reads thus, "But there is much to be ſaid, that during the legal, *&c.*"

[o] See above II. 3. 32. § 2. where a confirmation paſſed in exchequer is ſaid to exclude forfeiture. [p] See above, II. 3. 32. [q] See below, III. 2. 20. [r] See above, § 12. *h. t.* below, § 57. *h. t.*

or had been *in mora aut culpa*, which was not found, unleſs a year's rent of the land, or annualrent of the money, and a charter were offered with a bond to pay what further the Lords ſhould modify, *Feb.* 9. 1669. *Black* [s]. But a creditor appriſing, tho' infeft, if he poſſeſs not the ward falls not by his death, becauſe his appriſing is but a legal diligence, which he may renounce, or relinquiſh, and inſiſt by other diligence for payment **.

If an appriſing *and infeftment* be ſatisfied or extinct by intromiſſion, the ward-lands appriſed become in the ſuperior's hands by ward, till the majority of the heir, *July* 20. 1671. *Lindſay*: in which caſe, the appriſer was not found obliged to reſtrict to his annualrent, to the effect that the donatar of the ward might have the ſuperplus, by the act of *Parl.* 1661. *cap.* 62. betwixt debtor and creditor, whereby there is a power given to the Lords of Seſſion to cauſe appriſers reſtrict to their annualrent, which is only perſonal, in favours of the debtor, if he demand it.

The benefit of ward, is alſo burdened with the maintenance and ſuſtentation of the heir, by virtue of the aforeſaid act, 1491, *cap.* 25. whereby a reaſonable ſuſtentation according to the quantity of the heritage is appointed to the heir, if he have not lands blench or feu to ſuſtain him, and that *to be paid* by the ſuperior and his donatar, and conjunct-fiars and liferenters of his eſtate; the quantity whereof is to be modified by the Lords, according to the quality of the heir. Hence it follows, that if the heir have only ward-lands of ſmall value, which cannot exceed the heir's maintenance, the ſuperior can have no part of the fruits; this modification takes place, not only when the heir hath no means; but tho' he had, if it was not ſufficient to entertain him, the ſuperplus is modified out of the ward-lands, and lands liferented proportionably. But here we ſhall ſay no more of the aliment of heirs by ward ſuperiors, or their donatars in this place; but you may ſee it in its proper place [t].

Thus it appeareth in what way the caſuality of ward is excluded, burdened or reſtricted, being always by law, or by the conſent and deed of the ſuperior; but no private deed of the vaſſal without the ſuperior's conſent, or appointment of law, can burden the fee when it is in the hands of the ſuperior, by ward, *&c.* So that ſervitudes introduced by the vaſſal, as *thirlage*, *ways* and the like, are not effectual againſt the ſuperior or his donatar, when the fee is in their hands; unleſs ſuch ſervitudes be introduced by preſcription of forty years, or immemorial poſſeſſion, whereunto all parties having intereſt, their conſent is preſumed; and therefore, in that caſe there is ground for ſuſtaining of the ſervitude, even againſt the ſuperior, who might at leaſt have uſed civil interruption. Thus, marches ſet by the vaſſal of conſent, or by cognition, whereto the ſuperior is not called, hath no effect in his prejudice during the ward, *Feb.* 8. 1662. Lo. *Torphichen*, except in the caſe of preſcription, as ſaid is [u].

As to the perſonal debts of the vaſſal, whether heritable or moveable, they do not affect the fee *while* in ward, albeit *Craig*, *lib.* 2. *Diegeſ.* 20. § 20. relateth, "that of old it was otherwiſe, and that the ſuperior had the ward, with the bur-"den of entertaining the heir, and *of* paying the annualrents of his heritable "debts [w], and that the cuſtom of wards in *France* is ſuch:" for which there is a great deal of reaſon; ward being granted to ſuperiors, when debts were not ſo many or ſo great as now, ſo that the ſuperior in gratitude had what was *then* ſuperfluous to the vaſſal; but now the vaſſal may, and many have been ruined by their heritable debts, running on in annual during the ward: but cuſtom having given the ward to ſuperiors ſimply, there is no remeid without a ſtatute, correctory of this cuſtom. The caſuality of ward may be enjoyed immediately by the ſuperior, but is more ordinarly gifted to donatars, not only by the king, but by other

** *July* 28. 1680, King's Advocate, The caſuality of marriage was in this caſe, found due by the heir of an appriſer infeft; but it does not appear whether the appriſer was in poſſeſſion or not.

[s] See above II. 3. 30. [t] See below III. 5. 3. [u] See below II. 7. 3. [w] Reg. majeſt. II. 42. 6.

other ſuperiors; which donatars may do whatſover the ſuperior himſelf might; becauſe they act by his right, and are in effect his aſſignies: ſo that if gifts be granted to more donatars, the firſt intimation or diligence will be preferred [ww].

Gifts of ward and *of* non-entry were accuſtomed of old, to be granted by the exchequer together, bearing, "not only for bygones, but for time coming "till the entry of the righteous heir or heirs:" And albeit gifts of ward run ſtill in the ſame ſtile, yet by the acts and cuſtoms of exchequer, ward and non-entry are ſeveral caſualities, and paſs by ſeveral gifts; and notwithſtanding the foreſaid clauſe, the gift of ward reacheth only during the time of ward, and three terms thereafter, if the lands run in non-entry [x]; but ward was not found to give right to three terms full rent, (here the donatar was not in poſſeſſion during the ward) *Dec.* 2. 1680, L. of *Dun* [xx]. And albeit the gift contain relief, yet that caſuality, as *Hope* obſerveth [xxx], is always demanded by the exchequer, and counted for by the Sheriff, being but a ſmall duty of the retoured mail, as a gratuity to the ſuperior at the vaſſal's entry: and in that ſame place, he ſaith, "that "under the gift of a ſimple ward, is not comprehended taxed ward, which being "taxed is as a feu-duty, and rather as a part of the King's ordinary revenue, than "a caſuality:" upon which ground the Earl of *Kinghorn*, as tutor to the Earl of *Errol*, having gotten a gift of his ward, without mention of taxt-ward, he was neceſſitate again to take a new gift for the taxt-ward, and gave a conſiderable compoſition, and did not adventure to put the matter to debate before the Lords of Seſſion, whether his gift would have been extended to taxt-ward or not.

XXXVII. The 4th caſuality of ſuperiority, is called the marriage of the defunct vaſſal's heir, by which is underſtood the value of his tocher. There is nothing of this in the common feudal cuſtoms: it is in uſe in *France* and *England*; and *Craig* relates, that it was introduced in *England* in the reign of *Henry* III. and from thence came to us; but it is more likely that we had it ſooner; for King *Malcolm Kenmore* gave out all his land to his ſubjects, reſerving the ward and marriages of their heirs, which is long before *Henry* III. of *England*.

XXXVIII. *Craig* II. 21. 4. ſtates this caſuality in a power of the ſuperior, whereby he may marry the heir of his vaſſal who died laſt infeft at his pleaſure, but without diſparagement; by this ſuppoſition, the benefit of the heir's marriage, would only be a penalty in two caſes; the one, if the defunct's vaſſal's heir marry without obtaining his ſuperior's conſent, his fee ſhould be burdened with a ſuitable avail of the tocher, which he did or might get; but if his ſuperior did offer a ſuitable match, if he did marry another, he ſhould pay the double avail of his tocher.

XXXIX. Yet in the common opinion the double avail is only penal. And the ſingle avail ariſeth from the nature of proper fees, or ward-holdings, according *to what* a fee is underſtood to comprehend, by the cuſtom of this and other nations, who hold this caſuality; and therefore it is *debitum fundi* as ariſing from the nature of the fee, or from the expreſs tenor of the inveſtiture, as is in ſeveral feu-holdings of the king.

XL. And therefore the avail of the marriage being declared, an appryſing, or adjudication on that decreet, is preferable to all other appriſings or adjudications, for the debts or deeds of the defunct-vaſſal, his predeceſſors or heirs, albeit they were prior, as was found *Dec.* 17. 1673, *Hadden*.

XLI. But the avail of marriage doth not affect the apparent heir perſonally, *Jan.* 5. 1681. L. of *Dun*, and therefore cannot affect any other part of his eſtate but the ward-fee, or the feu *cum maritagio*; tho' there be one deciſion in the caſe of *Arbuthnot* contra *Keiths*, Feb. 25. 1662. where *it was found, that if* the avail of the marriage was more worth than the ward-land, the heir was liable perſonally, in ſo far as exceeded the ſame, which hath never been ſeconded, nor ought to be drawn in example [a].

XLII. It

[ww] See below III. 3. 1. [x] *Hope* minor Pract. Ed. 1734. *tit.* iv. § 6. [xx] See above § 25. *h. t.* [xxx] *Hope* minor Pract. *tit.* iv. § 19. 20. [a] See below, § 48. *h. t.*

or had been *in mora aut culpa*, which was not found, unleſs a year's rent of the land, or annualrent of the money, and a charter were offered with a bond to pay what further the Lords ſhould modify, *Feb.* 9. 1669. *Black* [s]. But a creditor appriſing, tho' infeft, if he poſſeſs not the ward falls not by his death, becauſe his appriſing is but a legal diligence, which he may renounce, or relinquiſh, and inſiſt by other diligence for payment **.

If an appriſing *and infeftment* be ſatisfied or extinct by intromiſſion, the ward-lands appriſed become in the ſuperior's hands by ward, till the majority of the heir, *July* 20. 1671. *Lindſay*: in which caſe, the appriſer was not found obliged to reſtrict to his annualrent, to the effect that the donatar of the ward might have the ſuperplus, by the act of *Parl.* 1661. *cap.* 62. betwixt debtor and creditor, whereby there is a power given to the Lords of Seſſion to cauſe appriſers reſtrict to their annualrent, which is only perſonal, in favours of the debtor, if he demand it.

The benefit of ward, is alſo burdened with the maintenance and ſuſtentation of the heir, by virtue of the aforeſaid act, 1491, *cap.* 25. whereby a reaſonable ſuſtentation according to the quantity of the heritage is appointed to the heir, if he have not lands blench or feu to ſuſtain him, and that *to be paid* by the ſuperior and his donatar, and conjunct-fiars and liferenters of his eſtate; the quantity whereof is to be modified by the Lords, according to the quality of the heir. Hence it follows, that if the heir have only ward-lands of ſmall value, which cannot exceed the heir's maintenance, the ſuperior can have no part of the fruits; this modification takes place, not only when the heir hath no means; but tho' he had, if it was not ſufficient to entertain him, the ſuperplus is modified out of the ward-lands, and lands liferented proportionably. But here we ſhall ſay no more of the aliment of heirs by ward ſuperiors, or their donatars in this place; but you may ſee it in its proper place [t].

Thus it appeareth in what way the caſuality of ward is excluded, burdened or reſtricted, being always by law, or by the conſent and deed of the ſuperior; but no private deed of the vaſſal without the ſuperior's conſent, or appointment of law, can burden the fee when it is in the hands of the ſuperior, by ward, *&c.* So that ſervitudes introduced by the vaſſal, as *thirlage*, *ways* and the like, are not effectual againſt the ſuperior or his donatar, when the fee is in their hands; unleſs ſuch ſervitudes be introduced by preſcription of forty years, or immemorial poſſeſſion, whereunto all parties having intereſt, their conſent is preſumed; and therefore, in that caſe there is ground for ſuſtaining of the ſervitude, even againſt the ſuperior, who might at leaſt have uſed civil interruption. Thus, marches ſet by the vaſſal of conſent, or by cognition, whereto the ſuperior is not called, hath no effect in his prejudice during the ward, *Feb.* 8. 1662. Lo. *Torphichen*, except in the caſe of preſcription, as ſaid is [u].

As to the perſonal debts of the vaſſal, whether heritable or moveable, they do not affect the fee *while* in ward, albeit *Craig*, *lib.* 2. *Diegeſ.* 20. § 20. relateth, "that of old it was otherwiſe, and that the ſuperior had the ward, with the bur-"den of entertaining the heir, and *of* paying the annualrents of his heritable "debts [w], and that the cuſtom of wards in *France* is ſuch:" for which there is a great deal of reaſon; ward being granted to ſuperiors, when debts were not ſo many or ſo great as now, ſo that the ſuperior in gratitude had what was *then* ſuperfluous to the vaſſal; but now the vaſſal may, and many have been ruined by their heritable debts, running on in annual during the ward: but cuſtom having given the ward to ſuperiors ſimply, there is no remeid without a ſtatute, correctory of this cuſtom. The caſuality of ward may be enjoyed immediately by the ſuperior, but is more ordinarly gifted to donatars, not only by the king, but by other

** *July* 28. 1680, King's Advocate, The caſuality of marriage was in this caſe, found due by the heir of an appriſer infeft; but it does not appear whether the appriſer was in poſſeſſion or not.

[s] See above II. 3. 30. [t] See below III. 5. 3. [u] See below II. 7. 3. [w] Reg. majeſt. II. 42. 6.

other ſuperiors; which donatars may do whatſover the ſuperior himſelf might; becauſe they act by his right, and are in effect his aſſignies: ſo that if gifts be granted to more donatars, the firſt intimation or diligence will be preferred [ww].

Gifts of ward and *of* non-entry were accuſtomed of old, to be granted by the exchequer together, bearing, "not only for bygones, but for time coming "till the entry of the righteous heir or heirs:" And albeit gifts of ward run ſtill in the ſame ſtile, yet by the acts and cuſtoms of exchequer, ward and non-entry are ſeveral caſualities, and paſs by ſeveral gifts; and notwithſtanding the foreſaid clauſe, the gift of ward reacheth only during the time of ward, and three terms thereafter, if the lands run in non-entry [x]; but ward was not found to give right to three terms full rent, (here the donatar was not in poſſeſſion during the ward) *Dec.* 2. 1680, L. of *Dun* [xx]. And albeit the gift contain relief, yet that caſuality, as *Hope* obſerveth [xxx], is always demanded by the exchequer, and counted for by the Sheriff, being but a ſmall duty of the retoured mail, as a gratuity to the ſuperior at the vaſſal's entry: and in that ſame place, he ſaith, "that "under the gift of a ſimple ward, is not comprehended taxed ward, which being "taxed is as a feu-duty, and rather as a part of the King's ordinary revenue, than "a caſuality:" upon which ground the Earl of *Kinghorn*, as tutor to the Earl of *Errol*, having gotten a gift of his ward, without mention of taxt-ward, he was neceſſitate again to take a new gift for the taxt-ward, and gave a conſiderable compoſition, and did not adventure to put the matter to debate before the Lords of Seſſion, whether his gift would have been extended to taxt-ward or not.

XXXVII. The 4th caſuality of ſuperiority, is called the marriage of the defunct vaſſal's heir, by which is underſtood the value of his tocher. There is nothing of this in the common feudal cuſtoms: it is in uſe in *France* and *England*; and *Craig* relates, that it was introduced in *England* in the reign of *Henry* III. and from thence came to us; but it is more likely that we had it ſooner; for King *Malcolm Kenmore* gave out all his land to his ſubjects, reſerving the ward and marriages of their heirs, which is long before *Henry* III. of *England*.

XXXVIII. *Craig* II. 21. 4. ſtates this caſuality in a power of the ſuperior, whereby he may marry the heir of his vaſſal who died laſt infeft at his pleaſure, but without diſparagement; by this ſuppoſition, the benefit of the heir's marriage, would only be a penalty in two caſes; the one, if the defunct's vaſſal's heir marry without obtaining his ſuperior's conſent, his fee ſhould be burdened with a ſuitable avail of the tocher, which he did or might get; but if his ſuperior did offer a ſuitable match, if he did marry another, he ſhould pay the double avail of his tocher.

XXXIX. Yet in the common opinion the double avail is only penal. And the ſingle avail ariſeth from the nature of proper fees, or ward-holdings, according *to what* a fee is underſtood to comprehend, by the cuſtom of this and other nations, who hold this caſuality; and therefore it is *debitum fundi* as ariſing from the nature of the fee, or from the expreſs tenor of the inveſtiture, as is in ſeveral feu-holdings of the king.

XL. And therefore the avail of the marriage being declared, an appryſing, or adjudication on that decreet, is preferable to all other appriſings or adjudications, for the debts or deeds of the defunct-vaſſal, his predeceſſors or heirs, albeit they were prior, as was found *Dec.* 17. 1673, *Hadden*.

XLI. But the avail of marriage doth not affect the apparent heir perſonally, *Jan.* 5. 1681. L. of *Dun*, and therefore cannot affect any other part of his eſtate but the ward-fee, or the feu *cum maritagio*; tho' there be one deciſion in the caſe of *Arbuthnot* contra *Keiths*, Feb. 25. 1662. where *it was found, that if* the avail of the marriage was more worth than the ward-land, the heir was liable perſonally, in ſo far as exceeded the ſame, which hath never been ſeconded, nor ought to be drawn in example [a].

XLII. It

[ww] See below III. 3. 1. [x] *Hope* minor Pract. Ed. 1734. *tit.* iv. § 6. [xx] See above § 25. *h. t.* [xxx] *Hope* minor Pract. *tit.* iv. § 19. 20. [a] See below, § 48. *h. t.*

XLII. It is not the want of the ſuperior's conſent, which gives him the avail of the vaſſal's heir's marriage, as was found in the caſe of *Campbel contra* L. *M'Naughton*, *Jan.* 3. 1677. where the ſuperior's being preſent at the marriage, did not exclude him from the ſingle value* ; yea, the ſuperior's ſubſcribing witneſs to the vaſſal's contract of marriage, was not ſuſtained to exclude the ſingle value, *Feb.* 25. 1662. *Arbuthnot*.

XLIII. The ground of the reſtriction of the avail of marriage, ought chiefly to be taken from the riſe and deſign of this caſuality, which ſome do attribute to the ſuperior's power, as tutor to his ward-vaſſal, whom he kept in his cuſtody, and educate for his ſervice in the war, which the name of ward inſinuateth ; for ward or guard is a fence or cuſtody. But this cannot be the true cauſe of this caſuality, ſeeing that tutorial truſt behoved to be in favour of the vaſſal, directing him in his choice of a match, and could not be ſo far turned to his prejudice, as to make his fee liable to a double avail, if he refuſed the ſuperior's offer of a match without diſparagement, and married another.

XLIV. Others therefore hold the cauſe of this caſuality, to be for preventing the vaſſal's marrying with a family in enmity with the ſuperior ; but that would be too narrow a ground ; for thereby the avail of a marriage would only be due, if the vaſſal's heir did actually marry with a family in enmity with the ſuperior, and ſo would never be due, if the vaſſal's heir never married, or where he married with his ſuperior's relation, or known friend, and yet neither of the ſaid caſes doth exclude a ſingle avail.

XLV. We muſt therefore inquire for a more adequate and rational ground of this caſuality, which appears very clearly to be thus ; that by the nature of ward-holding as it was when firſt introduced, being for military ſervice, and being a gratuitous donation, that ſervice was not as an equivalent cauſe, ſeeing the occaſions of war were uncertain, but was as a grateful acknowledgment of the vaſſal; and therefore when the vaſſal was not in capacity for ſervice in war, the ſuperior reſumed his fee into his own hand, during the vaſſal's minority, and was not thereby obliged to aliment the heir, as appeareth by 25th act *Par.* 1491, ordaining wardators, that is, all having right to the ward of a vaſſal's heir, whether ſuperior or donatar or aſſigney, to give a reaſonable living for ſuſtentation of the heir, according to the quantity of the heritage, if the heir hath no blench or feu-lands to ſuſtain him on ; ſo that before this act, the heir had no aliment out of his fee during his minority, and by the act he had no aliment from the ſuperior, if he had feu or blench lands to ſuſtain himſelf ; ſo that formerly the heirs of ward-vaſſals, were redacted to extreme penury in their minority, if they had nothing elſe but their ward-fee. For remeid whereof, mutual burdens were introduced upon the ward-fee, *viz.* That the ſuperior ſhould aliment his minor vaſſal, and in recompence thereof, he ſhould have the avail of his tocher ; but being obliged only to aliment the heir, and not to aliment him and his family when he were married, therefore his tocher belonged to himſelf *ad ſuſtinenda onera matrimonii*, till he came to majority, and might enter to his fee, and have the full profits thereof.

XLVI. The avail of which tocher, hath certainly been of old the tocher the vaſſal got, wherein the ſuperior had this juſt intereſt, that *leſt* his vaſſal ſhould imprudently marry, getting too ſmall a tocher, the ſuperior might offer him a match with a better tocher ; and if he refuſed it, and married the other, the avail ſhould be eſteemed as equivalent to the tocher he might have had, and that in conſideration not only of his ward-fee, but of all other his eſtate, real or perſonal, which was very rational and ſuitable to the time that the avail of marriage was introduced, when perſonal debts were very rare ; and therefore the vaſſal might well pay the avail of his marriage when he came to his fee, without any exceſſive burden.

XLVII. But

* The defence in this caſe was, that the ſuperior, by an anſwer he wrote to a letter from the vaſſal, had approved of the marriage. This defence was firſt repelled, *Dirleton*, *January* 3. 1677, but the deciſion was afterwards altered and the defence ſuſtained, *Dirleton*, *January* 23. 1677.

XLVII. But ſince perſonal debts came to be ſo frequent, the avail of marriage is only in relation to the free eſtate, real or perſonal of the vaſſal, and cuſtom hath fixed the ſingle avail about two years free rent of the vaſſal, wherein there is a latitude to the Lords, to modify according to the circumſtances; and as to the double avail, it never exceeds three years free rent: But it is ſo little favourable, and hath ſo many ſolemnities, that I never obſerved, ſince the inſtitution of the College of Juſtice, the double avail to be found due; the method of obtaining it being ſo contrary to all the deſigns pretended for this caſuality: for therein the ſuperior or his donatar, do never offer a match which he believes the vaſſal will accept, but of deſign to get a double avail; wherein nothing appears of tutorial truſt, or of that ſtrict confidence between ſuperiors and vaſſals; nor any thing to prevent marrying with an unfriendly family.

But the ſingle avail is favourable, as a real burden upon the fee, and hath for recompence the aliment of the vaſſal's heir, and is a burden which the vaſſal may bear, without hazard of ruin, or great diſtreſs, being oft-times within the value of the tocher the vaſſal gets, and never above what by prudent management he might get, cuſtom having fixed it to about two years free rent; ſo that tho' the vaſſal marry an heretrix of a great eſtate, and ſhe diſpone the ſame to her huſband, yet he pays no more, as was found *June* 14. 1673, *Gibſon* *. And there is no extention upon the conſideration of his perſonal qualifications, by his birth, beauty, vigour or reputation; but only in conſideration of his eſtate, wherein the tocher is not accounted any part of his eſtate, becauſe the avail comes in place of it.

XLVIII. There is one burden which may befal the vaſſal, and ſeems exceſſive. When he hath a ſmall ward-fee, and a conſiderable eſtate beſide, two years of his free rent may be of more value than the fee itſelf, which he cannot avoid during the time of the ward; for the ſuperior is not then obliged to accept a reſignation *ad remanentiam* [a]; and ſeeing fees or feudal contracts, having mutual preſtations, if there be a contract in writ, the ſuperior at no time is obliged to accept a reſignation, and always there is ſuch a tacit feudal-contract. Yet if the vaſſal did firſt receive his *ward* fee, he ought not to complain, tho' he cannot avoid it, ſeeing it is by the increaſe of his fortune; and if he accept it after his other eſtate, he may blame his own imprudence **. Yet he hath this remedy, that by acquiring a ward-holding of the King, who is the moſt benign ſuperior, his marriage is only due to the King, tho' he be not the eldeſt ſuperior, by his royal prerogative, who is always favourable, if application be made to prevent a rigorous donatar.

XLIX. That the burden of the avail of a marriage may be eaſy, albeit a vaſſal have many ward-fees, holden of the ſame ſuperior, or of different ſuperiors, he is liable but for one avail, and that to the King if he be one of the ſuperiors, or otherwiſe to the eldeſt ſuperior. And on the other part, that ſuperior, to whom the marriage is due, is only liable for maintenance of the heir, which is a further evidence of the true riſe and deſign of this caſuality, as hath been expreſſed.

L. Yea, tho' the marriage were taxed by the King, it excludes any other ſuperior, as was found *July* 19, 1672, E. *Argyle*; where it is expreſsly determined, that one marriage can only be due for one vaſſal: and it was not reſpected, that a taxed marriage becometh like a feu-duty, ſo that if a vaſſal have ſeveral ward-fees with taxed marriages, he *ſhould* pay all the taxed duties, yet the King by his prerogative excludes any other ſuperior. But where a vaſſal holds ſeveral ward-fees of the King, ſome taxed, ſome ſimple, he gets but one avail for the ſimple ward, wherein the duty of the taxed ward is deduced, as was decided, *Feb.* 24. 1675, King's Advocate.

* The queſtion here was, with regard to the extent of the marriage of a female vaſſal. It was contended, that the total free value of her eſtate ought to be conſidered as the avail of the marriage; becauſe ſhe might reaſonably expect to marry a gentleman of an eſtate equal to her own. This was repelled, tho' the caſe of the donatar was remarkably favourable.

** This is taken from *Craig* III. 1. 9. who mentions a caſe where the apparent heir was not allowed to renounce his ward fee. The contrary doctrine is to be found above, § 41. *h. t.*

[a] See below, II. 11. 6.

LI. When there is a Prince, he being a ſubject, a ward-holding of the King excludes the avail of the marriage due to the Prince; but when there is no Prince, the marriage of the vaſſal of the principality is not excluded by an anterior ſuperior; becauſe then the King enjoys the principality, not as a ſubject Prince, but as a ſovereign Prince, and ſo hath the ſame prerogative as in the royalty, albeit he gives his charters as Prince and Steward of *Scotland*; yet not as a Prince ſubject as his ſon would be, nor as ſupplying the vice of the Prince, for he is not comptable to a ſuperveening Prince, as was found, *Jan.* 9. 1680, *Purves* Solicitor. Yet if the King in the minority of the Prince, infeft ward-vaſſals of the principality as adminiſtrator to the Prince, he is comptable to the Prince, and his royal prerogative doth not exclude anterior ſuperiors.

LII. Yea it is alſo conſequent, that if the King acquire a ſuperiority, by buying the ſame, it is *in privato patrimonio*, and therein *utitur jure communi*, and doth not exclude an elder ſuperior.

LIII. There is no marriage due, if the vaſſal's heir apparent was married in his predeceſſor's lifetime, which gave occaſion to think that the riſe of this caſuality was by the tutorial power of the ſuperior, which being excluded by the lawful adminiſtration of the father, the ſuperior could not claim his vaſſal's tocher for his neglect or contempt: but this is too narrow a ground; for tho' the vaſſal's predeceſſor be not his father nor grandfather, but a collateral, there is no tocher due; but the true cauſe is evident enough, that here the vaſſal's heir (while in ward) hath no tocher to expect, being married already, and ordinarily his tocher applied for his predeceſſor's debt; and therefore a ſuperior cannot claim a tocher where the vaſſal can have none, nor could he claim a tocher, if it were known that his vaſſal were impotent and incapable of marriage.

The confidence between ſuperiors and vaſſals, maketh the feudal contract to be *uberrimæ fidei*, moſt excluſive of all rigour and fraud; and therefore, if a vaſſal ſhall by precipitation, when he is *moribundus*, marry his apparent heir, without treaty or publick proclamations, the heir is liable for a marriage, altho' he was married before his predeceſſor's death, as was lately found in the caſe of the Lord *Colvil* of *Cleiſh*, *Feb.* 20. 1667, much more if the vaſſal marry his apparent heir before he attain to the marriageable age, which in males is eſteemed fourteen compleat, and in females twelve compleat; and altho' all formalities were obſerved, yet it were juſtly to be accounted a fraudulent deſign, to elude the avail of his heir's marriage; or if the heir were of that vigour that he did marry himſelf, or his tutors did marry him before he were fourteen compleat, the avail of his marriage would be due; or if during the ward, the heir ſhould acquire a ward eſtate holding of the King, it would not exclude his other ſuperior, but would juſtly make him liable both to him and to the King, and might well be extended to two years rent to either ſuperior; whereas other double avails upon requiſition are never to be extended above three years free rent; for theſe are never without fraud, (*upon the part of the ſuperior or his donatar* [y]) albeit they have been hitherto ſtill excluded upon informality.

LIV. Let us now conſider on the part of the heir, whether the ſuperior can juſtly claim more avails of marriage than one by the death of one vaſſal, who died laſt infeft as of fee. It is beyond queſtion, as hath been ſhown before, that one marriage only can be due, tho' the heir have many ward-fees, not only of different ſuperiors, but of the ſame ſuperior; nor is it to be controverted, that if ſeveral heirs apparent be married during the ward, that the ſuperior may have a marriage for each of them, tho' they die during the ward and not entered; for theſe cannot be accounted rigorous, ſeeing the ſeveral heirs either did get tochers, or it was their own fault if they did not; ſo the queſtion only remains in caſe the apparent heirs die during the ward, and do not marry, whether any avail ſhall be due for them, or either of them, but only by the next heir that paſſeth

[y] See above, § 47. *h. t.*

paſſeth the determination of the ward, who if not married then, is held as forbearing fraudfully in prejudice of the ſuperior, and therefore is liable for a marriage, tho' he never marry.

This rigorous extenſion hath one deciſion for it, that every apparent heir of a ward vaſſal, attaining to the marriageable age, tho' dying during the ward unmarried, heaps as many avails of a marriage upon the fee; *this* was found, *July* 11. 1622, *French* and L. of *Thorniedykes*, which the Lords declared they would obſerve thereafter, in all ſuch caſes of marriage; yet they emitted no act of ſederunt thereupon, to certify the lieges againſt miſtakes of the juſt intereſt of ſuperiors: but *Durie* declares it was never ſo decided before at any time, which ſufficiently inſinuates, that his judgment was contrary. It was again attempted in the caſe of *Dickſon* of *Headrig*, *Nov.* 14. 1635, where two apparent heirs had died unmarried, and the donatar of the marriage of the firſt having purſued the ſecond, not for his own, but for the marriage of his elder brother, who dying *pendente proceſſu*, the ſame donatar of the firſt brother purſues the third brother for the marriage of the firſt, wherein there was no more done but this dilator proponed and repelled, *viz.* no proceſs, becauſe the third brother was not charged to enter heir, and ſo there was no paſſive title againſt him for his brother's marriage, which the Lords did moſt juſtly repel; becauſe an action for the avail of a marriage is *declaratorie*, not *petitorie*, and only for affecting the ground, and ſo is competent againſt any apparent heir: but there is no act or decreet ſuſtained for the avail of the marriage of the firſt brother, who died during the ward unmarried; and as there was never a deciſion before that of *French*, ſo, for ought I could ever obſerve, there was never one ſince, and I hope never ſhall be; for it is no way conſiſtent with the deſign of this caſuality, that a foundation ſhould be laid to ruin a vaſſal, and *is* very incongruous to other caſes; for if the vaſſal's heir ſhould marry never ſo oft, he is but liable for one avail, even tho' he held ſeveral ward-fees of the ſame, or divers ſuperiors, how incongruous then would it be, if the fee ſhould be burdened for all the heirs that ſhould happen to die unmarried during the ward: for in the ſaid caſe of *Headrig*, there were three brothers ſucceeded unmarried, and there might been many more; for it is no rarity for a vaſſal to die, and leave many children, who may alſo die during the ward; ſo *John Campbell* of *Skeldon* told me, that he ſucceeded to his father in a ward-fee, being the ſeventeenth ſon.

But the great objection would be, that the vaſſal's heir is marriageable at his age of fourteen complete, and therefore he may be then required to marry, and if he doth not, but refuſe a match offered without diſparagement, he is contumacious, and he muſt be repute fraudulently to forbear to marry, in prejudice of his ſuperior. I never found any example of an heir required to marry at his age of fourteen; and it were far rather to be accounted fraud in the ſuperior *ad captandum lucrum*, being under the pain of paying the double avail; and on the other hand, the vaſſal could pretend no prejudice, *that* if he did not marry before he were twenty one complete, *he were made* liable for the ſingle avail; yea if he were required during the twentieth year of his age, and refuſed an offered match without diſparagement, *that* he were made liable to the double avail. But if the riſe and deſign of this caſuality be conſidered, which at firſt was the real tocher, the vaſſal happened to get without fraud; or *becauſe* getting leſs, was no hurt to him, but to the ſuperior, therefore the ſuperior might, ſo ſoon as he could evidence the heir's ſuit, treaty or proclamation of marriage, offer him another; that ſo he might not only have that tocher which he got, but which he might have gotten; but now when cuſtom hath determined the avail whatever the tocher were, there is no ground for requiſition, till the laſt year of the ward.

But if a major ſucceed as apparent heir, unmarried in his predeceſſor's time, if he continue unmarried a year after his predeceſſor's death, though he be not required, his fee may be burdened with a ſingle avail; or if at the iſh of that year an offer be made of a match without diſparagement, he might be liable for the

the double avail, becauſe he may be preſumed to forbear fraudulently in prejudice of his ſuperior, in the ſame manner as a minor forbearing to marry till the ward be ended.

LV. But this queſtion yet remaineth undetermined, at what age of the ward-vaſſal the avail of his marriage may be declared, and in relation to what time his eſtate is to be counted. There was occaſion for determination of this point in the declarator of the marriage of the Laird of *Dalmaghie*, who ſucceeded to a ward fee, firſt to his mother before he was fourteen complete, and then his father died at his age of ſeventeen or eighteen, and ſhortly after he married; the donatar inſiſted for the avail of his marriage according to the free rent he had when he married, *before* which time his father's eſtate fell to him, that was much more conſiderable. The defender alledged that his eſtate could only be conſidered at his marriageable age of fourteen, and there were ſeveral interlocutors ſuſtaining that alledgeance, but ſtopped again. The Lords inclined much to eaſe the vaſſal ſo far as law would allow, eſpecially being a gift in gros granted to the donatar of the wards of ſeveral years; but certainly the general rule of eſtimation ſhould be the time of the vaſſal's marriage; or being required in the current year before the termination of the ward; ſeeing the firſt deſign was, that the ſuperior ſhould get his vaſſal's tocher, the value of it ſhould be eſtimate when himſelf gets a tocher, or is ſuppoſed fraudfully to forbear to get it; for ſuppoſe the vaſſal's marriage be diſſolved within year and day without a child, tho' he were married he would get nothing by it: and it can never be accounted fraud which is a virtuous prudence, that perſons ſhould not marry till they come to vigour, and are capable to rule a family; and therefore ſhould never be accounted fraudulent, until the men come to twenty, and women to thirteen.

And now ſeeing the avail of marriage is determined to ſuch a quantity, there is no reaſon for the ſuperior to precipitate; becauſe the marriage being *debitum fundi*, no other debt, real or perſonal of the defunct vaſſal, or his heir, can prejudge the ſuperior; becauſe the avail of the marriage is preferable to the ſame, or any other right, being a real burden upon the fee, and he can have no benefit by the marriage till the ward end; and proceſs ought not to be ſuſtained, till a year after the marriage, or a year after expiring of the ward; for if the vaſſal die unmarried, before the year that the ward terminates, there ſhould be no avail, unleſs marriage actually exiſt, and be effectual by a year, or a child.

It may be pretended, that by this courſe the ſuperior may be at the loſs, if the heir become poorer at the time of the marriage, than when he was marriageable; which imports not; for minors are barred up by law from hurting themſelves, and ſo they can ſell nothing, but for payment of debt, whereby the ſuperior has no loſs; becauſe the annualrent of the debt is more than the rent of the land: but on the contrary good curators do frequently increaſe their minors eſtates; and ſeeing the ordinary avail comes now in place of the real tocher, it can never be ſo well declared, as at the time when the tocher was due.

LVI. The termination of the ward in males, is known to be the termination of their minority, but in females, it is determined to be their 14th year complete, for then they are capable of children, and governing their houſe, and they are never fit for war, and therefore a robuſt age for war is not required in them, nor can they otherwiſe ſerve but by a ſubſtitute, and their ward-fee is in ſo far improper, that women are capable to ſucceed. The termination of their ward is declared to be 14 years complete, *Parl.* 1546, *cap.* 5. and *Parl.* 1571, *cap.* 42. And albeit heretrixes get no tocher, yet their fee is liable for an ordinary avail, as if they were men, and that alike, whether there be more than one co-heir. In taxed marriage no aliment is due, becauſe the vaſſal hath always the greateſt part of the profit of the fee, exceeding the taxt-duty.

LVII. There is a great queſtion, ſcarce yet cleared by cuſtom or deciſion; in the caſe of appriſers being infeft in ward-fees, if they die within the legal, whether a marriage be due, ſeeing the appryſing is then but *pignus prætorium*, conſiſtent

ſiſtent with the debtor's fee, and therefore the caſualities ſhould be due by the death of the debtor, and not of the appriſer: or if it were due by the appriſer, it behoved to return upon the debtor, ſeeing the appriſer or adjudger ſhould have his debt without damage: for it is beyond queſtion, that the ſuperior cannot have the benefit of the caſualities, both by the death of the debtor, and creditor appriſing or adjudging, during the legal; but thereafter, if the creditor do not forſake his infeftment, (which he may do, and ſeek other means of payment), the debtor's right becomes totally extinct, and the caſualities fall only by the death of the appriſer or adjudger; and tho' there were many appriſers of parcels of the ward-holding, each of them would be liable to all the caſualities. There is one deciſion in the caſe of the King's Advocate contra *Yeoman*, *July* 13. 1680. *where* the appriſer of a ward-fee dying within the legal, his heir having proponed a defence, that the appriſing was extinct by ſatisfaction within the legal, and his oath being taken upon the value of his eſtate, he ſuccumbed in proving his exception; and his oath was found to prove his rent, but not his burden, as being a quality to be proved otherwiſe, and therefore he was decerned: but he acquieſced in that defence, and did not urge an anſwer to the objection, that his father died within the legal, which therefore yet remains intire. And there is much more reaſon, that during the legal, the caſuality ſhould only fall by the debtor's death *. But now ſince by the act of Parliament, bringing in all appriſers and adjudgers *pari paſſu*, a charge is declared ſufficient to make the ſame effectual, if the adjudger will unneceſſarly take infeftment within the legal, putting an unneceſſary burden on the debtor, the caſuality ſhould juſtly ly upon himſelf, without relief, and no part of it ſhould ly upon the debtor, or the other adjudgers coming in *pari paſſu*; but after the legal, the caſualities will fall after the death of all the adjudgers.

LVIII. There remains now to be conſidered, the addition made by the double avail of a marriage, which is moſt unfavourable, and hath quite deborded from the riſe of it, which was, that the ſuperior might not be prejudged, by the vaſſal's accepting too mean a tocher, therefore he was allowed to offer a match without diſparagement, whereby he *might* get a better tocher; but none uſes to be offered, but ſuch as it is notour the vaſſal will not accept, that a double avail may be claimed; and therefore ſuch offers ſhould take no effect, till the laſt year of the ward of a minor-heir, or the firſt year of a major-heir. Altho' it hath been claimed at other times, yet there are many objections againſt it, both as to the matter and form: as to the matter, it takes only place, when a perſon is offered, when both the heir and that perſon is free of being otherwiſe engaged to marry; and therefore the double avail was not found due, when the heir was agreed in marriage with another woman before the requiſition, tho' the contract of marriage was not ſubſcribed; as was found, *Feb.* 22. 1678, *Drummond* of *Machany*: and much more where the woman is engaged in marriage to another man, the offer of her cannot infer the double avail, *Had. Dec.* 20. 1609, and *Jan.* 20. 1610, *L. Kilbirnie contra the heretrix of Fairlie* **.

LIX. 2*dly*, The perſon offered, muſt be without diſparagement, which is not to be accounted by means, but by quality and fame. There are only three degrees of quality that the law reſpects in this caſe; nobility; comprehending not only Lords but Barons, Burgeſſes, and Yeomen; and therefore a burgeſs offered to the heir of a Lord, or Baron, or Gentleman of the like quality, tho' he have little land-eſtate, may be refuſed, or a Yeoman to a Burgeſs. There is alſo a diſparagement in the age of the perſon offered and the heir, which yet is with ſome latitude, that the perſon offered be not much older than the heir. 3*dly*, There is diſparagement in the feature or integrity of the body, which may give a juſt averſion; in which more of beauty is required in a woman, offered to an heir

* See *July* 28. 1680 *inter eoſd.* where the marriage was found to fall due by the death of the appriſer. See above § 36. § 3. *h. t.*

** By the firſt of theſe deciſions quoted from *Haddington*, it was found, that tho' the female ward-vaſſal was engaged, before requiſition was made by the ſuperior, the double avail was notwithſtanding due. The ſecond deciſion does not relate to this point.

being a man, than in a man offered to an heireſs; but in no caſe lame, or blind, or dumb, or deaf, or defective, or redundant in any member, or any conſpicuous diſtortion can be offered. 4*thly*, There is a diſparagement in the qualities of the mind, as if an idiot, a fool, or weak perſon be offered, or a perſon of known evil humour, or evil fame, or the like.

LX. As to the form of the offer, nothing is admitted to be proved, but by the ſolemnity of the inſtrument of a Notar, which ought to be two. The firſt *inſtrument*, muſt bear the ſuperior, or his donatar's offering to the vaſſal's heir a perſon by name, and an equal and unſuſpected place for interview and conference, and a lawful time, and an inſtrument taken thereupon, bearing the production of the donatar's gift, if it be made by a donatar, and the procuratory of a procurator, and the reading thereof: and the ſecond inſtrument muſt bear the ſuperior, procurator, or donatar's appearing on the day appointed for interview, and then requiring the ſolemnizing of the marriage to be at a convenient kirk, on a particular day, which ought not to be the ſabbath, not being the ordinary time of marriage; which inſtrument muſt contain the production and reading of the former inſtrument, that the ſuperior, his donatar or procurator, with the perſon offered, came to the place of interview in due time, and waiting till mid-day was paſt; and therefore the double avail was not found due upon that defect, *Hope*, marriage, the E. *Angus contra Niſbet*. Nor where the inſtrument of requiſition mentioned not the gift produced, albeit it was not called for, tho' it was offered to be proved by witneſſes, that it was truly produced, *Hope*, *ibid. Drummond contra Laird of Manner*, *March* 8. 1627. *E. Rothes contra Balfour* *. Neither where the place of interview was not an indifferent place, but the donatar's lodging, *July* 3. 1622, *French*; in which caſe it was not found neceſſary to require the curators, the heir being minor, for their conſent is not neceſſary to marriage.

LXI. The laſt common caſuality of ſuperiors, is the liferent-eſcheat of the vaſſal, when the vaſſal is denounced rebel, for diſobedience of the law (which becauſe it is intimate by three blaſts of a horn, is called horning), if he continue ſo unreſtored, or unrelaxed year and day, his liferent is eſcheated, or forfeited unto his ſeveral ſuperiors, of whom he held his fees; this may ſeem a penalty for diſobedience to law, and is ſo as to fees holden of the King; yet if it had no other ground, the liferent could not befal to the ſuperior, but to the king, whoſe command was diſobeyed, as forfeiture and ſingle eſcheat do; but the original of it is, that rebellion is like *capitis diminutio*, or *civitatis amiſſio* amongſt the *Romans*, whereby ſuch perſons cannot ſtand in judgment, and they are *civiliter mortui*, and thereby their fees become void, and return to their ſuperiors, and ſo is declared *Parl.* 1535, *cap.* 32. except in the caſe of treaſon or leſe majeſty, for then they fall to the King.

LXII. Liferent-eſcheat carries the profit of all fees and liferents [z], whether conſtitute by conjunct-fee, infeftments, terce, or liferent-tack, during the life of the rebel, having remained year and day at the horn, tho' thereafter he be relaxed, even tho' he be not infeft and entered as heir the time of his denunciation [if he enter thereafter; but if he renounce to be heir, or die unentered, there is no reaſon his liferent-eſcheat ſhould prejudge another ſuperior's creditors] ** *July* 3. 1624. *Muir*. Yea, tho' there be no infeftment, if by contract or diſpoſition, there be any heritable-right or liferent provided, even tho' there were no infeftment required, as a terce by paction without ſervice or kenning, *Hope*, horning, *Maxwell* and *Gordon contra L. Lochinvar*. So liferent-tacks of lands or teinds fall under eſcheat, without prejudice to thoſe who have right to ſuch tacks after the liferenters,

* In theſe two caſes it was found, that tho' the procuratory was not produced, it was no nullity in the requiſition; but the learned author's doctrine with regard to the neceſſity of producing the gift, and that the production thereof muſt be mentioned in the inſtrument, is proved both by the next deciſion here quoted *July* 3. 1622, *French*; and by *Spotſwood*, Marriage.

** What is incloſed by the parentheſis, is in none of the MS nor in the firſt Edition. It appears unintelligible.

[z] See above II. 1. 4. 2. Below III. 3. 15. 2.

liferenters, *Parl.* 1617, *cap.* 15. Theſe tacks befal to the maſter of the ground *; and liferents by terce or courteſy, fall to the ſuperior of the land; for theſe liferenters are his vaſſals during life, and owe him fidelity and a *reddendo*.

LXIII. Whenſoever there is not infeftment actually expede, the denunciation makes not the liferent to belong to that perſon, of whom the liferent ſhould have been holden, but to the King; as an annualrent due by contract or diſpoſition, to be holden of the diſponer, *Haddingtoun*, *December* 20. 1609, *Hay contra Laurie*, *July* 22. 1675, *Menzies of Caſtlehill*. (So likewiſe, liferent-eſcheat of a miniſter [a] cauſeth his ſtipend and profit of his manſe and gleib, tho' locally within a regality, to fall, not to the Lord of regality, *but to the King*, *March* 28. 1628, *Fletcher contra Irving*.) But if there be infeftment, it falleth to the immediate ſuperior, *Janary* 23. 1624, *Meldrum*. And likewiſe an annualrent due by an heritable bond, bearing a clauſe to infeft the creditor in an annualrent, without mention of particular lands or manner of holding, was found to fall in liferent-eſcheat to the King's donatar after year and day, *July* 1. 1626, *Haliburton*. And it was found, that a ſum conſigned to redeem a wadſet, was to be re-imployed for the ſuperior, during the wadſetter the rebel's lifetime, *June* 29. 1661, *Tailziefer*.

LXIV. Liferent-eſcheat of the vaſſal carries the liferent of the ſub-vaſſal, falling after the denunciation of the vaſſal, and *his* being year and day at the horn, *Feb.* 26. 1623, *Sibbald*, *July* 24. 1632, *Rule*; becauſe then the ſuperior is in place of the vaſſal; but where the ſub-vaſſal's liferent fell before the vaſſal's own liferent, it is carried by the vaſſal's ſingle eſcheat. Liferent-eſcheat falleth by the vaſſal's rebellion, and the year and day ſubſequent is only allowed to purge the rebellion by relaxation, which being uſed year and day after the rebellion, hath no effect as to the liferent-eſcheat of ſuch lands as belonged to the rebel the time of the denunciation, tho' it hath effect as to his moveables *afterwards acquired*, *Feb.* 24. 1635, *Lockhart* [b]; therefore the vaſſal's voluntary deeds prejudge not the ſuperior of his liferent-eſcheat, not only ſuch deeds as are done after year and day from the denunciation, but which are done at any time after the denunciation, if relaxation be not uſed within year and day, which is to be extended to theſe following caſes.

LXV. *Firſt*, No infeftment, proceeding upon a debt contracted by the rebel, after the rebellion, tho' the infeftment be accompliſhed within the year, will exclude the liferent-eſcheat, or prejudge the ſuperior, if relaxation be not uſed within year and day, whether the infeftment proceed upon the rebel's own diſpoſition, or upon appriſing; becauſe, in both caſes, it is the voluntary deed of the rebel that prejudgeth the ſuperior: for albeit the appriſing be a deed of law, and neceſſary, yet it proceeds upon a debt voluntarily contracted after rebellion, which debts will not exclude the ſingle eſcheat, and therefore ought not to exclude the liferent-eſcheat.

Secondly, The debts or obligements of the vaſſal, tho' they precede the denunciation, yet no infeftment granted by him *in curſu rebellionis*, for ſatisfying theſe anterior debts, will exclude the liferent-eſcheat, unleſs he had been ſpecially obliged to grant ſuch an infeftment before the rebellion; for then the granting of it after is not a voluntary, but a neceſſary deed, which he might be compelled to grant, *Jan.* 23. 1627, *Wallace*; in which caſe an infeftment for an onerous debt before rebellion, was not found ſufficient to exclude the liferent, ſeeing there was no anterior obligement to grant that infeftment; which is the more confirmed by the parity of the caſe of inhibitions, which annul infeftments after the inhibition, tho' granted for ſatisfying anterior debts: but if there were an anterior obligement, the infeftment conform thereto, tho' after the inhibition, is valid, as not being a voluntary, but a neceſſary deed.

Thirdly,

* Such tacks were found to fall to the King, *Had. Feb.* 1598, *Leſlie contra Stewart*.

[a] See above, II. 3. 4. & 40. [b] See below, III. 3. 14. & IV. 47. 10.

Thirdly, Diſpoſitions and obligements to grant infeftments anterior to the rebellion, and infeftment thereupon poſterior, do not exclude the liferent-eſcheat, unleſs the infeftment be taken *in curſu rebellionis* [c]; and ſo a contract of wadſet long before rebellion, clad with thirty eight years poſſeſſion before denunciation, was not found ſufficient to exclude the liferent-eſcheat, *Dec.* 3. 1634, *Lindſay*. Neither a charter and inhibition thereupon, ſeeing there was not ſeiſin taken within year and day, *Dec.* 3. 1623, *Harris*. Neither a baſe infeftment before denunciation, there being no poſſeſſion thereon till year and day, *March* 19. 1633, L. *Rentoun*; *Feb.* 21. 1667. *Miln*.

LXVI. *Fourthly*, Appriſings or adjudications, tho' for a debt anterior to the rebellion, exclude not liferent-eſcheat, unleſs infeftment or a charge againſt the ſuperior be uſed thereupon within year and day after rebellion; for without infeftment or a charge, appriſing is no real right [d]: and therefore, tho' it were led before rebellion againſt a vaſſal, if infeftment or a charge follow not *in curſu rebellionis*, it excludes not the vaſſal's liferent-eſcheat to fall to the ſuperior or donatar, *July* 24. 1632, *Rule*, albeit infeftment follow upon the appriſing before the liferent was gifted, *Hope*, horning *and* eſcheat, *Sir Patrick Murray contra Adamſon*. Neither did an appriſing upon a denunciation begun *in curſu rebellionis*, but not perfected, exclude the liferent-eſcheat, *Feb.* 16. 1631, *Cranſtoun*. But if appriſing or adjudication be led for ſums prior to the rebellion, and be compleat by infeftment or charge *in curſu rebellionis*, albeit they be deduced after rebellion, they exclude the liferent-eſcheat, as is inſinuate in the limitations in the former deciſions, and was ſo decided, *Had. Feb.* 13. 1611, *tenants of Lochauld contra Young and Areſkine* *.

Liferent-eſcheat being one of the caſualities of ſuperiority, only introduced by ſtatute or cuſtom, there is this difference, from that which hath been ſaid of non-entry, ward, or recognition, which are caſualities ariſing from the nature of the feudal contract, that liferent-eſcheat flowing not thence, but upon the vaſſal's rebellion and diſobedience to law, which is not againſt the ſuperior, or any delinquence againſt the feudal contract, the vaſſal's liferent-eſcheat gives the ſuperior no more than the vaſſal himſelf had the time of his denunciation; and ſo all real rights compleat by poſſeſſion, whether infeftments or tacks, are not prejudged by the ſubſequent liferent-eſcheat, as was found, *Jan.* 19. 1672, Mr. *William Beatoun*. In feus, ſo far as is allowed by law, the vaſſal's liferent will reach no more than the feu-duties of feus ſet by the vaſſal before his denunciation; but any ſubaltern baſe infeftment, not clad with poſſeſſion before rebellion, is excluded by the liferent, *March* 19. 1633, L. of *Rentoun*; *Feb.* 21. 1667, *Miln*: in which caſe it was found, that poſſeſſion, not being attained *in curſu rebellionis* during the year, it was not effectual. If a tack be ſet, without diminution of the rental, for the old tack-duty, it will not be excluded by the liferent, tho' it be ſet after denunciation, as was found in a tack after denunciation within the year, *Hope*, horning, *Charters contra M'Lelland*, *Spotiſ.* eſcheat, *L. Tillibairn contra Dalziel*. The like of a tack ſet to a kindly tenant, *Hope*, tacks, *Paton contra L. Drumraſh*: for in ſuch caſes, ſetting of tacks is a neceſſary adminiſtration for the good of both ſuperior and vaſſal, and to ſhun debate concerning prejudice and unanſwerable tack-duties; as in other caſes of adminiſtration of beneficed perſons, who, if their tacks be ſet without diminution of the rental, they are good.

LXVII. Liferent-eſcheat extends itſelf to all fees, whether holden ward, blench or feu, but not to burgage and mortification, becauſe the fiar is a ſociety and incorporation, which dieth not; and therefore have no liferent-eſcheat: and tho' denunciation may be uſed againſt the perſons adminiſtrating the ſame, even for that which is due by the incorporation, and as they repreſent it; yet that being

* It does not appear from the deciſion, as marked by *Had.* that the infeftment was obtained upon the appriſing within year and day of the rebellion, or even that a charge was given within that time.

[c] See below, III. 3. 26. & IV. 9. 6. [d] See above, § 32. *h. t.*

being ſuppoſed, their fault and negligence doth not prejudge the ſociety; as magiſtrates of burghs, maſters of colleges, incumbents in common or collegiate churches, chapters or convents *ſede vacante*.

LXVIII. But where a beneficed perſon having a diſtinct benefice, or a ſtipendary, is denounced for his own debt, his liferent-eſcheat falleth, and therewith the profits, during his life or incumbency; becauſe tho' the fee be not in him, yet he hath a diſtinct liferent thereof, which is not ſo in the former caſe, where both fee and profits are in the ſociety.

LXIX. Liferent-eſcheat is made effectual by general declarator, finding the vaſſal to be denounced, and year and day paſt, by production of the horning; but there is no neceſſity to prove him vaſſal, unleſs he be a ſingular ſucceſſor in the ſuperiority, not acknowledged by the vaſſal, or in caſe the vaſſal diſclaim[e]: herein is no mention of profits; but this declarator being obtained, the fee is void from the denunciation, and the ſuperior or his donatar have acceſs to the mails and duties thereof, and to ſet and remove tenants from the ſame, and to do all deeds accuſtomed by the vaſſal himſelf, in the ſame manner as in ward.

TITLE V.

Infeftments of Annualrent, where, of poinding of the Ground, and of Penſions.

I. *Deſcription of annualrent.*
II. *The riſe of annualrent, and ſeveral kinds thereof.*
III. *The manner of conſtituting annualrents.*
IV. *The kinds of holding of annualrents.*
V. *Liferent-eſcheat of annualrenters.*
VI. *Kinds of annualrents among the Engliſh.*
VII. *The difference of feu-annuals, ground-annuals, and top-annuals.*
VIII. *Poinding of the ground.*
IX. *How far it is extended againſt poſſeſſors.*
X. *Who muſt be cited in a poinding of the ground.*
XI. *The effect of poinding the ground in a competition as to the ground-right and property of the land.*
XII. *The order of poinding moveables, by ſeveral annualrenters. It affects every part of the ground* in ſolidum.
XIII. *Annualrents are effectual perſonally againſt intromitters, and are liable for publick burdens.*
XIV. *Annualrents are moveable as to bygones.*
XV. *Extinction of annualrents.*
XVI. *Penſions eccleſiaſtick affect the benefice.*
XVII. *Penſions by ſecular perſons, how far effectual. What if the cauſe of granting ceaſe.*
XVIII. *The King's penſions are not arreſtable.*

WHether annualrent by infeftment be a diſtinct right of property, or whether it be only a ſervitude upon the ground, leaving the name of property to the ground-right, as *Craig* eſteemeth, *Lib.* 1. *D.* 10. § *penult.* is not worth much debate; but in either caſe it falleth fitly here under conſideration, after property and ſuperiority, and before unqueſtionable ſervitudes.

I. Annualrent is ſo called, becauſe it returneth to be paid every year, at one or more terms. The *Engliſh* extend theſe rents to rents due by leaſe or tack; but with us, annualrents are only conſtitute by infeftment; and tho' the diſpoſition or proviſion thereof, may be ſufficient againſt the conſtituent or his heirs, it is not effectual againſt their ſingular ſucceſſors, and is no real right of the ground without infeftment.

[e] See below, III. 3. 22. & 26. 2.

II. The riſe of annualrents, is from the prohibition of uſury in the canon law, which they extend to the taking of any annual, or profit for money or any other thing; in lieu whereof thoſe who were unfit for trading, or managing the property of lands, bought annualrents, either irredeemably, or under reverſion, which had the ſame effect with the perſonal obligement for annualrent; and therefore it is ſtill retained *with us* even where annualrent is allowed by perſonal obligation, and is not uſury.

Annualrents then may be conſtitute, either of money, victual, or other fungible, and that either in fee and heritage, or in liferent; and either by a ſeveral infeftment, or by reſervation in infeftments of property: in which caſes the proprietar's ſeiſin ſerveth both.

III. Infeftments of annualrents in moſt things do agree with infeftments of property in the manner of conſtituting thereof, by charter or diſpoſition and ſeiſin; in which the ſymbol and token of the delivery of poſſeſſion of the annualrent, when money, is a penny money; and when victual, a parcel thereof. Yet an old infeftment of annualrent was ſuſtained, tho' it bore only "ſeiſin "to be given, according to the ſolemnities uſed in ſuch caſes;" albeit it was given thirty ſix years before, and no poſſeſſion thereby, *March* 23. 1631, *Somervel.* Annualrent being once validate by poſſeſſion, it was not excluded by the infeftment of property of the preſent heritor, tho' the annualrenter ſhowed not the infeftment of him who conſtitute the annualrent; ſo that it did not appear whether both infeftments flowed from one common author *; but ſeeing the infeftment of annualrent was prior to the infeftment of property, it was not excluded thereby, *Feb.* 7. 1667, *Smeiton.*

IV. Annualrent may be either holden ward, or blench, or by mortification, and uſeth not to be holden feu or burgage, and is moſt frequently blench for a penny; but if no holding be expreſſed, it is held to be ward; and therefore, the caſualities of the ſuperiority befal to the ſuperior, according to the kind of the holding, as in property; ſo that being ward or blench, it falleth in non-entry, in the hands of the ſuperior, without declarator, and ſo ceaſeth during that time, even tho' the *ſuperior as* conſtituent and debtor, may be liable perſonally [f], upon any perſonal obligement, for paying thereof, *March* 23. 1631, *Somervel.* And becauſe annualrents have no retour as lands, but *are* retoured *quod valent ſeipſum*; therefore the non-entry did carry it without ſpecial declarator; but by the late act of *Parl. cap.* 42. *P.* 1690, if the annualrent be blench for a penny or the like, no more is due till declarator. Annualrents may be either baſe, or public by reſignation or confirmation, and as to the requiſites to accompliſh it when baſe, it is fully ſhown before [g].

V. So likewiſe annualrent falling in liferent-eſcheat, belongs to the ſuperior during the annualrenter's life; and if it be redeemed, the profit of the money comes in place thereof, as followeth *a pari*, from a wadſet redeemed, which was fallen in liferent-eſcheat; and therefore, the money was ordained to be employed upon annualrent for the ſuperior, during the life of the wadſetter, *June* 29. 1661, *Tailzieſer* [gg].

VI. The Engliſh diſtinguiſh rent in rent-ſervice, rent-charge, and rent-ſeck. Rent-ſervice is that which is due by the *reddendo* of an infeftment of property, as a feu or blench duty; this is as a part of the infeftment of property, but hath the ſame effect by poinding of the ground, as other annualrents. Rent-charge is that, which not being by *reddendo*, yet is ſo conſtitute, that the annualrenter may *brevi manu*, (his term being paſt) poind the ground therefor. We have no ſuch annualrent, for we admit of no diſtreſs without public authority; but all execution muſt proceed by decreet and precept. *Rent-ſeck* is ſo called, as *redditus ſiccus*, becauſe it is dry, having no effect without ſentence; ſuch are our annu rents.

VII.

* The infeftment of the perſon in whoſe favour the annualrent had been originally conſtitute, was not produced, but he had been once in poſſeſſion. This was the only objection repelled in the caſe here quoted. Compare *June* 16. 1674, *Brown.*

[f] F. even tho' the conſtituent as debtor be ſuperior, tho' he may be liable perſonally. [g] See above, II. 3. 27. [gg] See above, II. 4. 63.

VII. There is a diſtinction of annualrents mentioned, *Parl.* 1551, *cap.* 10. in feu-annuals, ground-annuals, and top-annuals, which *Craig* [h] thinketh to quadrate with the Engliſh diſtinction of rents: but the conſideration of that act and ordinance, in relation to the articles there expreſt, will make it appear, that the caſe being there of tenements within burgh, the feu-annual is that which is due by the *reddendo* of the property of the ground before the houſe was built; ground-annual is a diſtinct ſeveral annualrent, conſtitute upon the ground, before the houſe was built; and the top-annualrent, is out of the houſe: which is the more clear, that when ſuch tenements were deſtroyed, the leaſt abatement was of the feu-annual, or feu-duty; and therefore the proprietar repairing the tenement, was to pay the feu-annuals, with abatement of a ſixth part; and the ground-annual as being more antient than the top-annual, ſuffered an abatement of a fifth part, and the top-annual of a fourth part *.

VIII. The chief effect of annualrents, either by *reddendo* in property, or ſeveral infeftments, is by poinding of the ground, upon which the annualrent is conſtitute, and that by an ordinary action, whereby the annualrenter purſueth *for letters* to poind and appriſe all goods upon the ground, for payment of his annualrent; and alſo for the poinding and appriſing the ground-right and property itſelf. As to the firſt member, the Engliſh cuſtom extendeth it to all goods that ſhall happen to be upon the ground at the term, if they have but lain down thereupon. And our antient cuſtom extended it to all goods of the poſſeſſors, *& invecta & illata* by them, without retrenching it to what the tenant is due to the proprietar conſtituent of the annualrent; and the poinding in this caſe was extended to purge a ſpulzie, *Nov.* 21. 1628, *Watſon*; *June* 26. 1628. La. *Ednem*, where the purſuit was rather declaratory to eſtabliſh the purſuer's right, than for preſent poſſeſſion or execution. *See alſo July* 11. 1628, *inter eoſd.*

IX. But thereafter the Lords have been accuſtomed to interpoſe with chargers upon decreets of poinding of the ground, to reſtrict the ſame in favour of tenants, to their terms mails, from the ſtatute, 1469, *cap.* 36. bearing, "that the "cattle of poor men, inhabitants of the ground, ſhall not be pointed for the "landlords debt, where the mail extends not to the avail thereof." [i] And tho' the act ſeemeth correctory of an evil cuſtom, to poind the tenants goods for the maſters *perſonal* debt; yet the ſame reaſon, equity, and favour of their ruſticity, craves the extenſion of it to theſe *debita fundi*; and therefore it was ſo reſtricted, the tenants producing their tacks, or offering to depone upon their rent ſummarily, without taking a term; but it was not found requiſite that the annualrenter ſhould either libel or prove the quantity of the rent, *Feb.* 4. 1674, La. *Pitfoddels*: in which caſe it was found, that if the tenants the time of the poinding had compeared and produced their tacks, or had offered to make faith what the rent was, if more had been pointed than equivalent to their rent, it would have been a ſpulzie; but they ſhould not only depone what their rent is, but what is reſting of it; for the poinding of the ground or the brieve of diſtreſs, is only reſtricted by the act of Parliament, for remeid of that inconvenience, that was ſometime in uſe; that where ſums were to be paid by the brieve of diſtreſs againſt the Lord owner of the ground, the goods and cattle of poor men, inhabitants of the ground, were taken and diſtrenzied for the Lord's debt, where the mail extended not to the avail of the debt; and therefore it is ordained, "That "the tenant ſhall not be diſtrenzied for the Lord's debt, where the mail extends "not to the avail of the debt, further than his term's mail extends to." And therefore, in ſo far as the tenants mails are reſting, the poinding may proceed: and likewiſe for the current terms, tho' not yet come; that is, if the rent be victual, payable all at one term, the poinding may proceed for the value of the victual, according to the rate of the victual, *communibus annis*, in the ſeveral places

* By the act here quoted it appears, that the ſmalleſt deduction was from the ground-annual, *viz.* one ſixth, and from the feu-annual one fifth.

[h] *Craig* I. 10. 38. [i] See below IV. 23. 1. *et* 2. IV. 47. 24.

ces of the country, as men uſe to buy or wadſet, or by the fiars of that place. Neither can tacks abſolutely ſecure the tenants, if they be poſterior to the infeftment of annualrent; in which caſe, if they be within the true value of the land, the annualrenter or others poinding *pro debitis fundi*, cannot be prejudged by colluſive tacks, or ſuch as are granted with conſiderable diminution of the true worth: ſo that the poinding may proceed for one year or term's mail, as the lands are worth the time of the conſtitution of the annualrent: but in this caſe the poinding cannot proceed ſummarily, till it be cognoſced by declarator, or reduction of the tacks; which may frequently occur, tenants being oft accuſtomed to ſuſpend in decreets for poinding the ground. Poinding of the ground was found to take no effect againſt corns ſtanding upon the ground, having been poinded before by a third party, for a debt, *Hope, poinding of the ground, Paterſon contra Adamſon.*

X. In a poinding of the ground, the proprietar the time of the ſummons muſt be called, albeit his infeftment be baſe, but not the ſuperior, *Jan.* 19. 1636, *Oliphant*. And it is ſufficient to call the wadſetter without the reverſer, *Feb.* 1. 1631, *Williamſon*. The tenants alſo muſt be called, in ſo far as concerns their goods, but the preſent heritors and tenants being once decerned, the decreet will be effectual againſt all ſingular ſucceſſors, and ſubſequent tenants, without a new decreet of transference, *Hope, poinding of the ground, Forreſter contra tenants. Nov.* 21. 1628, *Watſon contra Reid. June* 26. 1662, *Adamſon contra Ld. Balmerino*. But a poinding of the ground upon annualrents, may proceed ſummarily, without declaring the right in a petitory judgment, tho' the annualrenter hath been *out of* poſſeſſion for *more than* ſeven years; and a poſterior annualrenter in poſſeſſion ſeven years, was not found preferable, becauſe annualrents being *debita fundi*, have neither prejudice nor profit by poſſeſſion, as in a poſſeſſory judgment, which is only competent upon infeftments of property or tacks, *Jan.* 9. 1668, Lady *Clerkingtoun*. And a poinding of the ground may proceed againſt the apparent heir, without a charge to enter heir, *Jan.* 2. 1667, *Oliphant*. [k]

XI. As to the ground-right and property of lands, appriſing upon infeftment of annualrent is not only effectual againſt the proprietar, but againſt any other appriſing for perſonal debt, and infeftment thereupon, being after the original infeftment of the annualrent, tho' before the appriſing thereon, *Hope, poinding and appriſing, tenants of Clunie contra L. Tarachtrie, Slowand and Glendining*. And it is the ſingularity of this right, that the infeftment of annualrent being once eſtabliſhed, appriſing thereupon will be preferred to all interveening rights and diligences, even tho' they proceed upon poſterior infeftments of annualrents. And tho' by the late act of Parliament, *Parl.* 1661, *cap.* 62, appriſings within year and day come in *pari paſſu*, there is an expreſs exception of annualrents; and therefore, an appriſing proceeding *after requiſition*, upon *the* perſonal obligement both for principal and annual, and within year and day of other appriſings, the appriſer was allowed to paſs from his appriſing *and requiſition* as to the annualrents prior to the appriſing; and theſe were preferred to all the appriſings: and his appriſing was brought in *pari paſſu*, for the principal ſum and annualrents after the appriſing, *Dec.* 22. 1671, *Campbell*. Yea, an infeftment of annualrent being betwixt the firſt effectual appriſing, and the ſubſequent appriſings within year and day, was brought in *pari paſſu* with theſe appriſings, as to the whole right, as being in a matter dubious, upon a new ſtatute, the annualrenter having reſted thereupon, and not having appriſed for his principal ſum; which if he had done, he would clearly have come in *pari paſſu*, *Feb.* 6. 1673, *Brown of Colſtoun* [l]. But as to the competition of annualrents, adjudications, and inhibitions, and the preferences thereupon, *vide infra, lib.* 4. *tit.* 35.

There is a caſe propoſed by Sir *Thomas Hope, viz.* If one having right to ſome years of an annualrent by liferent, or otherwiſe, ſhould appriſe for theſe years, and that

[k] See below III. 5. 23. *fin.*

[l] See below IV. 35. 30.

that appriſing expiring, whether that appriſing expired will carry the right of property, not only from him who conſtitute the annualrent, but from the fiar of the annualrent himſelf, ſo that the infeftment of annualrent ſhould become extinct? which ſeems to be reſolved affirmatively, becauſe of the nature of the right; for the infeftment of annualrent, being *jus ſed ignobilius*, becomes extinct, if the annualrenter thereupon do appriſe the property, and be infeft: and therefore, whoever appriſeth for any years of the annualrent, the infeftment thereof, unleſs it be taken away by ſatisfaction or redemption, extinguiſheth the infeftment of annualrent, without diſtinction whether the appriſing be led for any years belonging to the fiar, liferenter, or any other: and whereas the difficulty ſeems to be, that the liferenter cannot prejudge the fiar of the annualrent, or appriſe more from the fiar of the land than he had; it is anſwered, the fiar of the annualrent needs not be prejudged, becauſe he hath a virtual reverſion, and might thereby redeem from the liferenter of the annualrent, and ſo extinguiſh his right: neither doth the appriſing exclude the annualrent itſelf, as to years poſterior, by the tenor of the appriſing, but by the nature of the right conſtitute to that very end, that an appriſing for any years of the annualrent is drawn back *ad ſucm cauſam*, *viz.* the original infeftment of the annualrent; and ſo excludes all poſterior infeftments: and therefore, extinguiſheth not only theſe, but even the infeftment of annualrent itſelf ceaſeth, by acceſſion of the property, *ut juris nobilioris*; but if the fiar of the annualrent were neglective in ſo dubious a caſe, it is like the Lords would repone him, he ſatisfying the liferenter [ll].

In the caſe of competition, the infeftment of annualrent itſelf will be preferred to the poſterior rights, tho' no appriſing followed, *Jan.* 29. 1635, *Hamilton* of *Brownhill*. For all infeftments of annualrent have that privilege and preference, tho' they be made uſe of by way of competition, without appriſing thereupon: yea, tho' requiſition was made, and an appriſing led upon the ſum, whereunto the annualrent was acceſſory, yet it was found the appriſer might *pro loco et tempore* paſs from that appriſing, and upon the annualrent itſelf be preferred, *Jan.* 24. 1663, *Graham*.

XII. But as to appriſing of moveables for rents, the Lords uſe in competitions to give ſo much time to the firſt annualrenter, and ſo to the reſt, after each term, at which they only may poind: and ſo they decerned the firſt annualrenter to poind within twenty days of each term, and the ſecond within the next twenty days, *Feb.* 15. 1662, Ladies *Mouſwall* elder and younger competing. The like allowing the firſt annualrenter forty days after each term, *July* 26. 1662, Sir *John Aiton*. But as to the appriſing of the property, the firſt annualrenter may appriſe when he pleaſeth, and then is preferable to all others; but the regulating of the poinding of moveables is in favour of the poor labourers. The like, *June* 26. 1662, *Adamſon*, where it was found, that the annualrenter might affect any part of the ground *in ſolidum*, albeit now belonging to ſeveral heritors; but ſo, as the heritor of the ground affected, behoved to have aſſignation to the decreet for obtaining and recovering his relief.

XIII. Annualrents long ago had no effect but by poinding of the ground, and could not come in to hinder arreſters of the duties for the proprietar's debt, *March* 24. 1626, *Gray*; but thereafter it was ordained to be a ſufficient title againſt all intromitters with the duties perſonally, *March* 15. 1637, *Guthrie*. Annualrents were found liable to public burdens, proportionally with the ſuperplus rent belonging to the fiar, *June* 23. 1675, *Bruce*. Yet this annualrent was not for ſecurity of a ſtock, *but an irredeemable conſtitution of annualrent*: the like was found of a liferent-annualrent, *June* 18. 1663, *Fleming*.

XIV. Annualrents, as to bygones, are moveable, and ſo arreſtable, and belong to executors, *Dec.* 15. 1630, *Ogilvy* [m]: yet it will be more competent and ſuitable to purſue it perſonally againſt intromitters with the rents, or poſſeſſors, than by a real action of poinding the ground.

[ll] See below, IV. 23. 7.

[m] See above, II. 1. 4. *fin.*

XV. An infeftment of annualrent redeemable, was found extinct by a renunciation regiſtrate in the regiſter of reverſions, and that againſt a ſingular ſucceſſor, tho' there was no reſignation of the annualrent, *Jan.* 7. 1680, *M'Lellan.* An annualrent was alſo found extinct, by the annualrenter's intromitting with the rents of the lands, out of which the annualrent was payable, equivalent to the principal ſum, for ſecurity whereof the annualrent was conſtitute; which intromiſſion was found probable by witneſſes, tho' it was ſilver-rent, *Feb.* 4. 1671, *Wiſhart*: and therefore, ſingular ſucceſſors ſucceeding in annualrents, either by voluntary diſpoſition, or by appriſing or adjudication, cannot be ſecure by inſpection of regiſters, as they may be for lands; but they run the hazard of ſatisfaction of the principal ſum for which the annualrent is granted, wherewith it falls in conſequence: and no provident man will buy an annualrent given for ſecurity of a principal ſum, but either upon neceſſity, for ſatisfying a prior debt, or upon great advantage; in both which caſes, he ſhould take his hazard, *nam ſcire debet cum quo contrahit*, as all purchaſers of perſonal rights muſt do[n]; for as intromiſſion with rents, doth more directly infer payment of the principal ſum, ſo it extinguiſheth the annualrent, as acceſſory thereto, even againſt ſingular ſucceſſors. Annualrents are alſo ſuppreſſed by wadſet of the land, or other more noble right in the perſon of the annualrenter, unleſs that right were evicted.

XVI. Penſions reſemble annualrents, or the *feuda ex camera*, or *ex cavena*, mentioned by the feudiſts; for thereby, a yearly rent is conſtitute to be paid out of the conſtituent's lands, generally or particularly: yet theſe penſions, not having infeftment, have but the nature of aſſignations, and ſo are not valid againſt ſingular ſucceſſors. Except only eccleſiaſtick penſions, conſtitute by prelates, which are valid againſt their ſucceſſors in office; but not unleſs they be cloathed with poſſeſſion or decreets conform, in the conſtituent's life. And ſo a penſion granted by a biſhop, with power to aſſign, was found valid to the aſſigny, after the firſt penſioner's death, againſt the ſucceeding biſhop, and to be no dilapidation, *July* 23. 1625, miniſter of *Kirkliſtoun*; yea, tho' the penſion bore a power to aſſign *etiam in articulo mortis*, and the diſpute was with the aſſigny, *Dec.* 17. 1628, *Chalmers*: but in this caſe the penſioner granting aſſignation, reſerving his own liferent, or to take effect after his death, whereby both might at once have intereſt therein, the aſſignation was found null by exception, tho' having decreet conform, and thirty years poſſeſſion. The like, *Hope*, aſſignation, *Abernethie contra La. Drumlangrig.* But by the act of *Parl.* 1606, *cap.* 3. archbiſhops and biſhops are diſabled to grant penſions to affect their benefices, further than themſelves have right to the benefice, but do not prejudge their ſucceſſors in office; yet penſions granted by beneficed perſons, are not only due during their life, but out of their annat after their death, *Feb.* 28. 1628, Bairns of the biſhop of *Galloway*.

XVII. Penſions granted by ſecular perſons, tho' they contain aſſignations to the duties of lands ſpecially, and have decreet conform, were found ineffectual againſt ſingular ſucceſſors in the land, *July* 9. 1629, *Urquhart*; *Dec.* 11. 1662, *Clapperton*; neither againſt the Lady tercer of the conſtituent, *March* 27. 1634, Counteſs of *Dumfermling*: yet a decreet conform being obtained againſt the granter of a penſion, his tenants and chamberlains, is effectual againſt ſubſequent chamberlains, without new decreet or transference, yet muſt be transferred againſt the conſtituent's heir and his chamberlain, tho' it would be valid, being an eccleſiaſtick penſion, againſt his ſucceſſor, *Dec.* 7. 1630, E. of *Carrick*; *Spotiſ. hic, Weyms contra chamberlain of the D. of Lennox* *.

A

* The deciſion, *Dec.* 7. 1630, E. *Carrick*, proves only, that a new decreet is neceſſary againſt the heir, and inſinuates, that in the caſe of an eccleſiaſtick penſion, no new decreet would be required againſt the ſucceſſor in office. The deciſion from *Spotiſwood* makes it unneceſſary to call the granter of the penſion in a proceſs againſt his tenants and chamberlains. But it does not appear, that a new chamberlain, or new tenants, may be charged upon a decreet againſt the former chamberlain or tenants.

[n] See above, II. 3. 22. 1. & III. 1. 21.

A penſion, bearing for love and ſpecial ſervice done and to be done, was found effectual, tho' the penſioner was removed, and did not that ſervice, his removal being neceſſary by tranſportation, *March* 25. 1629, Doctor *Strang*. The like of a penſion granted to an Advocate, for ſervices done and to be done, which was found valid during his life, tho' he left pleading, *Dec.* 3. 1661. *Jamieſon*. The like of a penſion, for ſervice done and to be done, tho' the ſervice was not done, but not required: nor was it excluded by the penſioner's purſuing proceſſes at his own inſtance againſt the conſtituent, upon a probable ground, tho' the conſtituent was aſſoilzied, *July* 26. 1678. Mr. *William Weir* Advocate.

XVIII. Penſions granted by the King are declared not arreſtable in the treaſurers hand's. Act of Sederunt, *June* 11. 1613 *. The reaſon thereof muſt be, becauſe ſuch are ordinarily alimentary, and always for the King's ſpecial ſervice, which would be impeded, if arreſtable, by hindering payment of the penſion °.

TITLE VI.

Liferent-Infeftments, where, of Conjunct fees, Terces, and Liferents by the Courteſy of Scotland.

I. *Servitudes perſonal by the* Roman *law.*
II. *Servitudes perſonal by our cuſtom.*
III. *Clauſes of conqueſt, of liferent or fee of lands acquired during marriages, how far extended.*
IV. *All liferents muſt be* ſalva rei ſubſtantia.
V. *Liferenters are burdened with the aliment of heirs.*
VI. *Liferents without infeftment are not effectual againſt ſingular ſucceſſors.*
VII. *The effect of aſſignations to liferents.*
VIII. *Liferents are not prejudged by tacks or other deeds of the fiar, poſterior thereto.*
IX. *What terms do belong to liferenters.*
X. *Conjunct fees.*
XI. *Liferenters by conjunct fee have all the caſualities of ſuperiority.*
XII. *Terce.*
XIII. *Services of terces.*
XIV. *Kenning of terces.*
XV. *The effect of terces.*
XVI. *The extent of terces.*
XVII. *Exceptions againſt terces.*
XVIII. *Burdens of terces.*
XIX. *Liferents by the courteſy of Scotland.*
XX. *Public burdens.*

FRom the feudal rights of property, we proceed to ſervitudes, burdening the ſame; theſe are either perſonal or real: Perſonal ſervitudes are thoſe, whereby the property of one is ſubſervient to the perſon of another than the fiar; Real ſervitude is, whereby a tenement is ſubſervient to another tenement, and to perſons *only* as, and while they have right to the tenement dominant; as thirlage, paſturage, ways, paſſages, *&c.* and the like. Servitudes perſonal for term of life, are therefore called liferents; ſervitudes for an indefinite time are ſuch, which either may or uſes to be conſtitute for a longer or ſhorter time, ſuch are penſions eccleſiaſtick, rentals and tacks, which, tho' they be in their nature but perſonal rights; yet by ſtatute or cuſtom, they have the effect of real rights, of which hereafter. Teinds alſo muſt come in as ſervitudes, tho' they are accounted as diſtinct rights.

I. The *Roman* law divideth perſonal ſervitudes into uſufruct, uſe, and habitation. Uſufruct "is the power of diſpoſal of the uſe and fruits, ſaving the ſub-"ſtance of the thing," which if it be reſtrained to theſe perſons, and their proper

* This act of Sederunt is to be found in *Spotiſwood*, *voce*, Penſion.
° See below III. 1. 37.

per uſe, without making profit or diſponing to others, it is called the Uſe, *l.* 12. *ff. de uſu & hab.* where the particular benefits are enumerated; But is without reſtriction of the proprietar, or uſu-fructuar, who may make uſe of the fruits at their pleaſure, and who as he cannot moleſt, ſo cannot be moleſted by him to whom the Uſe is granted, § 1. *inſt. de uſu & hab. l.* 15. §. 1. *ff. eod. Vid. l.* 10. § *ult. & l.* 11. *eod.* and becauſe of ſome ſpecial conſideration in the law of that uſe (*which regards*) houſes, Habitation is a diſtinct ſervitude from other uſes, § 2. *Inſt. de uſu & habit. & tit. ff. de uſu & habit. paſſim.*

II. All ſervitudes with us come under ſome of the kinds before named. Perſonal ſervitudes are either conſtitute by the deeds of men, or by the law, which provideth a competent portion to either of the ſurviving ſpouſes, out of the lands and tenements of the other, during the ſurviver's life; as if the wife ſurvive, ſhe hath the third of her huſband's tenements: and if the huſband ſurvive, he hath the liferent of the wife's whole tenements by the courteſy, if the wife be an heireſs, and that *proviſione legis* alone. But other liferents conſtitute for ſurviving ſpouſes, or otherwiſe, are *proviſione hominis*: ſo may the terce or liferent by the courteſy be provided, and ſome things altered from the courſe of law; but oftner liferents are conſtitute by conjunct fees, and moſt ordinarily otherwiſe, which therefore retain the common name of liferents appropriated thereto, as diſtinct from conjunct fees.

III. Liferents are ſometimes provided particularly, and ſometimes generally, for the whole or ſuch a ſhare of the conqueſt, during the marriage, which tho' not fulfilled by the huſband in his life, is effectual againſt his heirs, and is not accounted a fraudulent proviſion, tho' it be the whole conqueſt, even among merchants. And where a huſband purchaſed lands in favour of his eldeſt ſon, being then an infant, and not to himſelf, yet his relict was found to have right to her liferent thereof, as being a fraudulent deed in prejudice of the obligement of conqueſt, *July* 3. 1627, Counteſs of *Dunfermline*. But theſe proviſions of conqneſt do not hinder the huſband acquirer to denude himſelf without fraud, for any onerous or juſt cauſe; as ſelling for a price, or diſponing to children, whether it be to the apparent heir by ordinary terms of contract of marriage, or to younger children, or to wives of ſubſequent marriages, *June* 16. 1676, *Mitchel.* And ſuch a clauſe being of all ſums acquired during a ſecond marriage, was fonnd to annul an univerſal legacie to the eldeſt ſon of the firſt marriage, but not to annul competent proviſions to the bairns of the firſt marriage; *June* 19. 1677, *Murrays* *. The like, *Jan.* 3. 1679, *Gibſon.* Yea, a clauſe providing the preſent ſtock, and all the conqueſt to the bairns of a marriage, which failing, the one half to the man's heirs, the other to the wife's heirs, was found to make the man fiar, and not to hinder him to provide his whole means, which were very great, to his bairns of a ſubſequent marriage, there being no bairns ſurviving of the former marriage, *Dec.* 1. and 21. 1680, *Anderſon* [p]. But as to ſuch clauſes, conqueſt is only underſtood where the huſband acquired more than he had the time of the clauſe, but not when he ſold ſome lands and acquired others of no greater value, *June* 27. 1676, E. of *Dunfermline*: yea a clauſe of conqueſt in a wife's contract of marriage, who was otherwiſe ſufficiently provided, was found to be with the burden of the annualrent of a ſum, which the huſband declared under his hand to be a part of the price of the lands acquired, remaining due to the ſeller, *Dec.* 20. 1665, La. *Kilbocho* [q].

IV. This is common to all kinds of liferents, and involved in the nature thereof, that they muſt be *ſalva rei ſubſtantia*, which by ſtatute is eſpecially extended to conjunct-fiars and liferenters, that they muſt be countable, and find ſurety not to waſte or deſtroy the biggings, orchards, woods, ſtanks, parks, meadows or dovecoats,

* This was a circumſtantiate caſe; all proviſions to the prejudice of the clauſe of conqueſt were reduced, but the court inclined to conſider how far a proviſion to the ſon of the firſt marriage was rational or not before they would declare it null.

[p] See above II. 3. 41. *fin.*

[q] See below III. 5. 52.

dovecoats, but that they hold them in ſuch like caſe, as they receive them, *Parl.* 1491. *cap.* 25, which is confirmed and declared to proceed upon twenty one days *charge* by ſheriffs, bailies of burghs or regalities, under pain of confiſcation of the liferent right to the King's uſe, *Parl.* 1535, *cap.* 15. And tho' the narrative of the ſtatute expreſſeth conjunct-fiars and liferenters giving caution, as being moſt ordinary by proviſion of men; yet the ſtatutory part is general, at leaſt may be extended to terces and liferents by the courteſy. So a liferenter was charged ſummarily to uphold the tenement liferented, and to leave it in as good caſe as ſhe found it, without precognition, how it was the time of her entry, *March* 23. 1626, *Foulis*. By act of *Parl.* 1594, *cap.* 226. " Anent ruinous " tenements within burgh," they being cognoſced by an inqueſt to be ruinous, as become, or which may become within a ſhort time uninhabitable, the ſame muſt be repaired, by the liferenter, or the fiar may enter in poſſeſſion, finding caution within the burgh to pay the liferenter the mail thereof, as the ſame gave, or might give the time of the precognition; but this act was not found to derogate from the former acts, nor that precognition was requiſite before finding caution, except in tenements within burgh, decayed before the liferenter's entry, as was found in the foreſaid caſe, *Foulis*. Neither was the liferenter freed from caution upon her offer to quite the poſſeſſion to the heritor for paying of the rent, the tenement not being ruinous at her entry.

V. It is alſo common to liferents and conjunct-fees, that the liferent right is liable, as the ſuperior of ward-lands or his donatar, for an aliment to the heir, to be modified by the Lords, by the ſaid ſtatute 1491, *cap.* 25[r]. So the ſaid ſtatute is extended to liferenters, to aliment the heir, tho' it doth not bear it, only *ex paritate rationis* it is ſo extended by cuſtom.

VI. Liferents are either conſtitute by way of reſervation, in infeftments of property, or otherwiſe by a ſeveral infeftment; but it cannot become a real right, and be effectual againſt ſingular ſucceſſors, without infeftment; tho' moſt ſervitudes may be conſtitute by diſpoſition and poſſeſſion.

VII. Yea, tho' liferents be conſtitute by infeftment, *they* may be conveyed by aſſignation[s], becauſe there can be no ſubaltern or renewed infeftment of a liferent, which is only perſonal to the liferenter, and the right is incommunicable; yet the fruits and profits ariſing thence are communicable and aſſignable.

VIII. It is alſo common to liferents, that nothing done after their infeftment, by the conſtituent or his ſingular ſucceſſor, can prejudge the liferenter: and ſo an appriſer from the huſband was found liable to the liferenter, for the true worth of the liferent lands, and not according as he ſet them, tho' they were never ſet before; except the appriſer had ſet the lands, wholly or near to the worth, *March* 9. 1631, Lady *Huttonhall*.

IX. A liferenter's executors were found to have right to the Martinmaſs term, tho' the liferenter died upon the Martinmaſs day in the afternoon, *Feb.* 16. 1642, Executors of the Lady *Bruntoun*. And they have right to the whole cropt and profit of the land laboured and ſown by themſelves, or which was in manſing and not ſet to tenants, tho' the liferenter die before Martinmaſs, *Dec.* 14. 1621, *Mackmath*. A liferenter's executors *were* found to have right to the whole year's rent of a miln liferented by her, ſhe having ſurvived Martinmaſs, and that miln-rents were not due *de die in diem*, but as land-rents, not as houſe-mails; tho' the conventional terms of the miln-rent was after Martinmaſs, *viz.* one term at Candlemaſs after the ſeparation, and the other at Whitſunday thereafter, *July* 20. 1671, *Guthrie*. And a liferenter infeft in an annualrent of victual provided to be payed yearly betwixt Yule and Candlemaſs, her huſband having died after Martinmaſs, and before Candlemaſs, ſhe was found to have no ſhare of her annualrent for that cropt, *Jan.* 12. 1681, *Trotter*[t].

[r] See below, III. 5. 3.

[s] See below, III. 3. 15. 2. and III. 1. 16.

[t] See below, III. 8. 57.

X. A conjunct-fee or conjunct-infeftment, is that which is granted to more perſons jointly; which if it be provided to them and their heirs ſimply, it maketh them and their heirs to have equal right *pro indiviſo*, and they are all equally fiars; *and after the death of any of them, their portion belongs to their heirs, ſeeing they and their heirs are equal fiars; but the liferent of the deceaſing, accreſces not to the ſurviving.* But when conjunct-infeftments are provided to huſbands and wives the longeſt liver of them two and their heirs; there the law preſumes, that the heirs are the man's heirs [tt]; and by that interpretation, the wife by the conjunct-fee is but liferenter: and generally heirs of man and wife in all things, except moveable rights, are ever underſtood to be the man's heirs, *propter eminentiam maſculini ſexus*; ſo it was found in an aſſignation to a reverſion, granted to a man and his wife and their heirs, that thereby the man's heirs (firſt, theſe of the marriage, and next, his other heirs whatſomever) were underſtood, *Hope, huſband and wife, Colleſtoun contra L. Pitfoddels:* yet tho' this be *præſumptio juris*, it admits of contrary and more pregnant evidences; as a reverſion granted to a man and his wife and their heirs, was found to conſtitute the wife fiar, becauſe ſhe was heretrix of the wadſet lands, *Hope, liferent, Kincaid contra Menzies of Pitfoddels.*

But to prevent this queſtion, the proviſion ordinarily is to the longeſt liver of them two and their heirs, which failing, to ſuch particular heirs expreſt; whereby theſe are commonly eſteemed fiars, whoſe heirs whatſomever are ſubſtitute: and yet a ſum provided to a man and his wife, and the heirs betwixt them, which failing, to divide betwixt the man and the wife's heirs, was found not to conſtitute the wife fiar of the half, but only liferenter; and the wife's heirs of line to be heirs of proviſion to the man, and that the ſum was diſpoſable by him, and arreſtable by his creditors, *Jan.* 29. 1639, *Grahame.* So ſtrong is this preſumption, that there is no more meant to be granted to wives, but their liferent-right, and no part of the fee, *that it ſtill takes place* unleſs the proviſion bear expreſly, "a "power to the wife to diſpone;" and if it be adjected, "at any time, during her life," the fee will remain in the man, and that power in the wife will rather be underſtood as a faculty, like tothe power given to commiſſioners to diſpone lands, than an act of property, unleſs that the proviſion bear, "a power to the wife and her heirs "to diſpone" as ſaid is; but a conjunct-fee to a future ſpouſe of the conqueſt during the marriage, in theſe terms, "The one half thereof to be diſponed upon "as the wife ſhall think fit," being in a minute of contract, expreſſing no heirs, but being a ſhort draught, the lady being of great quality, having about 22000 merks yearly in liferent, beſide money and moveables: and the huſband being a nobleman's ſon, having gained an eſtate of 7000 merks yearly, in the war, which he had left; the clauſe was found to be underſtood, and extended ſo, as to make both future ſpouſes equal fiars, ſeeing the conqueſt was mainly to ariſe out of the wife's liferent, *June* 27. 1676, E. of *Dunfermline* [u].

If a conjunct-infeftment be granted to two or more, the longeſt liver of them, and expreſs no heirs, *it is* but a liferent to them all, *and* the ſame accreſceth to the ſurvivers; or if it be a right of lands or annualrents to a man and his wife, the longeſt liver of them two in conjunct-fee, and to their bairns named and their heirs; then the perſons named are but as heirs ſubſtitute, and the father is fiar, even tho' the bairns were infeft with the father and mother, *Jan* 14. 1663, *Bog. July* 23. 1675, *Moor* of *Arniſtoun*, *in which caſe* a ſum was borrowed from a father, for himſelf, and for the uſe of his ſons, and payable to the father, he being on life, and failing of him to his two ſons, or the ſurviver, and his heirs, and all of them were infeft.

XI. The main difference betwixt conjunct-fees and other liferents, is, that the conjunct-fiar, tho' by interpretation liferenter only, and ſo may not alienate or waſte; yet by the nature of the right and cuſtom, they have the benefit of all caſualities befalling during their life, and may diſpoſe thereof; which will not only be effectual during their life, but ſimply for that individual caſuality. So conjunct-fiars

[tt] See above, II. 3. 41. 3. below, III. 5. 51. 3.

[u] See above, II. 3. 41. 3.

junct-fiars may receive and enter the heirs of vaſſals, and have the benefit of their ward, non-entry, liferent-eſcheat, and may grant gifts thereof effectually, even as to the time after their death. So alſo a conjunct fiar, infeft with her huſband in lands *cum ſylvis*, was found thereby to have right to make uſe of the woods for her *own* and her tenants uſe, *Had. Jan.* 10. 1610, *Hunter and others contra La. Gadgirth* [w].

Simple liferenters have not theſe caſualities of ſuperiority; yet a fiar having diſponed his barony, reſerving his liferent, was thereby found to have right to receive the heirs of his vaſſals. And there is reaſon, that the fiar diſponing with reſervation to himſelf, whereby his own infeftment ſtands *pro tanto*, ſhould have greater power than a liferent apart, or by reſervation, to a perſon not being before infeft. Conjunct-fees, tho' public, as ordinarily they are, whereby, as to the ſuperior, the fee is full, and the caſualities of ward and non-entry excluded, yet (*do not prevent*) the heir *to* enter to the property, and compel the ſuperior to receive him.

XII. Terce is the third of the tenements, in which the huſband died infeft as of fee provided to his wife ſurviving, by law or cuſtom, tho' there be no proviſion or paction for that purpoſe. The original hereof, as hath been ſhown before amongſt the intereſts of marriage [ww], is from that obligation upon the huſband to provide for his wife; which therefore poſitive law hath determined to a third of his moveables, if there be children in the family, and if there be none, to a half: but in either caſe, ſhe hath a third of his tenements. And tho', as *Craig* obſerveth, by our ancient cuſtom, terce extended only to a third of the tenements an huſband had the time of the marriage, which if it were extended to all his tenements he then had, it would hinder him to diſpoſe of any, and if only to theſe he had at his marriage, and at his death, it would be too narrow, and therefore now it extends to a third of thoſe he ſtands infeft in, as of fee the time of his death; and ſo, when he is denuded before his death, the terce is excluded. Yea, a baſe infeftment without poſſeſſion, granted by a huſband to his creditor, was found to exclude his wife from a terce of that land, *Jan.* 27. 1669, *Bell* of *Belford* [x]. This proviſion of law is more equitable and proportionable, than ordinarily their proviſions by contract with the huſband are, who being carried with affection, doth oft-times provide his wife to the prejudice of their children, and ruin of their eſtate; but this terce keepeth always proportionable, and maketh the wife ſharer of the induſtry and fortune of the man, and therefore more careful over it; and upon the contrary, huſbands giving but ſmall proviſions to their wives at their marriage, when they do but begin to have eſtates, they increaſe not their wives proviſions according to the increaſe of their fortune; but the law doth more fitly order the wife's proviſion to be increaſed or decreaſed, according to the condition of the man.

XIII. A terce taketh place ordinarily, where the huſband died infeft as of fee; and it hath effect by the widow's taking brieves [y] out of the chancellary, directed to ſheriffs or baillies, to call an inqueſt of fifteen ſworn men, and thereby to ſerve the brieves; which have two heads, the one, "That the bearer was lawful wife to the defunct;" the other, "That he died in fee of ſuch tenements." This is a pleadable brieve, and hath no retour; but ſervice alone is ſufficient enough to give the wife intereſt as other liferenters have. It was ſpecially ſtatute, That where the marriage was not queſtioned in the huſband's life, and the widow was holden and repute his lawful wife in his time; no exception in the contrary ſhall be ſuſtained in the ſervice of the brieve, but ſhe ſhall be ſerved and enjoy the terce, till it be declared in a petitory judgment, that ſhe was not a lawful wife, *Parl.* 1503, *cap.* 77.

XIV.

[w] See above, II. 3. 74. below, IV. 3. 11. [ww] See above, I. 4. 21. [x] See above, II. 3. 27. 5. *fin.* [y] See be-

XIV. The brieve being thus ſerved, the ſheriff or bailie muſt alſo, if it be demanded, ken the relict *to* her terce, which is ordinarily done by the ſun or the ſhade; that is, (*lots are caſt*) whether the diviſion ſhall begin at the Eaſt or the Weſt, and ſo the diviſion of the tenements proceeds by acres, two befalling to the heir, and one to the relict [z], wherein there ought to be marches ſet, and inſtruments taken thereupon, which is *rather like a diviſion than* a ſeiſin; but this diviſion being moſt inconvenient, except the whole intereſt were uſed to be ſet in acre-dale, it is not excluſive of other diviſions by the worth of the lands or the rent, ſo many rooms being deſigned for the tercer, the reſt remaining for the fiar. And this way of kenning would be valid, and much better. But it is not neceſſary to divide, at ſerving the brieve, to conſtitute the terce; for the ſervice giveth ſufficient title to the third of the mails and duties of every room, *March* 15. 1632, relict of *Veitch* of *Dawick*.

XV. But *that* ſhe cannot remove poſſeſſors *is*, becauſe ſhe brooketh the terce *pro indiviſo* with the heir, till it be kenned, or otherwiſe divided. The terce being ſerved, gives right not only to the years thereafter, but preceeding, ſince the huſband's death, *Nov.* 25. 1624, *tenants*; and ſo the tercer may purſue the heritor or other intromitter, for all bygones of the third of the duty, not as they were at the huſband's death, but as they were bettered by the fiar *, *Feb.* 13. 1628, Counteſs of *Dumfermling*, and that without deduction of factor-fee, *March* 27. 1634, *inter eoſdem*. The tercer being ſerved, hath intereſt to purſue for commiſſion to cognoſce paſturage-lands, what ſoums they may hold, that ſhe may have the third ſoum, or elſe to divide, *Jan.* 18. 1628, contra *M'Kenzie*. The diviſion of the terce from the two thirds, may be in the moſt convenient way, wherein all dwelling-houſes, or kilns and barns, and other houſes for ſervice, will come in as they may be moſt conveniently divided. This is the moſt ordinary way of terces, by ſervice as ſaid is, when the huſband died infeft in fee.

XVI. Terce takes place, not only in lands, but alſo in annualrents, wherein the huſband died infeft as of fee, *Nov.* 30. 1627, *tenants of Eaſthouſes*; but not to the terce of annualrents of bonds, whereupon no infeftment followed, *June* 24. 1663, *Elizabeth Scrimzeour*. It is alſo extended to infeftments of teinds, *Feb.* 13. 1628, Counteſs of *Dumfermling*. But it is not extended to tenements or lands within burgh, or holden burgage. Neither to ſuperiorities or feu-duties, or other caſualities thereof, *ibidem*; nor to tacks; neither to patronage or advocation of kirks; neither doth a terce extend to reverſions.

If the fiar, whoſe land is liable to a terce, die, and his wife have right to another terce, which is called the leſſer terce, tho' the huſband died infeft as of fee of the whole tenement, ſhe hath not a third of the whole, but a third of theſe two thirds, which were unaffected with the greater terce, till the former tercer's death. *Craig* [a] propoſeth two caſes, in which the relict will have a terce, tho' the huſband died not infeft as of fee; the firſt is, if the huſband infeft his apparent heir in his eſtate, if there be no liferent provided to the wife by a contract; in that caſe the relict will have a terce, which is moſt juſt, albeit it will not proceed ſummarily by a brieve, which bears only warrant for a terce of the tenements in which the huſband died infeft as of fee: but it may proceed by declarator, and would not only have effect againſt the apparent heir, but againſt any gratuitous diſpoſition made by the huſband, reſerving his own liferent; for ſuch deeds would be found fraudulent, and contrary to the nature of the obligation of huſbands to provide their wives, unleſs there remained tenements, out of which a reaſonable terce might remain to the relict, according to her quality. The other caſe is, when a father, by his ſon's contract of marriage, is obliged to infeft his ſon in fee in certain lands; if the ſon's relict be no otherwiſe provided, ſhe

* It does not appear from the deciſion what was made the rule of determining the amount of the bygones.

[z] *Craig*, II. 22. 32. [a] *Craig*, II. 22. 27.

ſhe may claim a terce of theſe lands, tho' the father did not perform his obligement, which may be conſtrued as fraudulent, and in her prejudice.

XVII. Terce is excluded by the wife's adultery or deſertion; or by the death of either party within year and day, without children. And alſo, by whatſoever way the huſband is *ſine fraude* diveſted, the terce is excluded: as by a crime inferring forfeiture or recognition by the huſband or his ſuperior, tho' not declared before his death, or by the ward and non-entry of his immediate ſuperior, carrying the rent of the huſband's eſtate. But there is one deciſion obſerved by *Hope*, appriſing, betwixt the relicts of *John Cranſtoun* and *Comiſton* [b], that an appriſing without infeftment, did exclude a relict from her terce: yet it were hard to ſuſtain that, in all caſes, even tho' there were a charge againſt the ſuperior upon the appriſing; which as it would not exclude the ſuperior from the ward, non-entry or relief, ſo neither could it exclude a relict from her terce, unleſs ſhe had a conjunct-fee or liferent by conſent, equivalent to a *tertia rationabilis*: and tho' our cuſtom hath far deborded from the ancient deſign of terces, whereby a reaſonable terce was appointed, and if any voluntary liferent were granted, *Craig* [c] obſerves, that it was ever underſtood to be no more, but for clearing and ſecuring the tercer againſt the trouble and difficulty of recovering poſſeſſion by a ſervice, and therefore was always retrenched unto the terce: yet now, not only real voluntary proviſions are ſuſtained, tho' of the huſband's whole eſtate and conqueſt, albeit granted *in æſtu amoris*, (with this temperament only, that if the heir have no other eſtate, the liferenter muſt entertain and educate him, according to his quality, by act of Parliament, which is more extenſive than a ſimple aliment; but ſhe is alſo liable, *ſuper jure naturæ*, to aliment her other children, if they have no proviſions;) *but* cuſtom hath ſo far proceeded, as not only to allow voluntary proviſions, how great ſoever, but therewith to add a terce of any other diſtinct tenement, unleſs the voluntary liferent were accepted in ſatisfaction of the terce; which indeed were reaſonable in many caſes, the voluntary liferent being oft-times ſmall, and ſuitable to the eſtate the parties have when they marry, but cannot make a *rationabilis tertia*, if by conqueſt, their eſtate ſhould grow great; neither is it reaſonable, that tho' the voluntary proviſion be never ſo great, that a terce ſhould be given, tho' little remained to the heir, only becauſe by ignorance or negligence, the clauſe in ſatisfaction, were not adjected: which ſatisfaction may not only be proved by writ, but by preſumption, from the deſign of parties, in the contracts of marriage, which are *uberrimæ fidei*: for ſuppoſe (which is ordinary enough) that a liferent of lands were provided by the contract of marriage; yet ſome lands were not mentioned, but there is a clauſe adjected for the liferent of the whole conqueſt, were it *rationabilis tertia*, to give the wife a third of that which is omitted, tho' ſhe had a particular liferent of more, and the whole conqueſt, tho' never ſo conſiderable? Yea, it came lately to be controverted, whether a liferenter infeft in an annualrent, out of her huſband's eſtate, conſiſting of one tenement, lying contigue, the annualrent being two thirds of the rent thereof, becauſe it bore not, "in ſatisfaction of a terce." The relict did alſo claim a terce out of that ſame one tenement, and obtained it, till a ſtatute was made in the contrary.

But ſo far as I can underſtand by former deciſions, it hath not yet been determined, whether relicts ſhould have a reaſonable terce, according to the terms of the antient law, inducing terces, or whether ſhe ſhould have a terce, proportionable or ſuitable or not, tho' ſhe be already ſuitably provided, if ſhe have not expreſsly accepted her former proviſion, in ſatisfaction of her terce: which terce is moſt favourable when ſuitable; and therefore takes place in the two caſes before mentioned [d], even beyond the letter of the law; and therefore, if it were un-proportionable to the quality of the huſband and wife, who might have a great eſtate in money, and little land, a voluntary proviſion out of any tenement,

[b] See below, III. 2. 20. [c] *Craig* II. 22. 8. Reg. Maj. II. 16. 77. & 78. [d] See above, § 16. *h. t.*

ſhould not exclude a terce out of the remanent of the ſame tenement, or of any other tenement, unleſs the relict were ſufficiently provided before. There is one interlocutor betwixt *Jean Crichtoun* and *Kirkhouſe* her ſon, *Jan.* 27. 1666, wherein it was alledged, that ſhe was ſufficiently provided, to more than a terce of her huſband's eſtate, which was repelled; but the caſe was *in poſſeſſorio*, where the relict was already ſerved, and kenned to a terce, and was purſuing the tenants, ſo that the ſervice and kenning being a ſtanding ſentence, doth not determine what might be done *in petitorio*; neither was that alledgeance proponed, and offered to be proved, but only alledged informative; whereas the defence proponed was, that the relict's proviſion was but a minute of contract, bearing, "to be "extended with all clauſes requiſite," whereof there was a proceſs of extention depending, including the acceptance, in ſatisfaction of the terce, as being ordinary; but it was replied, that that clauſe was omitted in the *infeftment upon the* contract extended *in ample form:* but now by the late act of *Parl.* 1681, *cap.* 10. there is no place for a terce, where there is a proviſion for the wife of liferent, unleſs a terce be expreſsly reſerved.

Craig propoſeth another caſe, whether the relict would have a terce of lands competent in fee to her husband, and ſo poſſeſſed by him, tho' by fraud or negligence, he never infeft himſelf, which, he ſays, is the opinion of *Littleton* [e], and it is not without much ground, tho' it hath not come to be decided with us, voluntary liferents in ſatisfaction being ſo ordinary; for tho' the apparent heir not entering, cannot burden the fee with his debt, yet his *jus apparentiæ* gives him or his executors right to the fruits during all his life [f], whereunto it would be ſuitable enough, that tho' his voluntary proviſions to his wife could not affect the fee; yet the legal proviſion of a reaſonable terce might, if the wife were not otherwiſe competently provided.

By the cuſtom of *England* relicts loſe their terces, by falling in publick and atrocious crimes, as treaſon, murder, witchcraft, altho' they be reſtored by the King, by way of grace, becauſe thereby the memory of their husbands, and fame of their children are diſgraced; I know no ſuch point to have been drawn in queſtion with us. *Craig* in the forecited place (II. 22. 27.) holds, that if the fiar tranſact for his own or his ſuperior's forfeiture, or recognition, or obtain a gift thereof, it ſhould accreſce to the tercer, whoſe proviſion is onerous, importing warrandice, and therefore might be effectual againſt the fiar, if he repreſent the husband; and in all diſtreſſes, relief doth import what the party diſtreſſed truly paid out. A terce of wadſet lands, wherein the huſband died infeft, was not found elided, becauſe the huſband required, or charged for the money, not being denuded before his death, *Feb.* 16. 1642, *Veitch.* But the wife's third continues as to the third of the annualrent of the money in lieu of the lands redeemed by the heir after his predeceſſor's death [g]. A terce is not excluded by ward, non-entry, or liferent-eſcheat of the huſband's (*heir*) as hath been more fully ſhown before [h].

XVIII. Terce is burdened proportionally by all *debita fundi* affecting the whole tenement, as annualrent, thirlage, paſturage, but with no other debts of the defunct, being perſonal, tho' they be heritable, and have a proviſion of infeftment.

XIX. Liferent by the courteſy or curiality of *Scotland*, is the liferent competent to the huſband of the wife's lands and hereditaments: it is introduced by our common law, which is our moſt ancient cuſtom whereof no beginning is known, in the ſame way as the terce of the ſurviving wife, whereby without any paction or proviſion, ſhe enjoys the third of her deceas'd huſband's heritable rights, wherein he died inveſted as of fee, during her life; ſo the husband liferents the whole lands and hereditaments of the wife, wherein ſhe died infeft in fee, and that without any ſervice or kenning, as in terces, but ſummarily,

[e] *Craig* II. 22. 27. [f] See above, II. 1. 22. II. 3. 16. 4. Below, III. 5. 2. [g] See above, II. 4. 63. *fin.* [h] See above, II. 4. 23. & 36. & 66.

ly, by virtue of his having been husband to the defunct; neither is there any difference, whether the defunct wife had a prior husband or not; or whether her hereditament be ward, blench, feu, or burgage *,

The original of this liferent by the courtesy, as *Craig* [i] observeth, is from the rescript of the Emperor *Constantine* [k], whereby the father had the usufruct of the heritage of his children, befalling to them as heirs to their mother; and therefore, the courtesy takes no place but where there were children of the marriage, one or more, which attained that maturity as to be heard cry or weep; for then the law regardeth not how long the children live, or whether they do survive their mother, but *hoc ipso*, that they are born at maturity, they are heirs apparent of the fee; and the liferent is established in their father: in this the courtesy of husbands differs from the terce of wives; for the wife hath her terce, if either the marriage continue undissolved year and day, or tho' it continue not so long, if a child was born of the marriage, heard cry and weep, tho' the child had been begotten before the marriage, yea, tho' it had been born before the marriage, being legitimate by the subsequent marriage, how short soever it endured, the wife should have her terce. But the courtesy takes no place, unless a ripe child be born, tho' the marriage should continue for many years, so that the being of children procreate and born into maturity is the chief motive introductory of this law. And the law hath well fixed the maturity of the children by their crying or weeping, and hath not left it to the conjecture of witnesses, whether the child was ripe or not, both as to the courtesy, terce and dissolution of the marriage within the year [l]; in all which cases also, the law alloweth women witnesses, as being necessary in the case of the death of the children, at the time of their birth.

Skeen in his *title*, *de verborum significatione*, upon the word *curialitas*, limiteth the courtesy to the lands or hereditaments, into which wives succeed as heirs to their predecessors, whether before, or during the marriage, which *Craig* in the foresaid place doth likewise follow, and doth exclude the husband from the liferent of the wife's land, to which the wife had right by any contract, as *titulo emptionis*; which will not exclude the husband, where the wife's predecessor infefts her, *per præceptionem hæreditatis*; as if a father should infeft his daughter, reserving his own liferent, with power to dispose, she is not thereby heir *activé*, nor is that estate accounted heritage but conquest; yet she is heir *passivè*, and there is more reason that the husband should enjoy his liferent of that estate, than if his wife had been therein heir of provision or tailzie, whereby failing her and her issue, another branch, not nearest of blood to her, might readily succeed; so that if her children were dead before herself, her heirs of tailzie would have much more reason to question her husband's liferent by the courtesy, than his own children as heirs of line would have to contravert his liferent of the estate, wherein she was infeft by her father or any of her predecessors, to which she was apparent heir; but there have been few debates or decisions, or limitations thereof, which would clear this and other points thereanent.

Liferenters were found free of the reparation of ministers manses, by the act of Parliament 1663, *cap.* 21. "Ordaining heritors to build or repair manses to "the value of 1000 pounds;" whereof no share of relief was found due by the liferenters, they not being expreſt, *Nov.* 14. 1679, *Minister of* *contra Beinston*. Yet if the whole estate were liferented by conjunct fee, the conjunct fiar might be liable as fiar in that case, when the heritor had no profit of the land; and if the whole were affected with a separate liferent, the effect would be the same, seeing what the heritor would be liable to, would diminish his aliment, which behoved to be made up by the liferenter.

Liferent

* The courtesy was found not to take place in burgage tenements, *June* 16. 1715, *Gordon*.

[i] *Craig* II. 22. 40. [k] *L.* 1. C. *de bon. maternis.* [l] See above I. 4. 19.

Liferent by the courteſy hath the ſame extenſions and limitations as terces, it affects all the wife's lands, not acquired by a ſingular title; it is not excluded by the ward, but it is excluded during the non-entry, or by the liferent-eſcheat of the wife *; and alſo by the ward of the ſuperior, or the forfeiture or recognition, either of the ſuperior or wife: it is burdened with all real burdens by infeftment or tack, and with the aliment of the wife's heir, if he have not *aliunde*; it is alſo excluded by the diſſolution of the marriage within year and day, by divorce, or by the huſband's deſertion of the wife, tho' divorce followed not; or by his adultery, or other atrocious crimes: but the courteſy excludes the ward non-entry, or liferent-eſcheat of the heir of the wife, that they have no effect againſt the fee while the huſband lives.

XX. Amongſt perſonal ſervitudes may be numbered Public burdens, impoſed by the King and Parliament for public uſe, ſuch as taxations, which by the acts impoſing them, are declared real, affecting the ground, and that thereupon the ground may be poinded; and ſo conſequently do affect ſingular ſucceſſors: the extraordinary burdens of maintenance and ceſs, impoſed by the Parliament during the troubles, had not that clauſe therein of poinding the ground, and ſo were not found *debita fundi*, but *debita fructuum*, nor do they yet affect ſingular ſucceſſors, *July* 13. 1664, *Graham* of *Hiltoun*.

TITLE VII.

Servitudes Real, where, of *Actus, iter & via*, Paſturage and Thirlage, *&c.*

I. *Requiſites to conſtitute real ſervitudes by conſent.*
II. *How preſcription conſtituteth ſervitude.*
III. *How far ſervitudes are effectual againſt the ſuperior.*
IV. *Extinction of ſervitudes.*
V. *Kinds of ſervitudes.*
VI. *Servitudes of ſupport. Who muſt repair the ſervient tenement.*
VII. *Stillicides.*
VIII. *Sinks.*
IX. *Servitudes of proſpect or light. Cannot be conſtituted by uſe alone.*
X. *Ways.*
XI. *Watering.*
XII. *Watergang.*
XIII. *Feualling.*
XIV. *Paſturage. Souming and rooming.*
XV. *Thirlage.*
XVI. *Several ways of conſtituting thirlage.*
XVII. *Several caſes in which thirlage is not inferred.*
XVIII. *The effect and extent of thirlage.*
XIX. *The import of ſeveral clauſes of thirlage.*
XX. Invecta & illata, *or tholing fire and water.*
XXI. *Sequels.*
XXII. *Miln ſervice.*
XXIII. *Privilege of milns.*
XXIV. *How thirlage becomes extinct.*
XXV. *In multure, ſeed, or horſe corn, are to be deduced, but no other expence of labouring.*
XXVI. *Thirlage conſtitute by a vaſſal, not effectual againſt the ſuperior.*
XXVIII. *Deductions for the inſufficiency of the miln, breaking down of the damn or froſt,* &c.

SErvitudes are diſtinguiſhed in *to* real and perſonal, tho' neither of them be perſonal rights; yet theſe ſervitudes whereby one tenement is ſubſervient to another tenement, and to perſons only as having right to, and for the uſe of that

* This and what follows muſt be underſtood of the excluſion of the *jus mariti* during the ſubſiſtence of the marriage; the courteſy which only commences at the wife's death is not excluded by the non-entry or liferent-eſcheat of the wife's heir. See above II. 4. 23. *et* 66. *et infra h. t.*

that tenement, are called real ſervitudes, as not being ſubſervient directly to perſons, but to things: and the other are called perſonal; becauſe thereby the tenement is ſubſervient directly to perſons, and not with reſpect to any other thing, as liferents, *&c.*

Before we come to the particular kinds of theſe real ſervitudes, it will be fit to enquire how ſuch ſervitudes are conſtitute; and next how they are deſtitute and extinguiſhed.

I. As to the firſt, theſe ſervitudes require no infeftment, tho' they may be conſtitute by infeftments, yet there is no neceſſity of infeftment, to their conſtitution. 2. Real ſervitudes cannot be conſtitute by any perſonal right, as by contract, paction, teſtament or legacy, neither by diſpoſition or aſſignation alone; the reaſon is, becauſe they are real rights, and cannot be conſtitute by any perſonal right, which tho' they be ofttimes the remote cauſe of real rights, yet there is more requiſite to their conſtitution; and therefore tho' ſuch perſonal rights may be ſufficient againſt the granters thereof, by a perſonal objection, whereby they cannot come againſt their own deed; yet they are not ſufficient againſt ſingular ſucceſſors, neither do they affect the ground. 3. All real ſervitudes are conſtitute by poſſeſſion or uſe; for things corporealonly, are ſaid to be poſſeſt; therefore incorporeal rights, as ſervitudes, have rather uſe than poſſeſſion to conſummate them, *L.* 3. § 2. *ff. de act. empt. l. ult. ff. deſerv. l.* 1. § *ult. ff. de ſerv. pred. ruſt*; which tho' it be the laſt requiſite to accompliſh ſervitudes, yet *it* is not ſufficient alone, but muſt have another title, either by the expreſs conſent of the proprietar, or by preſcription. There is no difference in what way the conſent be adhibited, ſo it be in writ; and the obligementto grant any ſervitude with poſſeſſion, is equivalent to the formal diſpoſition or grant thereof, as it is in the moſt of theſe rights, which do eſſentially require nothing elſe but conſent alone, or conſent with poſſeſſion, and not any other ſolemnity; as obligements to grant aſſignations, diſcharges, renunciations, are equiva-lent to theſe rights themſelves, when formally made [ll].

II. The Civilians debate much, whether ſervitudes can be introduced by preſcription, and whether in that caſe there be requiſite a title, and the proprietar's knowledge; wherein we need not inſiſt, ſeeing our preſcription being only by ſtatute upon the courſe of forty years, in moſt caſes it preſumeth both a title and knowledge: but theirs being upon ten years, againſt thoſe who are preſent, may require more; yet many, even of the learnedeſt of them, account preſcription ſufficient, without a title, or any other than preſumed knowledge.

With us, the ſervitude of a way to the kirk, was not found conſtitute by poſſeſſion thirty years, but by immemorial poſſeſſion, going and coming that way uninterrupted, without any writ, *Had. June* 27. 1623, *Neilſon contra Sheriff of Galloway*; for here the way was claimed at the neareſt to the kirk; whether the defender's lands were under cropt or not: for tho' a way to the kirk be due to all parties in the paroch, without conſent or preſcription, yet it muſt be with the leaſt detriment to the interjacent lands, and ſo cannot always be the neareſt way, but muſt go about corns; and tho' thirty or forty years *alternativé*, was not ſuſtained to conſtitute a way through lands, even under cropt; yet forty years is equivalent, and always equiparate to immemorial poſſeſſion; in the ſame caſe, *Haddington* obſerves, "That a convenient way to the kirk, without going through corns, was "ſuſtained without preſcription *;" and the like would be ſuſtained for paſſage to market towns, or public ports, till there be acceſs to a high-way [m]. A ſervitude of laying over a miln-damm upon another heritor's land, was found conſtitute by poſſeſſion forty years, whereby the heritor of the miln was found to have right, that when the water did waſh away the ground from the end of the damm, to lengthen the ſame upon the ſervient tenement, ſo that it might be made effectual with the leaſt detriment, and that he was not liable for any damage by waſhing away the ground of the ſervient tenement, by occaſion of his damm, *July*

* *Haddington* in the place quoted does not add what is here mentioned.

[ll] See below II. 10. 5. [m] See above II. 1. 5. *med.*

20. 1677, L. of *Gairltoun*. *Vid. L.* 11. *ff. comm. pred.* It muſt be adverted, that when ſuch ſervitudes are ſaid to be conſtitute by ſole preſcription, without writ, it is to be underſtood, without writ from the proprietar of the ſervient tenement, for ordinarly there is this much title in writ for theſe ſervitudes, that the party having right thereto is infeft in the tenement *dominant* with the pertinents, under which ſervitudes are comprehended; or with common paſturage, by which he hath not only ſuch paſturage as he hath been long in poſſeſſion of, upon the lands of his ſuperior or author; but forty years poſſeſſion therewith, is ſufficient againſt any other, who can be ſaid in no caſe to have done any deed for the conſtituting of the ſervitude; and it was ſo found in the caſe of the town of *Perth*, concerning the iſle of *Sleiples* *. But this long poſſeſſion is not eſtimate by deeds done by the proprietar of the ſervient tenement; as he who brings his grain to another man's miln, for never ſo many years, theſe deeds of his do not conſtitute a thirlage upon his lands, unleſs he ſuffer the proprietar or tenant of the miln, to cauſe him or his tenants either to bring their grain by proceſs, or otherwiſe: and he who opens a window in his dyke or wall, whereby his neighbour hath a proſpect, doth not thereby put himſelf under a ſervitude; but if he ſuffer his neighbour to break a window in his wall, *and* enjoy it till preſcription be run, his ſuffering introduceth that ſervitude.

III. As to thoſe who can impoſe ſervitudes, when they are conſtitute by expreſs conſent; They cannot be conſtitute without conſent of the proprietar *and ſuperior*; and if the ſuperior conſent not, they will not be effectual againſt him, if the fee be open and return to him by right of ſuperiority, for a time, or for ever. So liferenters cannot conſtitute a ſervitude, to have a real right againſt ſingular ſucceſſors, or beyond the endurance of that liferent or wadſet, much leſs can tenants; yet both can begin or continue to make up preſcription. But when ſervitudes are conſtitute by preſcription, the knowledge even of the ſuperior is preſumed, who tho' he had not the full right, yet might have interrupted [n].

IV. Servitudes are extinct by the proprietar of the tenement dominant his renunciation, or contrary conſent in writ, without any other ſolemnity; and there needs here no other poſſeſſion, than that poſſeſſion the proprietar of the ſervient tenement hath of his tenement, whereby he may make free uſe thereof; for he who poſſeſſeth naturally or corporeally, poſſeſſeth to all effects and uſes, unleſs there be impediment by any oppoſite ſtanding right. Servitudes are alſo extinct by preſcription of liberty; for as ſervitudes by preſcription take away liberty, or the free uſe of the tenement ſervient; ſo liberty is recovered in the ſame way; for tho' in the ſhort preſcription in the civil law, ſimple forbearance of the ſervitude, will not import preſcription, unleſs ſome contrary acts that may hinder the uſe of it, were done by the proprietar of the ſervient tenement; yet in our long preſcription of forty years ſimple forbearance of the uſe may ſuffice, as preſuming the will of the party to be, to relinquiſh the ſervitude, and to ſuffer liberty to be recovered; and when the ſervitude is conſtitute by writ, the ſame will be the effect, ſeeing the writ and obligement preſcrive, not being uſed or acclaimed, forty years.

V. To deſcend now to the kinds of ſervitudes; There may be as many as there are ways, whereby the liberty of a houſe or tenement may be reſtrained in favour of another tenement; for liberty and ſervitude are contraries, and the abatement of the one, is the being or inlargement of the other. Servitudes, in reſpect of the ſubject matter, are either in reference to city tenements, ſuch as houſes for habitation, (not for the uſe of agriculture or paſturage,) whether they be in towns or villages, or not; *or in reference to* country tenements, ſuch as fields and grounds, and all houſes for the uſe thereof, as ſtables, barns, byres, kilns, whereſoever ſituate in town or country. Servitudes upon city tenements are very many, whereof we ſhall *only* point at the prime; they are either poſitive or negative. A poſitive ſervitude is that, whereby the ſervient tenement is not only reſtrained of its liberty, but

* This deciſion not found.

[n] See above, II. 4, 36. 6.

but is conſtrained to ſuffer ſome things to be done to the behoof of the dominant tenement, contrary to its liberty. Negative ſervitude is *that* whereby the freedom of the ſervient tenement is only reſtrained.

VI. The prime poſitive ſervitude of city-tenements is, the ſervitude of ſupport, whereby the ſervient tenement is liable to bear any burden for the uſe of the dominant; and that either by laying on the weight upon its walls, or other parts thereof; or by putting in joiſts or other means of ſupport in the walls of the ſame, which the Romans called *ſervitutem tigni immittendi*; or otherwiſe, this ſervitude may be, by bearing the preſſure or putt of any building for the uſe of the dominant tenement, as of a vault or pend, or the like: ſuch is the ſervitude of ſuperſtructure, whereby any building may be built upon the ſervient tenement. Like unto which is now frequent in Edinburgh, when one tenement is built above another at divers times, or divers ſtories or contignations of the ſame tenement, are bought by divers proprietars, and thereby the upper becomes a diſtinct tenement, and hath a ſervitude upon the lower tenements, whereby they muſt ſupport it.

The queſtion uſeth to be moved here, whether the owner of the ſervient tenement be obliged to uphold or repair his tenement, that it may be ſufficient to ſupport *the burden of* the dominant tenement. There are opinions of the learned, and probable reaſons upon both parts; for the affirmative maketh the common rule, that when any thing is granted, all things are underſtood to be granted therewith that are neceſſary thereto: ſo he who conſtituteth upon his tenement, a ſervitude of ſupport, he muſt make it effectual. And for the negative, ſervitudes are odious, and not to be extended beyond what is expreſsly granted or accuſtomed, to which we incline; and therefore it would be adverted how the ſervitude is conſtitute, that if it appear, the conſtituent had granted this ſervitude, ſo as to uphold it; or if by cuſtom, he hath been made to uphold it, not upon the account of his own tenement, but of the dominant, he muſt ſo continue; and it is not only a perſonal obligation, but a part of the ſervitude paſſing with the ſervient tenement, even to ſingular ſucceſſors: but if it appear not ſo conſtitute, it will import no more than a tolerance, to lay on or impute the burden of the dominant tenement upon the ſervient, which therefore the owner of the ſervient neither can hinder nor prejudge; but he is not obliged to do any poſitive deed, by reparation of his own tenement, to that purpoſe; but the owner of the dominant tenement hath right to repair it for his own uſe, by reaſon of his ſervitude, and the owner of the ſervient tenement cannot hinder him: *yea, in what he thereby advantages the ſervient tenement, he hath upon the owner thereof the natural obligation of recompence.*

If it be objected, that within burgh, the owners of the inferior and ſupporting tenements are obliged to repair for the behoof of the ſuperior tenements, the owners whereof may legally inforce reparation, yet it inferreth not this to be the nature of a ſervitude, but a poſitive ſtatute or cuſtom of the burgh, for the publick good thereof, which is concerned in upholding tenements. But mainly, the reaſon of it is, becauſe when divers owners have parts of the ſame tenement, it cannot be ſaid to be a perfect diviſion, becauſe the roof remaineth roof to both, and the ground ſupporteth both; and therefore by the nature of communion, there are mutual obligations upon both, *viz.* that the owner of the lower tenement muſt uphold his tenement as a foundation to the upper, and the owner of the upper tenement muſt uphold his tenement, as a roof and cover to the lower: both which, tho' they have the reſemblance of ſervitudes, and paſs with the thing to ſingular ſucceſſors; yet they are rather perſonal obligations, ſuch as paſs in communion even to the ſingular ſucceſſors of either party.

VII. The next poſitive city-ſervitude is, ſtillicides or ſinks: ſtillicide is the eaſing-drop which falleth off any houſe or building, or the rain turned off a tenement either by dropping or by ſpout; concerning which conſider what may be done freely without any ſervitude; for thereby it will eaſily appear, what ſervitudes are competent

competent herein. The main queſtion is, whether the owner of any ground may build houſes cloſs to the march of his own ground, whereby his eaſing-drop will fall upon his neighbour's ground, or if by a ſpout he may make the rain that falls upon his own tenement, run over upon his neighbour's. And tho' it may appear from the common rule, *Cujus eſt ſolum, ejus eſt uſque ad cœlum*, that hereby the owner may build upon any part of his own ground what he will, even tho' it be to the detriment of his neighbour's proſpect or light: yet no man may diſpoſe ſo upon his own ground, as to put any poſitive prejudice, hurt or damage upon his neighbour's; as if he ſhould alter the courſe of any river or water running within his own ground, ſo that it cauſe an alteration thereof in his neighbour's ground, or by damming of the water make it run upon his neighbour's: and therefore he may not ſo build upon his own ground, as by gathering the water from its natural way, he ſhould make it fall together upon his neighbour's ground; otherwiſe, any neighbour might take away both the profit and the pleaſure of his neighbour's tenement or cloſe, by ſpouts or kennels carrying the rain-water upon it in abundance. And albeit it be not ſo palpable in the eaſing-drop as in ſpouts, what the neighbour's detriment may be, yet the very roof of the houſe is a conſiderable gathering of the water: and therefore every man ought ſo to build, as that the drops of the building may fall upon his own ground, which commonly in neighbourhood is counted two foot and a half within the march, according to the antient Roman cuſtom, *auctore Marciano*. If it were not ſo, but that the firſt builder might build to his march, no queſtion the ſecond might do the like; and ſo there ſhould be no way to convey the drop, without much detriment to both. And tho' either might by a ſpout, keep the water from falling upon his neighbour's ground, yet that ſpout might fail, and at leaſt his neighbour be put to the trouble of an action, to cauſe him keep it right, which his neighbour cannot enforce upon him. But as the Romans accounted it as a delinquence, *et damnum infectum*, a damage like to befal, tho' not befalling, when any thing was built, to hang over the highway, or whereby a neighbour might have probable damage, *and* therefore either cauſed the doer to demoliſh it, or to find caution not to damnify his neighbour; ſo from that ſame ground of equity and expedience, it ought to be in this caſe. There is an exception here of towns and villages, which for common conveniency, do allow houſes to be built cloſs together, which is tacitly imported in the incorporation of towns, or union of villages, in which the cuſtom of the place muſt be the rule.

VIII. What hath been ſaid of ſtillicides, holdeth more apparently in ſinks either for conveying of water, filth, or any thing elſe, upon or through the neighbour's tenements, which cannot be done, unleſs there be a ſervitude thereupon either by conſent or preſcription.

IX. Negative urbane ſervitudes do chiefly concern the light, view, or proſpect of tenements; for the owner of every ground may build thereupon at his pleaſure, tho' thereby he hinder the view and proſpect from his neighbour's tenement, or the coming of the ſun-beams or light thereto, which being but in relation to the extrinſick benefit of that, which is not in, but without the tenement, is not accounted a poſitive damage, from which the owners of neighbouring tenements muſt abſtain, as in the caſe of ſtillicides and ſinks: and ſo much the rather, that common utility would be highly impaired, if the firſt builder might hinder his neighbour to build upon his own ground, upon pretence that thereby his light or proſpect were hindered; ſo that it is free for the owner to build what he will, tho' thereby he darken his neighbour's tenement. For helping the inconveniency that may enſue by this liberty of building, two ſervitudes uſe to be introduced, both reſtraining the owner's liberty; the one is, by giving light or proſpect to the dominant tenement, whereby the building upon the ſervient tenement may neither be lifted higher, nor any building *made* where there are none, nor any window or in-let, whereby *there may be* proſpect from the dominant tenement to or through the ſervient, be marred or altered: the other is, whereby the

the proſpect or view of the ſervient tenement is reſtrained, in that there may be no building thereupon, or windows opened therein, which may look to the houſe, cloſe, or garden of the dominant tenement.

Theſe ſervitudes of light or proſpect cannot be introduced by the enjoyment and uſe thereof, tho' time out of mind: but there muſt be either conſent or preſcription, by hindering the owner of the ſervient tenement to uſe his freedom; for the firſt builder, tho' he have light or view for an hundred years through his neighbour's ground, doth not thereby put a ſervitude upon his neighbour, unleſs he has been in uſe to hinder his neighbour to take away that proſpect in any lawful way, by reiterate acts during the time of preſcription. And therefore, tho' two purchaſers bought houſes from the ſame owner, neither of them was found to be aſtricted, not to build as high as they pleaſed, albeit to the prejudice of the light and view of the other, *Hope*, ſervitudes, *Somervel contra Somervel.*

The predial or country-ſervitudes, whereby one ground or field is ſubſervient to another, may be as manifold as the free uſe of the one may be reſtrained or impaired, for the profit or pleaſure of the other; the chief of which in uſe with us are ways, watering, water-gangs, fueling, paſturage, thirlage.

X. Ways are a part of the reſervation from property, and the neceſſary veſtige of the ancient community of the earth: of which before, *lib.* 2. *tit.* 1. §. 5. and which are underſtood as the common pertinents of all grounds; for free iſh and entry are implied in the very right of property, tho' not expreſſed: but that doth not infer ways or paſſages from every part of the dominant ground, through every part of the ſervient, which would make both unprofitable, but it muſt be in the way, leaſt hurtful to either. And now by long cuſtom it is every where determined, and can be no further claimed, than according to antient cuſtom: and it is a neceſſary effect of property, rather than a ſervitude, ſeeing it is mutual and equal to either ground, whereof the one cannot be called dominant and the other ſervient; until cuſtom or conſent hath ſo determined that the ways which are conſtitute are more profitable to one tenement, and more burdenſome to another, whereby this becometh the ſervient, and that the dominant tenement.

Ways are diſtinguiſhed by the Romans, according to the meaſure or burdenſomneſs of them, in three kinds. *The firſt and leaſt is a road for men to walk or ride by, which they call* iter; *the ſecond is called* actus, *and it is a way for carts*; *the third is called* via, *which retaineth the common name, whereby droves may paſs, l.* 7. *& l.* 12. *ff. de S. R. P.* Of theſe the greater comprehends the leſſer; our cuſtom ſticketh not to this diſtinction, but meaſureth the way according to the end for which it was conſtitute, and by the uſe for which it was introduced, as having only a foot-road, or a road for an horſe to be led or ridden upon, or only a way for leading of loads upon horſeback, or a way for leading of carts, or a way for driving of cattle, and is obſerved accordingly. There is another diſtinction of ways amongſt the Romans, and with us, in public and private ways; public ways are theſe which are conſtitute for public uſe, and which go from one public place to another, as from one burgh to another, or from a burgh to a public port; this is called a highway, and by the Romans, an imperial or pretorian way, and with us, the King's highway; for preſervation whereof, there are expreſs ſtatutes, *Parl.* 1555, *cap.* 53. *P.* 1592, *c.* 159. and this is patent to all the lieges, without reſpect to any land, yea and to all ſtrangers having freedom of traffic.

Private ways are theſe which are conſtitute by private parties, for private uſe, whereof both, or at leaſt one end, is to a private place, and is a proper ſervitude to the uſe of that place for which it is conſtitute: ſo a way, the one end whereof is at a public place, may be a private way, if the other end thereof be from, or for the uſe of a private place; as a way from a private place to a city or church, which doth not fall in to any public way; for in ſo far it remaineth private, and cannot be made uſe of, but for the behoof of the place or ground

from which it comes; but it is not the largeneſs or latitude of the way, that makes a public or private way: for a private way may be as large as a public. Private ways are conſtitute as other ſervitudes by preſcription, by going and coming that way uninterrupted, time out of mind or forty years, without writ, or any other right °. Private parties may repair theſe ways becoming difficult; ſo an heritor having a way to the church, and to a royal burgh, at a ford where there was an old bridge, was found (the ford becoming difficult) to have right to re-build the bridge, tho' the one end of it was but upon his land, and the other end upon his neighbour's who withſtood it, *Nicol. de ſervitutibus*, Sir *James Cleland* *.

XI. Watering is a ſervitude of taking water, proper to one ground for the uſe of another, whether it be for the cattle of the dominant ground, which is moſt ordinary, or for other uſes thereof; and it doth ordinarily carry a way for theſe cattle to come to that water through the ſervient ground; but if it be only a way to a public water in rivers or public lochs, it differeth nothing from the ſervitude of a way, unleſs with the way, there be alſo the making uſe of the private water in the fountains, ponds, or other places proper to the ſervient ground, *l.* 3. § 3. *de ſerv. P. R.*

XII. A water-gang is a ſervitude, of conveying water through the ſervient ground, for the uſe or the dominant; and if the water be proper, and belong to the ſervient ground, the ſervitude is the greater, but hath no different name; ſuch are the aquæducts to mills and other uſes; for without ſuch a ſervitude, water may not be altered or diverted from its courſe, as was found, where the water-courſe was the march betwixt the heritors, that the one could not change its old channel (tho' it returned thereto again) without conſent of the other, tho' he alledged no prejudice, but the want of the pleaſure of the water, and fiſhing of trouts, and that thereafter he might make uſe of it upon his ſide, *June* 25. 1624, *Ballantine*. It was alſo found, that an heritor might not divert the water from its own courſe upon his own ground, to the prejudice of others, having the right of fiſhing therein, *Hope, de actionibus in factum, Bairdie contra L. Stonehouſe*.

XIII. Fueling is a ſervitude of ſuffering fuel to be taken from the ſervient ground for the uſe of the dominant and inhabitants thereof; and it is ordinarily in peats, turffs and heather; and it doth neceſſarily import fields to win the fuel upon, and a way to bring it away, tho' theſe be not expreſſed. This ſervitude is ſometimes conſtitute indefinitely upon a whole moſs or muir, and ſometimes upon a particular place thereof, and accordingly it is to be regulated by the conſent or cuſtom which did conſtitute it. The like is in the way for carrying the fuel, which ſometimes is a cart-way, ſometimes only a load-way.

Fueling is preſumed to be comprehended under paſturage, tho' not expreſſed; as the minor ſervitudes are involved in the major, yet this preſumption is taken off by contrary cuſtom, or expreſs paction; for they are not inſeparable, as *iter et actus* are under *via*, there being no end nor intereſt to hinder a man to go or ride, where a cart or drove doth paſs; but where common paſturage is conſtitute, it is a ſeveral and ſeparable intereſt to break the ground for fuel, feal or divot, which in ſo far excludes the other party, and appropriates that part of the graſs to the fueler; and ſo it was found, that a ſervitude of paſturage introduced by forty years peaceable poſſeſſion of the paſturage, was not to be extended to feal and divot, ſeeing the acquirer was interrupted in theſe, *Feb.* 15, 1668, L. *Hayning*. And even where the ſervitude was only conſtitute for feal, divot, clay and ſtone, in a large muir indefinitely, it was not found to hinder the proprietar to rive out a part of the muir, leaving enough that might ſerve

* It does not appear from the deciſion, as ſtated by *Nicolſon*, that there had been an old bridge, but he makes the ſummons to have proceeded upon the right to an old way to kirk and market, and that the ford was now impaſſable, which was found relevant to intitle the purſuer to build a bridge.

° See above, § 2. *h. t.*

ſerve that ſervitude for ever unplowed, and with condition, that if that ſufficed not, more of the muir ſhould be left lee again; wherein reſpect was had to the public utility of making a large muir to be profitable, *June* 21. 1667, *Watſon*. The like was found in a ſervitude of fueling upon a muir of vaſt bounds, that it did not hinder the proprietar to plow: but the moſt convenient places for fueling were appointed to be laid aſide, as they were adjacent to the dominant tenements; ſo that they might be ſecure of perpetual fueling, which the proprietar might never plow, *Jan.* 20. 1680, E. of *Southeſk*. But in all theſe by the nature of the ſervitude, they ſhould not be extended further than for the uſe of the dominant ground, and ſo are not applicable by the heritor of the dominant ground, to any other *of his grounds, nor to be ſold by him or his inhabitants, to any* not inhabiting the dominant field; yet if cuſtom and preſcription hath been to the contrary, it overrules all; and ſo it was found, that an heritor or his tenants, having right to a common muir, not only might win fuel there, for his own uſe, but ſell it to others, *Had. June* 21. 1611, *L. Monimuſk contra L. Pitfoddels.*

XIV. Paſturage is a ſervitude, whereby the graſs of the ground ſervient, is applied to the uſe of the ground dominant, and this ſometimes reacheth to the full benefit of the graſs: ſo that the proprietar hath no ſhare thereof, but the benefit of the tillage and other pertinents beſides the graſs, whereby he may till when he pleaſeth, or open the ground for other effects of property: as to win coal or ſtone, unleſs by conſent or cuſtom it be otherwiſe regulated; but ſo much as remains graſs, belongs wholly to the other. But moſt ordinarily paſturage is in common, either to the proprietar and him that hath the ſervitude; or to many having acquired the ſervitude promiſcuouſly, tho' with excluſion of the proprietar from graſing; and that again is either for an indefinite number of ſoums, or definitely for a certain number expreſt.

Common paſturage is ordinarily conſtitute by the charter of the dominant ground, expreſſing the clauſe with common paſturage, which when general, hath no other effect than the common clauſes of charters, to give the right of any paſturage belonging to the fee, if any be: but if it be cled with immemorial or forty years poſſeſſion, by the act of preſcription, it carrieth unqueſtionably the right of paſturage upon any ground belonging to the ſuperior, and upon which he might the time of the charter have conſtitute a paſturage: yet it is more dubious, whether long poſſeſſion can introduce paſturage upon ground not belonging to the ſuperior, granter of the charter; and it hath been found that it hath been ſo conſtitute; yea tho' the clauſe of common paſturage be not in the charter, but only the land diſponed with parts and pertinents, with long poſſeſſion, *Spotſ. Servitudes*, *L. Knockdolian contra tenants of Partick.* The like was formerly found in the caſe of the town of *Perth* anent the Iſle of *Sleiples* *. Paſturage may alſo be conſtitute by a contract cled with poſſeſſion, without any ſeaſin, which is effectual, even againſt ſingular ſucceſſors, *Jan.* 26. 1622, *Turnbul.*

Paſturage being conſtitute in reference to the dominant ground, tho' it be indefinite and promiſcuous, muſt be regulated and proportioned according to the uſe of the ſeveral dominant grounds having right thereto, proportional to the rent thereof, or the goods it may hold and fodder in winter. And tho' the paſturage hath been never ſo long promiſcuouſly uſed, without any determinate ſoums, but that all have put to it what they pleaſed, that cannot be conſtitute by preſcription as a right, being contrary to the very nature and ſubſtance of the ſervitude, whereby the paſturage would be deſtroyed and unprofitable to all, if not regulable and reſtrainable to what it might hold, and that by proportion; for tho' ſome have been in uſe to put more goods, and ſome fewer; yet unleſs the quantities had been determinate and fixed, others could not be excluded from their proportion; but ſuch as by forty years forbearance, are wholly excluded therefrom.

It

* This deciſion not found.

It is accuſtomed in ſome places, to regulate common paſturage by ſouming, which is the determining of the ſeveral ſoums it may hold; *and rooming*, *which is, affixing a particular proportion to* every room of the dominant tenements, but none of the parties intereſted can compel the reſt to divide; ſeeing it would be frequently to the diſadvantage of ſeverals of the parties intereſted: as when common paſturage is in a common muir, incloſed with a dyke, and ſo needeth none, at leaſt but one herd for them all, which if it were divided, oft-times the ſeveral proportions of moſt intereſted, could not be worth a ſeveral herd: eſpecially when the property remains in another, tho' burdened with this ſervitude; even tho' the proprietar retain (*not*) a ſhare in the common paſturage, yet he alone is proprietar; and if any ſtone or coal were found there, it would belong to him alone: but it is otherwiſe in the community of the full property, where, after diviſion any party may till and uſe all acts of property. A ſervitude of paſturage of a definite number of ſheep upon large muirs, was found not to give intereſt to cauſe the heritor or tenants ſoum the ſame, that the ground might not be overſtocked, to the prejudice of the ſervitude, *Jan.* 23. 1679, Mr. *Alexander Dunlop*. Where paſturage is conſtitute upon ground, a part of which hath been plowed before the conſtitution, it doth not hinder the maſter of the ground to plow other places, than what was formerly plowed, but he may plow as much as he pleaſeth; yet ſo that whenever the plowed ground lies lee, the paſturage will reach the ſame, *Jan.* 20. 1680, E. *Southeſk*.

XV. The chief and moſt frequent ſervitude in Scotland is thirlage, or a reſtriction of lands to mills, wherein the mill is dominant, and the lands aſtricted are ſervient: for as hath been ſhown before [p], a mill is a diſtinct tenement from land, and is not comprehended under the name of part and pertinent thereof, unleſs there be an erection in a barony, lordſhip, *&c.* Mills at firſt were built as ſometimes they are yet, without any aſtriction or thirlage, but only to gain by the work thereof, an equivalent hire; and ſo it is a voluntary perſonal contract of location and conduction, none being obliged to grind their grain thereat; but ſuch only come as pleaſe, and for ſuch an hire as parties do accord: yet thoſe who come to a mill without aſtriction, and without expreſs paction, are underſtood thereby to agree to the ordinary multures of corns not aſtricted, which are called "Outen-town-multures." But now moſt lands are aſtricted to certain mills, and for a certain quantity of multure, far beyond the value of the work or grinding of the corns; but upon other conſiderations; whereby it is a part of the rent of the lands aſtricted; as when an heritor aſtricts his own tenants to his own or another's mill, it is a part of their rent; for the more multure they pay, they pay the leſs rent; and ſo it is alike to them, whether it be great or ſmall; or otherwiſe, when a ſuperior gives out lands upon condition of thirlage, the multures are a part of the *reddendo* or price; and it is a general rule, that none can thirle lands but he that is fiar, and hath power of diſpoſal thereof; and therefore aſtriction tho' it be not favourable, but hath the ordinary *odium* that other ſervitudes have, yet it is not to be accounted an unjuſt and intolerable bondage.

XVI. There are many queſtions about thirlage, which may be reduced to theſe two heads; *firſt*, How thirlage is conſtitute and inſtructed. *Secondly*, How far it is to be extended. As for the firſt, we ſhall proceed from the ways more evident to theſe, which are more dubious; and firſt poſitively, and then negatively. The *firſt* and moſt unqueſtionable way of conſtitution of thirlage is, when an heritor thirleth his own lands to his own mill, by conſent of his tenants, whereby the multure becomes a part of the rent. *Secondly*, When an heritor diſpones his lands with expreſs condition of thirlage thereof to his mill, or to any other mill. *Thirdly*, When the heritor of mills or lands, feus and diſpones the mill with the multure of his own lands *per expreſſum*. All theſe ways are uncontroverted conſtitutions of thirlage, whether they be in an infeftment, contract, bond, or

[p] See above, II. 3. 71. Below, IV. 15. 1. *et ſeq.*

or other perſonal right; for theſe being cled with poſſeſſion, are ſufficient to conſtitute a ſervitude, tho' the right of the mill, being a ſeparate fee, requireth infeſtment. *Fourthly*, When the heritor of the mill feus or diſpones the ſame "with the multures uſed and wont," tho' he do not expreſs out of what lands, "it is ſufficient to conſtitute a thirlage upon the lands, which were wont to pay "in towns-multure," being then his own lands; or to convey the right of the multures of other lands, being formerly aſtricted, *July* 17. 1629, *Newliſton*. But where a barony was principally diſponed with the mill thereof, and the multures of the mill "uſed and wont;" it was not found to extend to the multures of another barony, holden of another ſuperior, tho' in uſe to come to that miln, *Dec.* 11. 1666, tenants of *Dalmortoun*. *Fifthly*, Thirlage of a whole barony is inferred by infeftment in the mill of the barony, "with the *aſtricted* multures of the ſaid *barony*," being granted by the heritor, both of the mill and barony, whereby theſe parts of the barony that were not in uſe of aſtricted multures before, were thereby aſtricted, and that according to the uſe of the reſt of the barony, *Had. Jan.* 16. 1611. *Neilſon contra* here the conſtitution bore not, "uſed and "wont," but "multures of the barony generally." The like where the infeftment bore only, "the mill of the barony, with aſtricted multures," not repeating multures of the barony, *Had. July* 9. 1611, *Moncreif contra Borthwick and Pittenween*. *Sixthly*, Thirlage is conſtitute without infeftment, or any writ ſubſcribed by the heritor of the lands aſtricted, but only by an act or rolment of baron-court, bearing, the heritor's conſent, and forty years poſſeſſion conform, *Hope, mills and multures, E. Murray contra L. Earlſmiln* *. The like by decreet againſt the poſſeſſors, their maſter not being called, or conſenting, but his bailie enacting them to pay multure with long poſſeſſion, *ib.* Mr. *Andrew Miln contra Falconer* **. *Seventhly*, A dry multure was found conſtitute and inſtructed by uſe of payment forty years, without any other adminicle; becauſe it could not be conſtructed as a free or voluntary deed, as other multures may be, *Hope, mills and multures, Dog contra Maxwel and the tenants of Preſton* ***; *July* 23. 1675, *Sir George Kinaird contra Mr. John Drummond*. *Eighthly*, Thirlage is inferred of lands within baronies of the King's property to the mills, holden and repute to be the mills of that barony, only as being in uſe paſt memory of man to do deeds of thirlage, as paying of multures, laying in of damms, *Feb.* 5. 1635, *Dog*. *Jan.* 8. 1662, *Stuart*. *Jan.* 14. 1662, *Nicolſon*. Nor was it found relevant, that the feuars had right *cum molendinis*, in their *tenendas*, which was but paſt of courſe in exchequer, in the common clauſe, as was found in the foreſaid caſe, *Jan.* 8. 1662, *Stuart*. The reaſon hereof is, becauſe the King's right is conſtitute *jure coronæ*, without infeftment or other writ, which is not requiſite, or accuſtomed to be keeped; and therefore, the preſumption from long poſſeſſion is ſufficient. *Craig*, (II. 8. 7.) relateth it as the opinion of ſome "that immemorial poſſeſſion is ſuffi-"cient to inſtruct the thirlage of kirk-lands, in the ſame way as of the King's "lands, to which he aſſenteth not;" but the reaſon ſeemeth much to be the ſame, eſpecially after the Reformation, when the evidents of the Kirk were loſt or deſtroyed: ſo that long poſſeſſion hath been ſufficient to inſtruct the right of property of kirk-lands; and may much more inſtruct this ſervitude, unleſs mills and multures had been granted to the feuars anterior to the feu of the mill. But unqueſtionably, thirlage is eaſilier ſuſtained in kirk-lands than others, as it was ſuſtained, being by an infeftment of a mill *cum multuris* generally; and the

* The words of the deciſion are: "*Item*, The Lords found that 40 years poſſeſſion with acts of court could "not prove thirlage, except there were an direct deed done by them after, and found the acts of court done by "the bailies except they had ſpecial power to that effect, could not induce thirlage," *July* 11. 1621. E. *Murray*.

** The deciſion is in theſe words. "The Lords ſuſtained the ſummons founded upon a tack of a mill "with the thirled multures uſed and wont, in reſpect of certain acts of court of the barony of *Garvock* made by "the bailies of the barony, whereby the tenants were convicted for abſtracting of their multures, which act the "Lords found ſufficient notwithſtanding that the baron himſelf did not conſtitute the ſaid thirlage, *May* 25. "1614. *Miln*."

*** The deciſion is thus ſtated by *Hope*. "The Lords found an exception that forty years of before they "were in uſe to pay three firlots bear for multure, relevant for liberation from bringing their bear to the mill in "time coming, *Feb.* 5. 1617, *Dog* of *Dunrobin*. The like betwixt *Maxwel* and the tenants of *Preſton*."

Biſhop's precepts to his tenants to pay their multures to that mill, with long poſſeſſion, tho' without conſent of the chapter, *Dec.* 7. 1665, *Veitch.*

XVII. As to the negative, 1. Thirlage is not inferred by the uſe of coming to the mill, and paying multures thereat, tho' immemorial, even tho' the multures payed were as great as the thirle multures, *March* 14. 1635, *M'key.* The reaſon hereof is, becauſe ſuch payment is but *voluntatis non neceſſitatis*; and therefore, can no more infer a ſervitude, than they who (paſt memory) came ſuch a way to a town, were aſtricted only to come that way: but infeftment in a mill, with the aſtricted multures of ſuch lands *per expreſſum*, and forty years poſſeſſion of paying the inſucken multures, was found to conſtitute the thirlage, tho' the feuars were infeft *cum molendinis*, before the feu of the mill, and ſometimes went to other mills, which not being frequent, and for ſome whole years, was found but clandeſtine, and ſuch as occurs in all thirlages, and no legal interruption, *June* 29. 1665, heritors of the mill of *Kythick.* 2. Thirlage is not inferred, becauſe the lands are a part of the ſuperior's barony, having a mill of the barony, where the vaſſal's infeftment contains *cum molendinis & multuris*, or a feu-duty *pro omni alio onere*, or ſuch a feu-duty allenarly, *Nov.* 26. 1631, *Oliphant.* But where the baron's diſpoſition and ſubaltern infeftment *granted* of a part of his barony, which part was thirled to the mill before, contained not theſe clauſes, *that part* was not found liberated, but continued thirled to the mill of the barony, tho' the mill and multures of the barony were diſponed thereafter to another, *July* 17. 1629, L. *Newliſtoun.* For, if the vaſſal had acquired that part of the barony with the multures, it would have been expreſt particularly or generally, ſeeing thereby the ſeller behoved to diminiſh the rental of his mill [q]. This deciſion is contrary to the former, for this charter bore a feu *pro omni alio onere* *. 3. Thirlage of a barony or any part thereof, was not inferred by a diſpoſition or infeftment of a mill granted by the baron, tho' it be the only mill of the barony, ſeeing he expreſſed it not to be ſo, nor expreſſed any lands nor the multures thereof, but only diſponed the mill with the pertinents, *July* 12. 1621, *Douglas.* In this caſe, there were ſeveral acts of court thirling the tenants, and long poſſeſſion; but the acts were only by a baillie, without warrant or conſent of the heritor, albeit cled with forty years poſſeſſion **. Neither was thirlage inferred by a charter of a mill with the multure uſed and wont, and long poſſeſſion, tho' it was the mill of a barony *of kirklands*, *July* 13. 1632, E. *Mortoun.* But a decreet againſt the tenants for aſtricted multures, and immemorial poſſeſſion, was found to conſtitute thirlage to the mill of the barony, albeit the defender was infeft *cum molendinis*, prior to the infeftment of the heritor of the mill, and did ſometimes go to other mills, but clandeſtinely, and ſometimes was brought back by force, *June* 24. 1665, Coll. *Montgomery*, which did not import interruption *which was not found to be* by clandeſtine abſtraction, but by paying no multure, at leaſt for a whole year ***. 4. Thirlage is not inferred by any deed of tenants, poſſeſſors, wadſetters, liferenters, or any other but the fiar; and therefore, there will be no proceſs ſuſtained againſt the tenants for multures, unleſs the fiar be called, *tho' the fiar compear for his intereſt and propone the objection*, *Feb.* 9. 1628, L. *Wardeſs*: or at leaſt, that there have been prior decreets wherein he was called, conſtituting the thirlage; and all decreets and acts otherwiſe are null by exception, if quarrelled within preſcription. 5. Thirlage of lands to another man's mill, doth not infer a thirlage of the teinds of theſe lands, tho' acquired by the heritor who thirled the lands,

* In both theſe caſes a clauſe *pro omni alio onere* was found not to exeem from multures, even tho' the lands diſponed to the vaſſal had not been otherwiſe aſtricted than by the preſumption that the whole lands within a barony are aſtricted to the mill of the barony, A clauſe *cum molendinis et multuris* in a vaſſal's charter does exeem from thirlage.

** In this caſe the purſuer pleaded alſo, that the E. of *Murray*'s bailies had pronounced frequent decreets againſt the tenants for multure.

*** This deciſion is contrary to the laſt. It was admitted that the heritor had not been called in the decreet founded on; but the poſſeſſion upon that decreet had been very long continued.

[q] See below § 24. *h. t.*

lands, *July* 7. 1635, L. *Innerweek*. The like *in molendino regio*, where no writ was ſhown, but poſſeſſion, to conſtitute the thirlage, which was found not to extend to the teinds, *Jan.* 8. 1662, *Stuart*. The like where the clauſe of thirlage bore *omnium granorum creſcentium ſuper terris ſuis:* here the heritor of the lands thirled, had no right to the teind, *Spotiſ.* mills and multures, *L. Wauchton contra Hume of Foord**. The like where the clauſe in a charter, granted by an abbot to his feuars, bore the aſtriction *omnium granorum*, which was found *not* to extend to the teinds which then belonged to the abbot; and the teind was found thirled, *when* a feu-duty was paid both for ſtock and teind, *Jan.* 21. 1681, *Grierſon* **. Nor will the exception of teind be ſuſtained in mills belonging to kirk-men, having right to both ſtock and teind.

XVIII. The next point propoſed, was the effect and extent of thirlage, being conſtitute, which is exceeding various; for clearing whereof, advert, that thirlage is either introduced and inſtructed by cuſtom and preſcription, or by paction and writ; when it is by preſcription and cuſtom, it is wholly regulate by cuſtom, and the heritor of the mill and his tenant, can get no more, and will get no leſs than they inſtruct to be their ancient cuſtom; which holds tho' thirlage be conſtitute by writ generally, with the multures, ſequels, and ſervices uſed and wont, for then alſo cuſtom muſt rule it; and the heritor of the mill will not be put to prove what the cuſtom was before that writ, tho' it relate to cuſtom paſt, but long cuſtom preſent will be ſufficient preſumption and proof of what was that preterite cuſtom, if the contrary cannot be proved; and tho' it ſhould be proved, yet forty years poſſeſſion will alter the caſe, and either increaſe the ſervitude or the freedom. If the ſervitude be conſtitute by writ, ſpecial regard is had to the tenor of the writ, which therefore varieth thirlage accordingly; ſo thirlage ſimply expreſſed in writ, without mention of all grain growing upon the ground, was found to extend to all corns growing thereupon, abſtracted to other mills, or ſold, tho' they had payed no multure paſt memory for ſold corns, *June* 26. 1635, L. of *Wauchtoun*.

XIX. A clauſe of thirlage bearing, *Una cum multuris omnium terrarum intra parochiam*, was found not to extend to other corns brought in, and not growing within the ſucken, *Hope*, mills and multures, *Murray contra tenants of Drumſei*. [A clauſe of thirlage, thirling an heritor's tenants to another man's mill, and all the tenants grain growing upon the land, found not to extend to that heritor's farm-bear, whether delivered to him, or ſold by him to his tenants or others, but that the ſame was multure-free, but yet was thirled, and behoved to come to the mill, and pay the ſmall duties only, *Hope*, mills and multures, *Lo. Keith contra Keith:* which is alſo obſerved, with this further, that *invecta et illata* were not thereby thirled, *Spotiſ. de ſervitutibus.* ***] A clauſe of thirlage *omnium granorum creſcentium*, was found not to extend to the heritor's farms, who had ſo thirled his lands, not being ground at any other mill, but ſold, or otherwiſe made uſe of: neither to corns not growing within the thirle, tho' tholing fire and water, or garnelled there, *Durie*, *July* 11. 1621, *Keith*.

XX. A clauſe of thirlage granted by a town to a mill, expreſſing *invecta et illata, which ſhould thole fire and water*, found to be extended to all corns kilned or ſteeped within the thirle, tho' not brought to the mill, nor uſe made thereof within the thirle, *March* 21. 1637, *Ruthven*. Thirlage of *invecta et illata* conſtitute by a town's charter, found effectual as to the grain that grew in the thirle

* The heritor in this caſe had only aſtricted *terras ſuas*, which the Lords found to import *ſegetes creſcentes ſuper terris ſuis*.

** It was here pleaded, that the teind muſt be free, unleſs the thirlage had been conſented to by the churchmen; it was anſwered, that preſcription was equal to conſent, and multure had always been paid for the whole produce, including the teind. This anſwer was ſuſtained.

*** This deciſion from *Hope* is the ſame with what is quoted in the next ſentence from *Durie*, *July* 11. 1621, by which it was found, that the farm bear was not ſubject to multure, unleſs it was ground; in which caſe the aſtricted multure was payable, but that it might be freely ſold without paying multure. It was alſo found, that *invecta et illata* were ſubject to the aſtricted multure, if ground, but not otherwiſe. The deciſion is not to be found in *Spotiſwood*: and the whole of this ſentence appears to have been inſerted by miſtake.

thirle of that *ſame* mill, and was liable for a greater multure, as *grana creſcentia*, ſo that theſe corns being bought by the town, fell to pay both the ordinary multure, as growing in the thirle, and a leſſer multure by a ſeveral thirlage by the town's charter, thirling *omnia invecta et illata* in their town, to that ſame mill; ſeeing the town might ſhun the inconveniency of double multure, by buying only corns which grew not in the thirle of that mill, *Dec.* 11. 1678, Sir *Andrew Ramſay*. In this caſe *invecta et illata* was found to import malt made within the liberties of the town, or brewed within the ſame, but not to meal where they did not buy the corn, but bought the meal, tho' it was baken in the town, in reſpect it was ſo proved to be the cuſtom, *Nov.* 24. 1680, *inter eoſdem*. But the quantity of abſtracted multures being referred to the townſmens oaths, they were not found obliged to depone, that they had payed the whole multures of years long bygone, but only if they knew and remembered, that any part of it was not payed, and what that part of it was, *Dec.* 12. 1679, *inter eoſdem:* but ordinarily, *invecta et illata*, or tholing fire and water, is only interpreted of ſteeping and kilning, but not of baking or brewing.

A clauſe in feuars charters thirling them to the ſuperior's mills of ſuch a pariſh, whereof there were four, was found not to put it in the option of the feuars to go to any of the four, but to keep to the particular mill, to which they were accuſtomed, in reſpect the mills had ſeveral ſuckens, and the feuars were in uſe forty years to pay multures, and do all ſervices thereto, as was found 1663, as to the mill of *Catharine*. And the like found as to the mill of *Dalſangan*, another mill of *Mauchlein*, about the ſame time *. Thirlage being conſtitute, or determined by cuſtom, doth ordinarily carry, "Not only multures of the grain growing within "in the ſucken, but thoſe that thole fire and water within the ſame, by being "kilned and ſteeped, and in ſome places brewn within the ſame." The quantity of multure, if it be not determined by writ, is determined by uſe of payment of the barony or ſucken, tho' a part thereof in queſtion payed leſs formerly, which did only liberate them from bygones, *Had. Jan.* 17. 1611, *Neilſon contra tenants of Endermeſſon*.

XXI. Beſides the multures, thirlage is extended to ſequels, which is underſtood to be the knaveſhip, bannock, or lock payable beſides the multures, to the millers and their ſervants for their ſervice, according to the uſe of the ſeveral mills, tho' theſe be not expreſſed, *March* 22. 1628, *Adamſon* of *Bracco*.

XXII. Thirlage alſo carries ſervice to the mill, "as carrying home of mill-"ſtones, upholding the damms, water-gates, and of the mill-houſe," which ſervices are diverſe, and regulated according to the cuſtoms of the ſeveral mills. *In proving of the cuſtom of theſe duties to mills, there is no neceſſity to prove forty years conſtant cuſtom, but diverſe years cuſtom whence the anterior years cuſtom is preſumed, unleſs a contrary cuſtom be proved by the thirled*, *Nicolſon*, *Reid contra Balachan*. The thirlage conſtitute by infeftment of a mill, *cum multuris et ſequelis*, found to give right to the ordinary mill-ſervices to the mill-damm and mill-ſtones, *without proving poſſeſſion*, unleſs by paction or preſcription, the ſame were taken away, *Feb.* 27. 1668, *Maitland*.

It was found, that an heritor of a mill being infeft, and in poſſeſſion of the mill, with the multures of the lands in queſtion, *nominatim*, he hath the benefit of a poſſeſſory judgment, with ſeven years poſſeſſion, and ſo it will ſtand and be effectual, till it be reduced, notwithſtanding an anterior infeftment, *cum molendinis* †, *June* 28. 1636, *Maxwell*.

XXIII. Thirlage alſo is eſteemed by ſome to carry this privilege, that the heritor of the mill may, *brevi manu*, caſt down any other mill bigged within the thirle; but *Craig*'s opinion is in the contrary, in the forecited place ††, and it was found that a mill might not be demoliſhed ſummarily where the mill ſo bigged had gone fifteen days, *Spotiſ.* huſband and wife, *L. Ludquharn contra E. Mariſchal.*

* Theſe two deciſions not found.

† See below, IV. 3. 47. IV. 17. 2 & 3. IV. 22. 5 & 8. IV. 26. 3 & 15. IV. 45. 17. 7.

†† *Craig* II. 8. 8.

Mariſhal. (But it may be hindered while the new mill is in building, and may be civilly interrupted, *nunciatione novi operis.*) In reſpect of the favour of going mills, which are not to be deſtroyed, for the public uſe of the country; from which ground it is, that the water-gang of a mill, paſſing through an heritor's land, was not ſuffered to be ſtopped, tho' it was without conſent or preſcription, not being to his prejudice, *Hope*, mills, *L. of Baſs contra L. of Balgowan.* But tho' mills may not be ſtopped, *brevi manu*, yet building a mill within the thirle on pretence to get voluntary multure, and that the builder will ſtill bring his own corns to the other mill, is unwarrantable, and contrary to the common cuſtom of deſtroying querns, which might have the ſame pretence: nor could it be known what were clandeſtinely ground at the new mill, within the old thirle; but *Halyards* being building a mill near to *Breaſt-mill*, who craved ſummarily to ſtop him, by ſupplication to the Lords, they did refuſe to ſtop, becauſe it was not clear that his lands were thirled, *July* 29. 1673, *Dundas.*

Thirlage hath alſo this effect in ſome places, that when any perſon is apprehended abſtracting corn, the horſe and corn may be ſeized upon *brevi manu*, and the corns confiſcated to the miller; and *Craig* relates in the forecited place [u], that it is the ordinary cuſtom in *France*, that corns carrying out of the thirle are eſcheat to the Lord, and may be ſeized ſummarily. It is alſo related by *Craig* [uu], out of the ſtatutes of King *William*, that there ought to be a maſter and two ſervants in every mill, ſworn to be faithful to the maſter of the ground, and *to* his men, and that the common multure, not determined by infeftment, is the twentieth grain; and that all grain that ſhall be ſet down upon the ground of another thirle, ſhall pay multure there; and that when a horſe carrying grain out of the thirle is taken, the grain is eſcheat to the miller, and the horſe to the maſter; and that he who removes from the thirle, ſhall have his ſeed multure-free; theſe are moſt part over-ruled by cuſtom, as hath been before ſhown. This far I find it amongſt our cuſtoms, that the ſpuilzie of a horſe was elided, becauſe he was ſeized upon (taking corns out of the thirle to another mill) as was the cuſtom of that place, and that after carrying back thereof, the horſe was offered that ſame night, *Jan.* 22. 1635, *Menzies.* Thirlage, *omnium granorum creſcentium* upon ſuch a tenement, found to extend *not only to what was ſet in tenantry, but* to the mains, *July* 29. 1673, *Dundas.*

XXIV. It remains that we conſider how thirlage being conſtitute, is deſtitute or taken off; and that is in the like manner as it was conſtitute, either by preſcription, whereby liberty is recovered to the thirled lands, which needs no poſitive act to deny the multures; but ſimply forbearance to lift or ſeek them is enough, or otherwiſe by any diſcharge or renunciation, without further ſolemnity, for in that way alſo it is conſtitute [w]; but the moſt ordinary way of taking off thirlage, is by granting a charter, containing mills and multures in the *tenendas*, which was not found good as to the King's feuars, becauſe paſſed in exchequer without notice, as the common ſtyle, *Jan.* 8. 1662, *Stuart*, which is more evident, when mills and multures are in the diſpoſitive clauſe: it hath the like effect when the mill and multure is diſponed to one party, and by a prior diſpoſition or infeftment, the ſame lands which were of old of the thirle, are granted to the vaſſals thereof, *cum molendinis et multuris*; for thereby the poſterior *diſpoſition or* infeftment of the mill and multures, is *a non habente poteſtatem*, and ineffectual, *Nov.* 26. 1631, *Oliphant:* which is clear when mills and multures are in the diſpoſitive clauſe, but if only in the *tenendas*, it is dubious whether the meaning be of mills, if any be on the ground diſponed, as in all the other clauſes, which are ordinarily repeated therewith, ſuch as dove-cotes, conny-gairs, *&c.* and ſo the vaſſal having continued to pay aſtricted multures ſeven years after the

[u] *Craig*, § 10. [uu] *Ibid.* § 9. [w] See above, § 4. *h. t.*

charter, the clauſe *cum molendinis et multuris*, did not infer liberation, yet freed from bygones, as in a dubious caſe, *Jan.* 1692, Lo. *Newbyth* *.

XXV. *In thirlage there is only allowance or deduction of ſeed and horſe-corn, but nothing for expence of labouring*, *Jan.* 14. 1662, *Nicolſon*.

XXVI. Thirlage by a vaſſal was not found effectual againſt the ſuperior, when the lands fell in his hands by ward, unleſs the ſuperior had conſented, *Dec.* 11. 1666, E. of *Caſſils*. Thirlage by a vaſſal's charter, found not to make him liable for the abſtraction of his tenants, but only the tenants themſelves, *Dec.* 10. 1667, E. of *Caſſils*.

XXVII. If it be queſtioned whether multure be due when the mill is unable to work by froſt, breaking of the damm, or otherwiſe, it muſt be diſtinguiſhed *thus*; that if the inſufficiency of the mill, or the want of ſervants be through the fault of the heritor, or his miller, thoſe of the thirle may go to other mills, and they will not only be free of ſmall duties, but they may retain for the reparation of their damage, ſuch out-ſucken multures as they payed at the mill they went to; but if the inſufficiency be by accident, without the miller's fault, they may go elſewhere with what is neceſſary for the *interim*, and will be free of the ſmall duties thereof, but of no part of the multure; becauſe, as hath been ſhown before, multures are now a diſtinct rent, and are not as the hire of the work, but beſides the multure, the ſmall duties are the hire; and therefore, the miller's failzie can only take away theſe ſmall duties, and was ſo found, *Feb.* 9. 1666, heretrix of *Johnſmill*.

TITLE VIII.

Teinds, where, of Benefices, Stipends, Preſentation, Collation, Inſtitution, Tacks, Annats, and Patronage.

I. *Teinds affect all intromitters, but not ſingular ſucceſſors.*
II. *The riſe of teinds.*
III. *The firſt diviſion of pariſhes.*
IV. *Whether teinds be* jure divino.
V. *Kinds of teinds.*
VI. *We have no perſonal teinds. Viccarage is local according to the cuſtom of the ſeveral places.*
VII. *What lands are teind-free.*
VIII. *Teinds might not be feued after the Lateran council.*
IX. *Teinds are not annexed to the Crown.*
X. *Teinds included, or* decimæ incluſæ.
XI. *Surrender of teinds to the King, and his decreet-arbitral, for valuing and ſelling thereof.*
XII. *Commiſſion for valuation of teinds.*
XIII. *Annuity of teinds.*
XIV. *The rule for valuing teinds.*
XV. *Benefices, and the ſeveral orders and offices of churchmen.*
XVI. Decimæ debentur parocho. *Of chapters, convents and patrons.*
XVII. *Conſent of the chapter, convent, or prebend, how far requiſite.*
XVIII. *Diminution of the rental of benefices, how far prohibited.*
XIX. *Conſent of patrons.*
XX. *Tacks by colleges.*
XXI. *The preſent condition of teinds.*
XXII. *Drawn teinds.*
XXIII. *Spuilzie of teinds, and inhibitions in teinds.*
XXIV. *Rentalled teind-bolls.*
XXV. *The intereſt of biſhops in their benefices.*
XXVI. *The intereſt of miniſters in benefices.*
XXVII. *Kirks patrimonial or patronate.*
XXVIII. *Preſentation and collation.*
XXIX. *The effect of poſſeſſion as to benefices and ſtipends.*
XXX. *Stipends allocate and unallocate.*
XXXI. *Teinds change as the lands are in graſs, corn, or other crop.*
XXXII. *Teinds are not* debita fundi.

XXXIII.

* This deciſion not found. See *Dirleton, Dec.* 7. 1665, *Veitch.* And the ſame deciſion differently obſerved by *Stair*.

XXXIII. *The legal terms of benefices and ſtipends.*
XXXIV. *The annat.*
XXXV. *Patronage, as it was before, and is now regulated by act of Parliament.*

TEinds being a burden, affecting lands, and the profits thereof; and being alſo a diſtinct right from the lands, do moſt fitly fall under conſideration here, and that either as a ſervitude ſubjoined to the preceeding ſervitudes, or as a ſeveral right; it requires the ſame order.

I. Teinds do affect all intromitters with the ſtock and teind jointly, or with the teind ſeverally [ww]; but tho' they be valued, they are not *debita fundi*, affecting ſingular ſucceſſors, for which the ground can be poinded. *Feb.* 20. 1662, E. of *Callender*. Neither do they affect the preſent heritor, while a liferenter poſſeſſeth, *June* 24. 1663, *Menzies*.

II. Teind, as the word denoteth, ſignifieth the tenth of that which is teinded; and beſides the civil decimations that have been impoſed by ſovereigns upon their ſubjects, as a tribute for defraying of public charges; there have been antiently and frequently teinds granted for ſacred and pious uſes; ſo *Abraham* gave to *Melchiſedec*, the teind of the ſpoil of his enemies, *Gen.* xiv. 20. *Jacob* voweth to God alſo the tenth of all that God ſhould give him, *Gen.* xxviii. 22. And it is evident that God appointed the tenths of *Iſrael* for the Levites, whom he had ſet apart for himſelf, who were to give a tenth thereof to the prieſts, who ſerved at the altar, *Numb.* xviii. 26, and 28. The teinds did ſo continue till the alteration of the *Jewiſh* church. The heathens alſo did conſecrate their teinds to their idols, and payed them to their prieſts: Thus *Plinius*, *cap.* 14. and 19. obſerveth: and *Herodote* obſerveth in his firſt book the like of *Cyrus*.

III. *Ariſtus* Biſhop of *Rome*, was the firſt who divided the miniſterial charge by pariſhes, the church before not being ſo diſtributed to the ſeveral miniſters; this order being ſo convenient, that by appropriation of a fixed paſtor to a certain flock, no paſtor might be idle, and no flock neglected, it hath run over the chriſtian world, and the teinds of theſe pariſhes have been payed to the paſtors and miniſters of the church.

IV. From theſe and the like grounds, moſt of the Popiſh, and ſome Proteſtant divines, have concluded teinds to be *jure divino*, as being inſtitute and conſecrate by God himſelf, having a moral and perpetual foundation, that thoſe who are ſet apart from worldly affairs, to the ſervice of God, ſhould have a competent livelihood from thoſe for whom they ſerve; but the determination of the *quota*, to be the tenth part rather than any other proportion, is a poſitive law that God manifeſted, and was obſerved before the written word; and was retained by the heathens, even after they had deviated from the true God: but moſt of the Proteſtant divines, hold teinds to be the voluntary dedication and conſecration of men, for pious uſes, and to have continued in a tenth-part from the example of *Abraham* the father of the faithful, and of the divine conſtitution, in the judicial law; but there is now no divine moral precept in the word for teinds, of which there is no mention in the New Teſtament, even where the maintenance of miniſters is purpoſely ſpoken to; but only "that thoſe who ſerve at the "altar ſhould live by the altar; that thoſe who ſow ſpiritual things, ſhould reap "temporal things;" which doth hold forth a moral duty of recompence, to provide a competent livelihood for thoſe who are ſeparate from the world for our cauſe, but doth not infer a tenth-part, or any other determinate proportion, but what is convenient.

V. Teinds are defined by the Canoniſts, to be a tenth part of all profits and increaſe; and they are of three kinds, perſonal, predial and mixed: perſonal are the teinds of the profit of perſonal induſtry, as by trading, negotiation, artifice, ſcience, *&c.* Predial are of the natural fruits of the ground or water. Mixed are of the induſtrial fruits of the ground only.

VI. But

[ww] See above, I. 13. 16. And below, § 23. 2. *h. t.*

VI. But our cuſtom alloweth of no perſonal teinds, and of the predial and mixed, ſuch only which have been in uſe, according to the cuſtom of the ſeveral places; ſuch are teind-fiſh, for which the buyers of the fiſh were found liable, becauſe of that cuſtom paſt memory, *Feb.* 15. 1631, *Tackſmen of the Biſhop of the Iſles*; but where the fiſhers were forty years in poſſeſſion without teind in ſuch a bay, it was found ſufficient to liberate them, *Nov.* 24. 1665, *Biſhop of the Iſles*: alſo in other places, there is no teind of fiſhes; in ſome places, hay, ſtaigs, ſwine, lint, hemp are teinded, in other places not, but generally victual is teinded, and ſtirks, lambs, wool and milk.

The viccarage teinds are local, according to the cuſtom of *every* benefice or pariſh; and therefore, was ſuſtained for the viccarage of ſalt, and ſo much out of each loom; but not upon thirteen years poſſeſſion, but only upon preſcription by forty years poſſeſſion, *Nov.* 29. 1678, *Birnie*: yea in the ſame pariſh there was found diverſity of the viccarage, ſome places having no viccarage of cows, and other places paying viccarage of *lamb*, and wool for ſheep; and other places paying viccarage of hay, geeſe and *cheeſe*, *July* 7. 1677, Parſon of *Preſtonkaugh*.

VII. Some lands alſo by long cuſtom are teind-free; as temple lands, being out of uſe of payment of teinds for fifty years, were found free for all time thereafter, *Hope*, teinds, *E. of Wigtoun contra La. Torwood.* Gleibs *of miniſters and readers* are alſo teind-fee, *Parl.* 1578, *cap.* 62. And the teinds of lands belonging to the Cyſtertian order, hoſpitalers and templers, were teind-free, and ſo continue in their feuars, tho' the privilege was only as to what theſe orders laboured themſelves; yet the teind was found to belong to their many feuars, for what the feuars themſelves labour, *July* 15. 1664, *Crawford.*

VIII. Teinds were prohibited to be ſet in feu to laymen, by the Lateran council, or any *other* way to be alienated from the church, tho' church-lands might be ſet feu; theſe being accounted but the temporality, and the teinds the ſpirituality, as flowing from a ſpiritual ground, or divine right.

IX. Teinds are are alſo acknowledged with us to be the patrimony of the kirk, *Parl.* 1567, *cap.* 10. and they are not annexed to the crown, as the temporality of benefices are. *Parl.* 1587, *cap.* 29.

X. Yet *decimæ incluſæ* are here excepted, for theſe are feued with the ſtock, and can be only ſuch, as time out of mind have gone along with the ſtock, and never have been drawn nor ſeparate; and therefore, are ſo ordinarily expreſt, *decimæ incluſæ nunquam antea ſeparatæ*; and therefore, ſuch are preſumed to have been feued out with the ſtock, before the Lateran council, and ſo conſiſtent with the canons: but if it can be proved that once they were ſeparate by churchmen; though they had right both to ſtock and teind, and were feued with teinds included; they are not true *decimæ incluſæ*, which no church-man could feu after the ſaid council; neither can the King conſtitute feus, *de novo cum decimis incluſis*; ſo that thoſe teinds included, are eſtimate as no teinds, long cuſtom being ſufficient to make lands teind-free; and therefore they have never come in with teinds or benefices in any burden, affecting teinds by law, as miniſters ſtipends, *&c.*

XI. About the time of the abolition of Popery in Scotland, the Popiſh Clergy did grant more frequently long tacks of their teinds: the King alſo gave donatives of teinds and erected them with church-lands into baronies and lordſhips, ſo that there remained little of them, no way able to entertain the miniſters; and much controverſy was like to ariſe about them, till all parties having intereſt ſubmitted and ſurrendered the ſame to the King. 1. By the general ſurrender of erections and teinds. 2. By a particular ſurrender of ſome beneficed perſons. 3. Of the Biſhops. 4. Of the burroughs. Whereupon the King upon the 2d of *September* 1629, ordered the whole matter to this effect; that the whole teinds ſhould be conſolidate with the ſtock, being always affected with competent ſtipends to miniſters, *&c.* And that therefore, the titular or the tackſman of the teinds, having perpetual or heritable right, ſhould ſell the ſame to the heritors, at

at nine years purchaſe; and where the right was temporary or defective, the price thereof ſhould be made leſs accordingly.

XII. And for that effect, a commiſſion was granted for valuation of teinds, and for diſpoſing thereof as aforeſaid, and for modifying and localling ſtipends to the miniſters: and his Majeſty reſerved to himſelf only a yearly annuity of ten ſhilling Scots out of each boll of wheat and barley, eight ſhilling of peaſe and rye, ſix ſhilling of oats, where the boll rendered a boll of meal, and proportionally leſs, where it rendered leſs: theſe decreets were ratified and proſecuted by ſeveral acts of Parliament, 1633, *cap.* 8, 15, 17, 19, and 1641, *cap.* 30. *Parl.* 1647, *cap.* 32. *Parl.* 1649, *cap.* 46. *Parl.* 1661, *cap.* 61. but there was an exception in the act 1633, *cap.* 19. which ordained the teinds of all abbacies and other benefices to be valued, except the teinds pertaining to Biſhopricks and other benefices, which fell not under the ſubmiſſion; in which there is a clauſe, that the ſaids Biſhops and beneficed perſons, ſhould enjoy the fruits and rents of their ſeveral benefices, as they were poſſeſſed by them, the time of the ſaid ſubmiſſion; and therefore, where they did draw the teinds by the ſpace of fifteen years before the year 1628, or at leaſt ſeven years of the ſaid fifteen years, or had the ſame in rentalled bolls, they ſhould ſo continue and not be valued, which proviſion is repeated, *Parl.* 1. *Ch.* II. *Seſſ.* 2. *cap.* 9. But all this proved for the moſt part ineffectual, for compelling titulars and tackſmen of teinds to ſell their intereſt in other men's teinds to the proper heritors; becauſe theſe Commiſſioners allowing them their opinion to allocate whom they pleaſed, for the payment of the miniſters ſtipend, few ventured to purſue them for vendition; leſt they might be excluded by allocation, which they were willing to avert by giving the deareſt rates; but if the ſtipend had been laid proportionally upon all, the King's favour had been more effectual and equal *. But buying of teinds being thereby retarded, the great work of theſe Commiſſioners was to value, modify and allocate ſtipends. When the tack-duties of the tackſmen were not found ſufficient to make up the ſtipend, the commiſſion did increaſe the tack-duties upon the tackſmen, and in recompenſe thereof, prorogated their tacks; whereby theſe, tho' at firſt being but ſlender rights, but many nineteen years prorogations became little leſs than heritable rights; this alteration the commiſſion made, as being a commiſſion of Parliament, owning then a greater power than other judicatures.

XIII. The annuities of teinds not being annexed to the Crown, were diſponed by King *Charles* the firſt, to *James Livingſtoun*, a Groom of his bed-chamber, to be uplifted by him till he was ſatisfied of the ſum of 10000 pounds Sterling, which right was purchaſed by the E. of *Lowdoun*, and did receive many ſtops, and took little effect till the King's return, who gave a commiſſion to the late E. of *Lowdoun*, to tranſact for the bygone annuities, and to diſpone them with the full right thereof in all time coming; and his diſpoſition with conſent of two members of exchequer was declared ſufficient rights to the buyers, and were appointed to be recorded in the books of exchequer, that the ſums gotten therefore might be known, and imputed unto the ſum, for which the right to the annuity was granted; according to which, many have brought their annuities. That commiſſion did alſo give power to value the teinds, that the annuity might be known, and to uplift and compone for the bygone and the current annuities until they were ſold; and accordingly collectors were appointed by the E. of *Lowdoun* in ſeveral places of the kingdom. The like commiſſion was renewed to *James* E. of *Lowdoun*, after his father's death, who did make ſome progreſs there-

* This was remedied by act 23. *Parl.* 1693. By which it is provided, that after citation it ſhall not be in the power of the patrons, titulars or tackſmen having right to teinds, to make any allocation of the purſuer's teinds ſolely but only proportionally, with the other teinds of the pariſh: The titular patron or tackſman having ſtill power to exeem the teinds of his own lands if there are ſufficient teinds beſides.

Biſhops teinds while remaining with the Crown, teinds belonging to colleges, hoſpitals, or mortified to pious uſes, and teinds reſerved by a proprietar in the ſale of lands, can be valued, but the heritors are not intitled to purchaſe them, *Parl.* 1693, *cap* 23.

in, in the ſame way as his father had done: but a ſtop was put thereto by the King's warrant, *in anno* 1674, which doth yet ſtill continue; and with this ſtop, by a proclamation from the King, all the arrears of the annuity before the year 1660, were ſimply diſcharged.

XIV. The rule preſcribed by the King, for valuation of teinds, to fix them to a conſtant yearly duty, was this; that where the teinds were ſeverally known from the ſtock, and ſet by tack or rental, the ſame ſhould be alſo valued ſeverally, deducing a fifth part for the eaſe of the heritor; becauſe frequently the churchmen had drawn the rate of the teind above the juſt value, by their ſtocked and rental bolls: but where the ſtock and teind were not ſeverally known, the fifth part of the rent was decerned to be for the teind.

XV. Teinds by the canon law, were all conſtitute into benefices, which follow the ſeveral offices in the Roman church, which were either prelacies or inferior to prelacies: prelacies were theſe who had chapters and convents, and therefore, one had the prelacy or preference amongſt the reſt of their collegues, ſuch were archbiſhops, biſhops, abbots, priors, prioreſſes, *provoſts*; inferior to theſe prelacies, were parſons, viccars, chaplains, prebendars; theſe had patrons whoſe advice and protection they uſed inſtead of a chapter and convent which prelacies had. Abbots and priors had the prelacy amongſt the monks, of ſeveral monaſteries, as the prioreſſes had over the nuns. There were alſo ſome few monaſteries, which keeped the name of monaſteries or miniſtries, and the prelate was called miniſter, of which there are four in Scotland; the miniſter of *Fale*, *Peeples*, *Scotland-wall*, and the Trinity-friers of *Aberdeen*: next unto theſe, were the provoſts of collegiate kirks, inſtituted for ſinging of maſs, ſpecially for their founders and patrons; theſe provoſts governed their prebends, who were ſkilful in muſick, and had their ſeveral ſtalls in which they ſat, for the more orderly ſinging of their parts of muſick, from which theſe prebends were deſigned of the firſt, ſecond, or other ſtall. Some of the college-kirks were founded by the King and great families: the chapel-royal is a collegiate church, governed by the dean of the chapel; which office is now annexed to the Biſhop of *Dumblain*, under whom are the prebends of the chapel-royal. The E. of *Fife* founded the college-kirk of *Kirkheugh*; the E. of *March* founded the college-kirk of *Dumbar*; the E. of *Bothwel*, the college-kirk of *Crightoun*; the E. of *Lennox*, the college-kirk of *Dumbartoun*; the E. of *Roſs*, the college-kirk of *Tain*. Other families erected chapels, officiated by one chaplain.

XVI. The general rule by the canon law was, that *decimæ debentur parocho de jure*, the parſonage teinds to the parſon; the viccarage, or ſmall teind to the viccar; and where no other appeared to inſtruct a right, the teinds were *ipſo jure* due to parſons and viccars: it was ſo found, that even the King's gift was not ſufficient to carry the right of teinds, from the incumbents, unleſs the mortification thereof to any other office or benefice, or poſſeſſion thereof by another office were inſtructed, *June* 27. 1665, *Ferguſon*. The biſhops and ſuch prelacies as had *curam animarum*, had chapters; and the priors, prioreſſes, abbots, *&c.* had convents, whoſe conſent in all matters of benefices being chapterly conveened, was neceſſary; and in evidence thereof, the ſeals of the chapter or convent were appended. Viccars were either ſuch as were ſubſtitute by parſons and other clerks, or ſuch as had a diſtinct office; and therefore were not changeable by their conſtituents, and were called viccars of cure *cum cura animarum*; or perpetual viccars: chaplains were clerks, having *curam*, inſtitute for the accommodation *of thoſe* who were far from ordinary churches; and therefore were erected upon the expences of the founders, who were therefore patrons; and of all other patrons ſuppoſed to have greateſt intereſt in theſe benefices; ſo that after the reformation, theſe chaplanries and prebendaries, were declared to return and be diſpoſed upon by their patrons, to burſers of colleges, *Parl.* 1567, *cap.* 12. *Parl.* 1592, *cap.* 161. *Parl.* 1661, *cap.* 54. Likewiſe prebendars were ſuch as had a *prebendam* or a benefice, which was at firſt a common name, but was made ſpecial by uſe to thoſe

thoſe clerks, who had no other ſpecial name. The intent of the conſtitution of theſe offices, as aforeſaid, was mainly to ſecure the benefice and patrimony of the church againſt dilapidation, the incumbents being adminiſtrators, or at beſt life-renters, who might otherwiſe have wronged their ſucceſſors, in favour of their friends and relations; and therefore prelates could do nothing of moment, without conſent of their chapters; or convents, or other beneficed perſons, without conſent of their patrons. Tho' theſe offices were aboliſhed by the Reformation, there was no other way fallen upon, for managing of benefices, but by giving ſecular perſons the deſignations of theſe offices, who therefore were called titulars; becauſe they had the naked title without the office of biſhops, priors, abbots, proveſts, *&c.* who in lieu of the conſent of the chapters and convents, appended only the common ſeal thereof; and when biſhops were ſet up again, and chapters appointed for them, the conſent of the major part thereof was requiſite, with the ſeal; yet it was not neceſſary that they ſhould be chapterly conveened, *Parl.* 1606, *cap.* 3.

XVII. Before the Reformation, according to the canon law, there were thoſe reſtraints upon beneficed perſons, in order to (*preſerve*) their benefices; as to teinds, they could grant no feus at all, neither could they grant tacks without conſent of the chapter, or convents of prelates; the members whereof were found ſufficiently proved by feus, and preſentations granted by prelates, and ſubſcribed by thoſe perſons as members of the convent, without neceſſity to ſhow the erection or foundation, or theſe perſons admiſſion; and that there were no more members of the convent than thoſe ſubſcribing the ſeveral writs, *June* 24. 1623, L. *Drumlanrig. Spotiſ.* kirk-men, *parſon of Kinkel contra L. Coulter* *. The conſent of moſt part of *the* prebendars was neceſſary, not reckoning the prebendars that were *pupils or* out of the country; this was alſo obſerved by the Earl *Haddington*, *March* 15. 1622, *Maxwell contra L. Drumlanrig.* The conſent of the chapter was found, not only neceſſary to the deeds of the prelate, but to the deeds of the members of the chapter; and ſo a tack ſet by a dean, tho' of teinds mortified to a college, whereof the principal was dean, was found null for want of the chapter's conſent, *Spotiſ.* kirk-men, *college of Aberdeen contra Lo. Fraſer*; where he obſerves, that the ſame was found twice before; yet it was not found neceſſary to the tacks of the ſeveral members of the new-erected chapter of *St. Andrews*, whereof many miniſters were of laick patronage, *Hope*, teinds, *tenants of Craigball contra Mr. Walter Kinninmont.* But the old privilege of the biſhop of *St. Andrews*, which is yet continued, is, that the appending of his ſeal is ſufficient, both for him and the chapter, without neceſſity of their ſubſcription, *Parl.* 1606, *cap.* 3.

XVIII. *Secondly*, Beneficed perſons were reſtrained from ſetting tacks of their teinds, even with conſent of their chapters, with diminution of their rental; and therefore miniſters provided to benefices, granting penſions, tacks or feus of their benefices, with diminution of the rental, as they found them at their entry, the ſame are declared null, and they to be deprived, *Parl.* 1581, *cap.* 101. And alſo all beneficed perſons were ordained to find caution to leave their benefices in as good caſe as they found them; and all tacks proviſions or changing of victual into money, in diminution of the rental which was at their entry, declared null, *Parl.* 1585, *cap.* 11. But by act of *Parl.* 1606, *cap.* 3. it is declared lawful to the biſhops to ſet as many tacks of the fruits and duties belonging to their benefice, either ſhort or long tacks as they pleaſe, and for as many years as they think expedient; which may ſubſiſt of the law, without reſtraint or limitation of any time; which tack being once ſet, ſhall be accounted the rental, not to be diminiſhed thereafter; but there is no reſtriction in relation to any rental, preceeding the ſaid act; but it is only recommended to the biſhops to ſet to a competent avail, near the worth; but by the act of *Parl.* 1617, *cap.* 4. biſhops are

* In theſe two caſes the queſtion was what proof was ſufficient, upon the part of the purſuer of a reduction of a tack of teinds, that the chapter or convent conſiſted of other members than thoſe who had ſubſcribed the tacks in queſtion. The production of other writings ſubſcribed by a greater number as members was ſuſtained.

are prohibited to ſet tacks for longer ſpace than nineteen years: and all penſions or tacks of the thirds of benefices, which then belonged to the Church, ſet in diminution of the rental, paid at the firſt aſſumption of the benefice, were declared null, *Parl.* 1597, *cap.* 244.

XIX. *Thirdly*, Inferior beneficed perſons could ſet no longer tacks of any part of their benefice, than three years, without conſent of the patron, *Parl.* 1594, *cap.* 203. which was extended to deeds done by provoſts and prebendars, tho' having a reſemblance with prelacies, ſeeing the patron hath ſo great intereſt, *Hope*, patron, *L. Drumlanrig contra L. Cowkill and others.* And beneficed perſons below prelates are diſcharged to ſet tacks of any part of their benefice, longer than their life, and five years after, *under pain of deprivation*; and if theſe tacks be not regiſtrate in a book, kept by the Clerk-regiſter for that effect, within forty days after the date thereof they are null, *Parl.* 1617, *cap.* 4. Yet in theſe long tacks the conſent of the patron is ſtill neceſſary; and therefore a tack of teinds, without conſent of the patron, was only found valid as to three years, and null as to the reſt of the years contained therein, *July* 18. 1668, Mr. *George Johnſtoun.* And a tack of teinds for more than three years without conſent of the patron, was ſuſtained by his ſubſequent conſent, having accepted a right to the tack, and obtained prorogation thereupon, *Jan.* 19. 1669, E. of *Athole.*

XX. A tack of teinds ſet by an univerſity for a definite time with an obligement to renew the ſame in all time thereafter, was found not effectual after the definite time, tho' the ſame rent was received for years after *the definite time*, which was not ſuſtained as an homologation, but as a tacite relocation, *July* 13. 1669, *old college of Aberdeen.*

XXI. To come to the condition of teinds, as they now ſtand; a great part of them is in the hands of the heritors, to whom the ſtock belongs; a part alſo is in the hands of Titulars and Lords of erection *, and tackſmen having right to other heritors teinds, who have ordinarily prorogation of their tacks; the reſt belongs to miniſters, or royal burghs, for the maintenance of their miniſters, colleges or hoſpitals. Of theſe teinds, which are not in the heritors own hand, ſome are drawn in kind, or *ipſa corpora*, ſome are in old ſtocked rental-bolls, ſome are in tack or uſe of payment, and others under valuation. We need ſay nothing as to teinds that are in the hands of heritors to whom the ſtock belongs, about which there can be little controverſy, except in the caſe of new erections or augmentations; for teinds, through whatſoever hands they paſs, carry always along with them, as a burden affecting them, competent ſtipends for the miniſters who are, or ſhall be erected [x]. Neither is there any other debate concerning teinds orderly valued, being thereby liquidate and clear; nor concerning thoſe teinds which are in tack during the tack, further than hath been ſaid before of the requiſites for ſetting ſuch tacks. It remains to conſider drawn teinds, and rentalled teind-bolls, and then to conclude with the preſent intereſt of miniſters and patrons.

XXII. As to the drawn teinds, the manner thereof is preſcribed, *Parl.* 1617, *cap.* 9. that the poſſeſſors may require the teind-maſter *thrice*, once for teinding of croft or infield-corn; next, for teinding barley; thirdly, for out-field corn, within eight days after the ſhearing *of each* of theſe three ſeveral kinds of corn; or at leaſt, when the ſame are ſhorn till about a tenth part, to come and teind the ſame within four days; and the teind-maſter, if he dwell not within the pariſh, is ordained to have a ſervant for teinding, and to intimate his name publickly the laſt Sabbath of *July*, or firſt Sabbath of *Auguſt*: ſo that upon requiſition to the teind-maſter perſonally, or at his dwelling-place in the pariſh, or to his ſervant ſo deſigned, the poſſeſſor might proceed to the teinding of his own corns; and if the teind-maſter reſided not in the pariſh, nor had any ſervant deſigned, or if

* By act 23. P. 1690, all teinds not heritably diſponed are beſtowed upon the patrons, with the burden of ſtipends and tacks, and under an obligation to ſell to the heritors at ſix years purchaſe. By act 25. P. 1693, the former act in favour of patrons, is extended to the teinds of all parſonages and other benefices. See below, § 35. 42. *h. t.*

[x] See below, § 30. *h. t.*

if upon intimation they appeared not, the poſſeſſor might, before witneſſes, teind his own corns, and was only obliged to keep the teind ſkaithleſs for eight days after the ſeparation; but if any meddled with the teinds any other way, he is liable for wrongous intromiſſion.

XXIII. Spuilzie of teinds is only competent in the caſe of violence, where the teind-maſter being in preſent poſſeſſion and uſe of drawing the teind, doth orderly come to teind, and is debarred by force; or when the teind-maſter, being in uſe that ſame year, or the former year, to draw the teind, any other intromitted therewith. The former act is like ejection, and this is like intruſion, eſpecially if the teind-maſter have uſed inhibition by publick letters, publiſhed at the pariſh-church where the teinds lie, as an intimation to all parties having intereſt, to forbear meddling with the teinds, otherways than by order of law, which may be executed by any perſon as ſheriff in that part, *Jan.* 27. 1666, E. *Eglingtoun.* This inhibition is the competent legal way to take off tacite relocation, when teinds have been ſet in tack, and the tack expired, and when they are in uſe of payment of certain duties; and hath then the ſame effect that warning hath in relation to tenants of lands; and being once duly uſed, it interrupts tacite relocation, or uſe of payment, not only for the years wherein it is uſed, but for all other ſubſequent years, *March* 18. 1628, Lo. *Blantyre.* But the titular may not by force draw the teinds after inhibition, but muſt purſue therefor, where there was any pretence of title, elſe it is a ſpuilzie in him, *Jan.* 27. 1665, L. *Bairdfoord* and *Beanſtoun.*

Spuilzie upon inhibition was ſuſtained againſt an heritor, receiving a joint duty for ſtock and teind, *March* 16. 1627, *Inglis:* but it is not effectual to infer ſpuilzie againſt tenants, continuing to pay their maſters a joint duty for ſtock and teind, as they were in uſe before, tho' the inhibition was particularly intimated to the tenants; ſeeing they knew not how to diſtinguiſh the proportion of ſtock and teind, having ſtill paid a joint duty promiſcuouſly for both, *Dec.* 13. 1627, *Hepburn*[y]. But the privilege of tenants paying to their maſters for ſtock and teind jointly, was not extended to a merchant buying a whole crop together, who was found liable for the teind, tho' he payed before any diligence, *June* 24. 1662, Mr. *Alexander Vernor.* In like manner, merchants buying the herring where they were taken in the iſles, were found liable for the teind by immemorial poſſeſſion, ſo to uplift the teind-fiſh from the merchants, who bought whole boatfulls of the herrings green, *Dec.* 13. 1664, *Biſhop of the iſles.* But as warning, ſo inhibition of teinds is taken off by accepting the old duty thereafter, or of the ordinary taxation, accuſtomed to be payed for the tack-duty, *Hope*, teinds, *Lo. Garleis contra tenants of Whitehorn*; or by a ſmall part of the old tack-duty, *ibid. Mr. Andrew Balfour contra Lo. Balmerinoch, Glendinning contra tenants of Partoun.*

XXIV. Rentalled teind-bolls is, when the teinds have been liquidated and ſettled for ſo many bolls yearly by rental, or old uſe of payment, which preſumed a rental, (by this means the beneficed perſons gained an advantage of the poſſeſſors; and therefore, by the King's decreet-arbitral, ſuch teinds which are ſeparated, and ſeverally ſet or known from the ſtock, had a diverſe and *lower* valuation *) and therefore rentalled teind-bolls were found due by uſe of payment immediately preceeding the debate, tho' exceeding the worth of the teind, till the teind in kind were offered, and intimation made that the party would not continue the uſe of payment of rentalled bolls, *March* 22. 1626, *Lennox of Branſhogle.* Teind-bolls were found due according to the old rental, tho' a leſſer quantity was received by a miniſter for ſeveral years: here the biſhop to whoſe biſhoprick the teinds of that pariſh were annexed, oppoſed the alteration of the old rentalled bolls, whereof a part only was allocated to, and received by the miniſter, *July* 3. 1630, Mr.

* The valuation of teinds ſeparately known from the ſtock, was by the King's decreet arbitral reduced to the ſame rate with that which he fixed for other teinds. The fifth of the rent was in general equal to one eight of the produce Lands were at that time uſually ſet for payment of third and teind, which rent was equal to four tenths of the produce, and the fifth part of that rent was equal to one eight of the produce. Where the teind was known ſeparately from the ſtock, the decreet-arbitral allowed deduction of one fifth, (above § 14. *h. t.*) by which deduction the teind, in this caſe alſo, was reduced to one eight of the produce.

[y] See above, I. 18. 3.

George Summer *. The like where there was a decreet formerly for the teind-bolls, but prejudice to offer the teind in kind in time coming, *Feb.* 20. 1633, *college of Glaſgow.*

XXV. The intereſt of biſhops in their benefices, is much alike with miniſters as to their entry, which is regulated by their conſecration or tranſlation, which if before *Whitſunday*, gives them the benefit of that year; and if after *Whitſunday*, and before *Michaelmas*, it gives them the half. During their incumbence, they have not only the fruits and rents of the benefice, but the power to ſet tacks for nineteen years, with conſent of their chapters, *vide ſupra* § 17. 18. and to receive vaſſals, and to conſtitute commiſſars; all which are effectual after their death or removal. They have alſo the quots of teſtaments confirmed by all their commiſſars during their life, or within the time of their ann after their death; but they have no quots of teſtaments not then confirmed, although the perſons died in their life, or during their ann; becauſe the quot is due for the confirmation, as was found, *July* 6. 1676, Biſhop of *Edinburgh* **: and for the ſame reaſon they have not the compoſitions or duplications of heirs, apprifers or adjudgers, whom they do not actually receive in their life, which will not belong to their executors, or fall within their ann, but to the next intrant, who only can receive theſe vaſſals.

XXVI. The intereſt of miniſters in the tiends may be conſidered, either in their entry, during their incumbency, or after their removal. In all which, the miniſter's intereſt is of two kinds; for either he hath the benefice, parſonage or vicarage, or hath only a ſtipend modified thereof; for theſe benefices did ordinarily belong to the incumbents of particular pariſhes, and followed the office of ſerving the cure there: and therefore, when theſe benefices were not erected in temporal baronies and lordſhips, or otherwiſe ſo affected by titles, tacks or new erections, that the miniſters thereby could not have a competency, they betook themſelves to the benefice, and had the ſame right and privileges as to them, as beneficed perſons formerly had, and might ſet tacks thereof in the ſame way, and with the ſame reſtriction, as is before declared. But more frequently, the Miniſters had modified ſtipends, which were appointed by the King and Parliament to be modified out of the teinds, whatever the title or intereſt of any other perſon were therein; which (*tiends*,) they could not reach, if they took them to the benefice itſelf; as they might have done by the act of *Parl.* 1581, *cap.* 102. Ordaining, "That all benefices of cures under prelacies, ſhould be provided only "in favour of able miniſters."

XXVII. The *entry* of miniſters was according to the nature of the benefices whereunto they were to have right, or out of which their ſtipends were to be modified; for all kirks were either patrimonial, or patronate, and by clearing patronage, it will eaſily appear what kirks are *free or* patrimonial: for, this diſtinction is taken from that of perſons in the civil law, into thoſe who are *ingenui* or fully free, and *libertini* or become free but with ſome acknowledgments and ſervices to the authors of their freedom, who were therefore called their patrons: ſo there ſtood the like relation betwixt patrons and kirks patronate, as betwixt patrons and libertines, the ground whereof was an eminent good deed done by the patron or his predeceſſor to that kirk, eſpecially theſe acknowledged in law, *patronum faciunt dos, ædificatio, fundus.* Signifying, the building of the church, or giving of the ſtipend, or of the ground neceſſary for the church, church-yard, manſe or gleib, were the grounds for conſtituting the patronage, which were ſufficiently inſtructed by the cuſtom of the Kirks, acknowledging ſuch a patron: yet it was a voluntary agreement between the patron and congregation at firſt, till pariſhes were ſettled and all churches behoved to have a patron (except menſal and common kirks;) then the intereſt of the parties pretending to be patrons, gave ground to determine the patronage, without the conſent of parties.

It was lately contraverted who ſhould be patron of a ſecond Miniſter, whoſe ſtipend was conſtitute, not out of the teinds, but by contribution and ingagement

* It does not appear that the biſhop oppoſed the alteration.

** Quots of teſtaments are now diſcharged, *P.* 1701. *c.* 14.

ment of a town for the greateſt part, and the heritors of the landward pariſh for the reſt, whether the patronage and power to preſent that ſecond miniſter, ſhould belong to the patron of the kirk, having the unqueſtionable power of preſenting the firſt miniſter, or to the contributers; in which competition, the patron of the kirk was preferred, becauſe the contributers had never been in poſſeſſion of preſenting, nor had reſerved the patronage nor power of preſenting in the erection of the ſecond miniſter; which was only by an act of the biſhop and preſbytery, bearing the ſhares contributed for a ſecond miniſter; but neither reſervation nor proteſtation by them concerning the patronage or power of preſenting the ſecond miniſter; nor was *there* any thing of cuſtom or poſſeſſion to ſhow the meaning of the parties, *Nov.* 18. 1680, Town of *Haddington*. This caſe will not prejudge erections of ſecond miniſters in moſt of other towns in the kingdom, where the erection doth bear a "reſervation of the patronage*." For clearing of the derived right from the firſt patron, eſpecially to ſingular ſucceſſors, the patronage was ordinarily conveyed by infeftments, carrying expreſsly "advocation, "donation, and right of patronage of ſuch kirks." Such kirks then as acknowledged no patron are fully free; and theſe are provided, not by preſentation, but the Ordinary conveyeth *pleno jure*, whereby the incumbent hath right to the benefice, and full fruits: but in menſal kirks, the incumbent hath but a ſtipend, and theſe belong to the proper patrimony of prelates, who have right to the fruits thereof, as a part of their own benefice; and therefore are called "patrimonial or menſal." Patronage is alſo, either, laick or eccleſiaſtick; laick is that which belongs to ſecular perſons; eccleſiaſtick, that which belongs to churchmen; as when a biſhop hath the right of preſentation to a kirk, not in his own dioceſs; there he preſents, but another muſt confer as ordinary, and ſo he is but eccleſiaſtick patron.

XXVIII. Kirks patronate required for the entry of Miniſters, a preſentation of the patron, preſenting a perſon to the church and benefice, to be tried by churchmen having that power, and giving him the right of the benefice, or ſtipend, being found qualified, and collation of the office and inſtitution therein by church-men upon trial, without which the incumbent could have no right; yet where the biſhop had the power of collation and inſtitution, and to confer *pleno jure* a gift from the biſhop *preſenting*, and admitting, was found ſufficient without a diſtinct *inſtitution* or collation, *July* 4. 1627, *miniſter of Sklate*. But in kirks not patronate, inſtitution and collation was ſufficient. And of late the act of ordination or admiſſion of miniſters by preſbyteries, ſerved for all: but in benefices without cure, as prebendries or chaplanries, preſentation is ſufficient without collation and inſtitution.

XXIX. Miniſters being thus entered, have right to their benefices or ſtipends, during their incumbency, which they need not inſtruct by writ, but it is ſufficient to prove by witneſſes, that the miniſter, or his predeceſſors, have been in poſſeſſion of that which is contraverted, as a part of the benefice or ſtipend of that kirk, and that *it* is commonly holden and reputed to be a part thereof; for there being no competent way to preſerve the rights and evidents of the kirk amongſt ſucceſſors in office, as there are of other rights amongſt other ſucceſſors, the canon law attributeth much more to poſſeſſion than the civil; for thereby *poſſeſſor decennalis, et triennalis, non tenetur docere de titulo* [a]: which was not only extended to inſtruct that the thing poſſeſſed belonged to the benefice, but that the incumbent had ſufficient right; and therefore liberated prebendars from production of their proviſions, in the caſe of improbation, *Hope*, improbation, *biſhop of Galloway and dean of the chapel-royal, contra the prebendars*: this preſumption would not be elided by any extrinſick reverſion [b], yea, it will liberate from production of any written right in reduction and improbation, where there is no right extant: but if a right be found by the oaths of church-men or others, to be extant in their hands,

* See *Jan.* 10 1683, T. of *Dundee*, obſerved by *Falconar*, No. 42.
[a] See above, II. 1. 25. [b] MS. extrinſick *right*.

hands, the ſame will be preſumed to be the right by which they poſſeſs, and it may be improved by a poſitive probation, but not by a preſumptive probation, by way of certification, concluding it falſe, becauſe the poſſeſſors declined to produce it, or to abide by it. When the right is produced, any exception may be proponed upon any thing contained therein; and therefore an annualrent of ten chalders of victual, mortified by the King to the chapel-royal, was excluded by a redemption thereof, granted by the King voluntarily upon payment, when the biſhops were ſuppreſſed, in reſpect the mortification bore "ſuch a right mortifi- "ed, which had therein a reverſion;" and therefore after redemption, thirteen years poſſeſſion could not eſtabliſh the right, being redeemed: neither could the act of reſtitution of biſhops, reſtoring them to the rights and poſſeſſion they had before 1637, do it; ſeeing that could not hinder another party to redeem, *July* 11. 1676, Biſhop of *Dumblain* [c]. A miniſter's ſtipend, as to the uſe of payment and quantity, was found probable by witneſſes without write, *in poſſeſſorio*, as was lately found, *miniſter's relict contra E. of Caithneſs* *. As to the time ſufficient to give a poſſeſſory judgment in benefices or ſtipends upon poſſeſſion, without evidence in writ, but being holden and reputed as a part of the benefice, the canon law, *regula cancellariæ* 33. determines it to *be* three years peaceable poſſeſſion, which is rather as to the incumbent's right, that after three years poſſeſſion he cannot be queſtioned during his life. I find not our deciſions ſo clear in it, but it cannot exceed ſeven years poſſeſſion, which gives a poſſeſſory judgment in infeftments of property, *&c.* and it was ſo found, *Nov.* 25. 1665, *Peter*. The like about that ſame time, *Ferguſon contra Agnew*. Miniſters alſo during their incumbency, may ſet tacks according to the rule for ſetting of tacks by beneficed perſons before expreſſed, which are valid and effectual, tho' the incumbent be deprived or tranſported, *Parl.* 1592, *cap.* 117.

XXX. Miniſters ſtipends are ordinarily allocated out of the teinds of particular lands, and when they are allocated, all intromitters with the teinds of theſe lands allocated are liable for the ſtipend, not proportionally with other intromitters, but in ſo far as their whole intromiſſion can reach, even tho' they made payment before they were charged by the miniſter, which they alledged was *bona fide* to the heritor or tackſman, *Feb.* 19. 1629, *Kirk*. And if there be no allocation, the ſtipend is a burden affecting the whole teind, out of which it was modified; and the miniſter may take himſelf either to the heritor intromitting, or the poſſeſſor, *Spotiſ.* kirk-men, *Kirk contra Gilchirſt*, *Dec.* 3. 1664; *Hutcheſon contra E. of Caſſils*: in which caſe it was found, that the miniſter might take himſelf to any of the heritors of the pariſh for the whole teind, in ſo far as his modified ſtipend went; ſeeing he had no locality, and that the heritor diſtreſſed behoved to ſeek his relief proportionally from the reſt. And a miniſter was found to have right to purſue an heritor for his ſtipend payable out of his lands; and that accepting an aſſignation to a part of the tenant's duties, did not liberate the heritor further than what the miniſter received, unleſs the aſſignation bore, "in full ſatisfaction," *Nov.* 9. 1677, *Rutherfoord*. Yea, tho' an heritor was but an appriſer of the ſtock and teinds, he was found liable perſonally, tho' he had not intromitted, and tho' he offered to *renounce his appriſing as to the teinds*, *Dec.* 20. 1622, *Preſtoun*. And tho' the intromitter was but a wadſetter, both of ſtock and teind, having no more but his annualrent, and there being ſufficient teind, beſide the *teinds of the* wadſet *lands*, *March* 21. 1633, *Keith*. But where a liferenter poſſeſſed, ſhe was only found liable, not the fiar, *June* 24. 1663, *Menzies*. The reaſon why heritors are ſo liable for ſtipends, is, that they ſet the lands for a promiſcuous rent of ſtock and teind; but if there were not a valuation of a whole tenement together, but of the ſeveral roums, the heritor would not be obliged to be the miniſter's factor.

XXXI.

* This deciſion is not found in Lord *Stair*'s collection. The MSS. make the date of it *Dec.* 16. or 18. 1657.

[c] See above, II. 1. 25.

XXXI. But teinds before valuation are only due according to the crop and goods, without reſtraining the heritor in the free uſe of his ground, who may leave it all graſs, tho' it had never been ſo long corn, and may ſtock it with yeld goods, which will yield no viccarage; and therefore having encloſed a parcel of ground, and ſown it with kail, carrets and herbs, the ſame was found teind-free, unleſs theſe were accuſtomed to pay teind in that place, *June* 9. 1676, *Burnet*.

XXXII. Even after valuation, teinds are not *debita fundi*, nor do they affect ſingular ſucceſſors, as to bygones before their right, *Feb.* 20. 1662, E. of *Callender*.

XXXIII. The legal terms of benefices and ſtipends, whereby they are due to the incumbents, are *Whitſunday*, at which *time* the fruits are held to be fully ſown, and *Michaelmas*, at which time they are preſumed to be fully ſeparated; and therefore, if the incumbent's entry be before *Whitſunday*, he hath that whole year, ſo if he be depoſed, or tranſported before *Whitſunday*, he hath no part of that year; if after *Whitſunday* and before *Michaelmas*, he hath the half, *July* 24. 1662, *Weyms*; If after *Michaelmas*, he hath the whole, *March* 21. 1628, *Murray* *: but if the incumbent die, he hath further intereſt in his benefice, even after his death.

XXXIV. For miniſters dying, their wives, bairns, or executors, have the annat of their benefice or ſtipends, which is acknowledged to be their ancient right, *Parl.* 1571, *cap.* 41. whereby it is declared, "That beneficed perſons dying, the "fruits of their benefice upon the ground, and the annat thereafter, *ſhall* per-"tain to their executors:" but the queſtion is, what the annat importeth. There is a letter concerning it written by the King to the General Aſſembly, and ratified by them. All do now agree, that if the incumbent die after *Michaelmas*, he hath right to that whole year by his ſervice, and to the half of the next year by the annat: but if he die before *Michaelmas*, he hath right to the half of the ſtipend, if he ſurvived *Whitſunday*, *proprio jure*; and to the other half as the ann, which his executors have right to; but all the queſtion is, when the incumbent doth not only ſurvive *Michaelmas*, whereby he hath the half of the next year, but if he ſurvive the laſt of *December*, whether he hath right to the whole ſtipend of that year; as to which that rule hath been ſuſtained, *in favorabilibus annus inceptus habetur pro completo*; and therefore the ann was the whole year, which was ſo decided, *July* 5. 1662, *executors of Fairly*; *July* 6. 1665, *Colvil*; but the anns of biſhops and miniſters are now brought to a much more equal way by act of *Parl.* 1672, *cap.* 13. whereby it is ſtatute, "That the ann in all time thereafter, ſhall "be half a year's rent of the benefice or ſtipend, over and above what is due to "the defunct for his incumbency, *viz.* if he ſurvive *Whitſunday*, he ſhall have "the half of that year for his incumbency, and the other half for his ann, and "if he ſurvive *Michaelmas*, he ſhall have the half of the next year for his ann;" whereas before, if he ſurvived *Michaelmas*, and lived but till the laſt of *December*, his ann was but the half of the next year; but if he lived till the 1ſt of *January*, his ann was that whole year, whereby the next incumbent had nothing to expect for that year, during which the kirk was like to lie vacant. And there being no law, ſtatute, or fixed cuſtom of the extent of the ann, that act gives the juſteſt record and account of it, even for miniſters.

The annat divides betwixt the relict and neareſt of kin, if there be no bairns, and is extended to the profit of the gleib, if there be no new intrant, *July* 19. 1664, *Scrimzour* relict of *Murray*: but where there is an intrant, the gleib belongs to him, and is not part of the ann, nor did belong to the former miniſter, unleſs it had been ſown by him, and the crop upon it at the entry of the intrant, *July* 6. 1665, *Colvil*; where it was alſo found, that the defunct had his ann, tho' he had neither wife nor bairns **.

* MS. yet a miniſter preſented at *Lambas*, ſerving thereafter, and admitted ſhortly after *Michaelmas*, his admiſſion was drawn back to his preſentation, and ſo found to have right to the one half that year, *Jan.* 17. 1664, *Hay*.

** By act 6. P. 1669, no ſuſpenſion of ſpecial decreets for miniſters ſtipends is allowed, but upon producing diſcharges, or on conſignation, and at diſcuſſing ſuſpenſions of general charges one fourth to be decerned for as expences.—By act 27. P. 1695, advocations of proceſſes for ſtipends are alſo diſcharged. Suſpenſions when paſſed are to be ſummarily diſcuſſed, and one fourth at leaſt to be given as expences. Ordinary actions for ſtipends before the court of ſeſſion are alſo to be ſummarily diſcuſſed.—By act 14. P. 1696, theſe privileges are extended to univerſities, ſchools and hoſpitals.

XXXV. To conclude this title with the intereſt of patrons in benefices. We have already ſhown their original and kinds; their intereſt in the benefices or Stipends is, firſt the right of preſentation of a qualified perſon for the miniſtry, whom the preſbytery behoved to try and admit, if he were qualified thereanent, *and if he were rejected*, the patron might appeal to the ſynod, and thence to the general aſſembly; and if that perſon be ſtill rejected, he muſt preſent another, which muſt be done within ſix months after the vacancy may come to his knowledge (but the ſix months may not run from the vacancy, but from the refuſal or appeal diſcuſt, which cannot be determined in ſix months) otherways the kirk may admit a qualified perſon for that time, *Parl.* 1592, *cap.* 117. *Parl.* 1606. *cap.* 2. *Parl.* 1609. *cap.* 12. And by the inſtitution of biſhops; the preſentation was directed to them in their ſeveral dioceſes.

Secondly, During the vacancy without the patron's default, but by the default of the preſbytery, refuſing to admit a qualified perſon, he had power to detain the whole fruits of the benefice in his own hands, as is clear in the ſaid act, *Parl.* 1592, *cap.* 117. But thence it is not to be inferred, that while the patron preſents none, he could enjoy the benefice.

Thirdly, Patrons are tutors and guardians to their church, without whoſe conſent the incumbent can ſet no tack longer than for three years, *Parl.* 1594, *cap.* 203. Patrons had alſo an indirect intereſt in their own benefices; where the miniſters had an ordinary ſtipend, ſettled to them by long cuſtom or modification, yet far within the worth of the benefice, patrons uſed to preſent them to the benefice, but withal took tacks of them to confident perſons to their own behoof, carrying the ſuperplus of the profit of the benefice, over and above the accuſtomed ſtipend of their predeceſſors, which hath not been quarreled as a ſimoniacal paction or dilapidation. It ſeems alſo, that patrons for reſemblance of perſonal patronages ought to be alimented out of the benefice, if they come to neceſſity, according as their benefice may bear, though there hath occurred no occaſion to queſtion or try this point; but by the act of parliament *July* 23. 1644, *Sſ.* 1. *cap.* 20. the power of diſpoſing of the vacant benefice or ſtipend, was taken from the patron, and ſtated in the preſbytery and pariſh, to be diſpoſed upon for pious uſes; and by act of *Parl.* 1649, *cap.* 39. the power of preſentation is alſo taken away; yet the title doth unfitly deſign that act an abolition of patronage, for there is no more there taken away but the power of preſentation: but on the contrary, whereas *formerly* the patron could have no intereſt in the benefice *or* teinds, but indirectly as aforeſaid, that act declares the heritable right of the teinds, over and above the ſtipend, to be in the patron, but with neceſſity to diſpone the ſame to the heritors, for ſix years purchaſe: but theſe acts are now reſcinded, and patrons were returned to their ancient rights*, but they were excluded from the fruits in the vacancy, which were applied to pious uſes, for ſeven years, and thereafter during his Majeſty's pleaſure, *Parl.* 1661, *cap.* 52. and the vacancies for ſeven years after the year 1672, were applied to univerſities, *Parl.* 1672, *cap.* 20 **.

Eccleſiaſtical benefices were ſo ordinarily patronate, that there were ſcarce any free, but all were preſumed to be patronate, and where the right of patronage did not appear to be eſtabliſhed in any other, the Pope was preſumed patron before the Reformation; and after the Reformation, the King is preſumed patron, *jure coronæ*, where the right of another patron appeareth not. There are other patronages belonging to the King, *jure privato*, as when the King or his predeceſſors acquired any rights of patronages from any private perſon; or when the King or his predeceſſors founded or doted the benefice; or when any lands or baronies fall in the King's hand as ſuperior, by recognition or forfeiture; all ſuch *baronies* having

* See below, *ad fin. h. t.*

** By act 1685, *c.* 18. the patron had the power of applying the vacant ſtipend to pious uſes, under a forfeiture of his right to the next *vice* of preſentation, if he omitted to apply it. By act 1690, *c.* 23. That omiſſion is declared to infer a forfeiture of the right of adminiſtration of the vacant ſtipend, for that and the next vacancy.

having annexed thereto, or comprehended therein, advocation, donation and right of patronage of any kirk, the King doth thereby become patron; and all thoſe patronages are at the King's diſpoſing, and tranſmiſſible to any ſubject by the King's proper deed, either annexing or incorporating the ſame in baronies or lordſhips, or by diſtinct gifts; for tho' patronage doth ordinarily paſs as annexed to lands, by charters of burghs, baronies, or lordſhips; yet they may paſs without infeftments, as *jura incorporalia*. All patronages or power of inſtitution, which belonged to biſhops, by their ſuppreſſion the King becomes patron, though the biſhops were not patrons of their menſal kirks; He is alſo patron of all common kirks, after the diſſolution. But there were other patronages which by act of Parliament, are annexed to the Crown, either expreſsly, or when baronies, lordſhips, or benefices are annexed to the Crown, if therein patronages of any benefice were comprehended, they are annexed though not expreſt; for barony or benefice are *nomina univerſitatis*, being united and erected; and therefore the barony or benefice, without expreſſing patronage, do carry the ſame by reſignation, appriſing, adjudication, recognition or forfeiture, as well as ſalmond fiſhing or mills: but theſe patronages being a part of the annexed patrimony of the Crown, cannot be diſpoſed by the King, without a public law, or by a ſpecial act of diſſolution for particular reaſons of public good, anterior to the King's gift and ratifications in Parliament, which paſs of courſe, and are accounted but private rights, which will not eſtabliſh the ſame, though in the ratification there be a clauſe of diſſolution, which is always underſtood to be as a private right and not a public law.

The patronage of all biſhopricks did belong to the King, who deſigns the perſon to be biſhop, and though the chapter might uſe the formality of election, they did not refuſe the King's deſignation: the order of this election is preſcribed, *Parl.* 1617, *cap.* 1. where the dean and chapter are ordained to chooſe the perſon, whom the King pleaſes to nominate and recommend, he always being an actual miniſter of the kirk, who being elected, hath ſufficient right to the ſpirituality of his benefice, but not to the temporality, till he have a charter from the King, and do homage, and ſwear obedience to him; but the archbiſhop of *St. Andrews*, is to be elected by the biſhops of *Dunkel*, *Aberdeen*, *Brichen*, *Dumblane*, *Roſs*, *Murray*, *Orkney*, *Caithneſs*, the principal of *St. Leonard*'s college, the arch-dean of *St. Andrews*, the viccars of *St. Andrews*, *Leuchers* and *Couper*, or moſt part of them, *Parl.* 1617, *cap.* 2. And by the ſame act the archbiſhop of *Glaſgow* is to be elected by the biſhops of *Galloway*, *Argyle* and the *Iſles*, and the ordinary chapter of *Glaſgow*, or moſt of them, the biſhop of *Galloway* being conveener of the electors; and now the biſhop of *Edinburgh* ſince that biſhoprick was erected, is by the erection made an elector and conveener for *St. Andrews*.

The King is alſo patron of many laick patronages; and there are ſeveral other laick patronages belonging to ſubjects; eccleſiaſtick patronages belonged only to the biſhops, who are patrons of ſome kirks; whereof ſome are patrimonial, or menſal, the fruits whereof are a part of the biſhops benefices, and the ſeveral pariſh-kirks are not diſtinct benefices, but *partes beneficii, and* muſt be ſerved by the biſhop himſelf, or a miniſter who is a ſtipendiary: and by the 19th act, *Parl.* 1633, all miniſters are appointed to be provided with ſufficient ſtipends, being eight chalders of victual, or eight hundred merks at leaſt, except in ſingular caſes, referred to the commiſſioners for plantation of kirks, who are authoriſed as commiſſioners of Parliament, to value teinds, modify ſtipends, and grant localities for fixing thereof upon particular lands. *The biſhops have the patronage of ſome kirks without their dioceſe, and do preſent to the biſhop of that dioceſe.* If a biſhop did acquire any patronage of a kirk within his own dioceſe, that kirk cannot be patronate, but becomes free, and is conferred by the biſhop *pleno jure*; for he cannot preſent to himſelf; yet by the collation, the perſon collated is not a ſtipendiary, but is parſon or viccar, and hath the full benefit of the fruits, except in ſo far as they

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are reſtricted by tacks, ſet lawfully by them or their predeceſſors, or unleſs they were become ſtipendiars before the biſhop's right.

Common kirks which were to be provided by the biſhops and their chapters in common, were not properly patronate by preſentations, but by nominations and collations; yet the incumbents were not ſtipendiaries, but enjoyed theſe kirks as benefices: but after the Reformation, when biſhops and chapters were ſuppreſſed, theſe common kirks were declared to be of the ſame nature with other parſonages and viccarages, and to be conferred by preſentations of the lawful patrons and collation, whereby they become then patronate, the King, or thoſe to whom he gave right being patrons; but after the reſtitution of biſhops and chapters, *Parl.* 1617, *cap.* 2. theſe common kirks were reſtored to their antient condition. College kirks were benefices, whereof the King was patron, except ſome few, which belonged to ſubjects: chaplainries, and altarages were under patronage of the founders or their ſucceſſors.

Before the Reformation there were but few inferior benefices below prelacies, *viz.* collegiate and common kirks, parſonages and viccarages, and may be found by the ſtent-rolls, whereby every parſonage and viccarage are taxed apart, as diſtinct benefices; the far greater part of all the teinds of *Scotland* did belong to prelacies, ſuch as biſhopricks and abbacies, and all the pariſh-kirks which belong to them, are not diſtinct benefices, but a part of their patrimony, and were ſerved by themſelves, their viccars or their ſubſtitutes, without any fixed maintenance, but *ad placitum*; ſo that there was no patronages of all theſe kirks, and the ordinary proviſion thereof was the viccarage or ſmall teind, and ſometimes viccar penſions out of the parſonage teinds.

After the Reformation, all monaſteries being ſuppreſſed, they returned to the King *jure coronæ*, as to their whole benefices, both teinds or ſpirituality, and lands and baronies or other temporal rights; but the King gifted the moſt part of theſe benefices, both ſpirituality and temporality, to the nobility and gentry, and erected the ſame in temporal baronies and lordſhips; but with the burden of competent proviſions to the miniſters of all the kirks, which were parts of the patrimony of the ſaid great benefices: whereby the lords of erection coming in place of theſe monaſteries, had right to all the teinds of the kirks, which were the patrimony thereof; and as the abbots and priors did nominate their viccars in theſe kirks, ſo the Lords of erection did nominate the miniſters to the ſame, and preſented them to the church-men, to be tried and admitted, and thereupon aſſumed the title of Patrons, *tho' properly they were not ſuch*, becauſe the miniſters had no benefices, but were ſtipendiaries, having no rights to the fruits till the year 1587, when the temporalities of all benefices belonging to archbiſhops, biſhops, priors, prioreſſes, or whatſoever eccleſiaſtical benefice belonging to any abbay, cloiſter, friers, monks, canons, common kirks, and collegiate kirks, were annexed to the Crown, with ſeveral exceptions, act 29. *Parl.* 1587, and tho' that act ſeem only to annex the temporality then belonging to theſe church-men, and not to extend to the temporalities already erected to ſecular perſons; yet by the exceptions of the many erections therein contained, it hath been ever held as an annexation of all the temporalities that did belong to theſe benefices, with incluſion of all others not excepted: but the ſpirituality or teinds, are declared not to be annexed; but by the act 121. *Parl.* 1592, erections either of kirk-lands or teinds in temporal lordſhips, after the ſaid act of annexation, are declared null, except ſuch parts and portions of the kirk-lands, already erected in temporal lordſhips, to ſuch perſons as, ſince the act of annexation, have received the honours of Lords of Parliament, and have ſitten and voted in Parliament, as temporal Lords: whence the queſtion ariſeth, whether that exception derogates only from this act, or alſo from the ſaid general act of annexation, but by the 198th act of Parliament 1594, all erections ſince the ſaid general act of annexation, not excepted in the ſaid act, are declared null, which doth leave no doubt as to the erections, preceeding the ſaid act, not *excepted in* the act of annexation; and by the act 2. *Parl.* 1606,

1606, reſtoring biſhops, it is declared for the better ſatisfaction of his Majeſty's ſubjects and faithful ſervants, whom his Majeſty hath rewarded with erections, feus, patronages, teinds and confirmations of teinds, patronages and other rights of abbacies, and that they may not be put in miſtruſt, therefore ratifies the whole erections, infeftments, confirmations, patronages, tacks, and other ſecurities of benefices, not being biſhopricks given, diſponed and confirmed by his Majeſty, during the Parliament 1587, before or ſinſine, agreeable to the ſaid laws and acts of Parliament; and faithfully promits *in verbo principis*, never to quarrel the ſame: which ſeems to give further ground to erections, tho' qualified with that proviſion, that the ſaid erections be conform to the acts of annexation, and laws made ſinſine, whereby the ſame might only extend to the erections, excepted and warranted in the ſaid act of annexation, which excepts ſeveral erections formerly made, and leaves ſome kirk-lands to the King's diſpoſal, by ſubſequent erections: in this caſe did King *James* leave the condition of kirk-lands, teinds and patronages, when he died in *anno* 1625.

King *Charles* I. coming to the crown, and being informed of the great benefit his father might have made by ſuppreſſing of Popery, and the Popiſh benefices, if he had not gifted them away before he did conſider, did reſolve to recover the ſame to the Crown; and therefore made a very ample revocation of all deeds done in prejudice of the Crown, or any of his royal progenitors; and in the year 1627, there was a reduction intented of all erections of kirk-lands, teinds, patronages, which did pertain to whatſomever abbacy, priory, or other benefice, and acts of Parliament ratifying the ſame, with all infeftments of heritable offices or regalities: which revocation and proceſs having made a great noiſe, the King gave commiſſion to ſeveral Noblemen and others, to endeavour an agreement with thoſe who had right to erections, or any right to kirk-lands or teinds; whereupon there was a ſubmiſſion made by many perſons, who had right to kirk-lands and teinds, containing a procuratory of reſignation in the King's hands *ad perpetuam remanentiam*, of the ſuperiority of all lands, and other temporal rights, pertaining to whatſoever erection of the temporality of benefices, reſerving and excepting the property of all the ſaid lands, and others, whereunto they had right, before or after the ſaids erections, they paying the ancient feu-duties to his Majeſty, that were payable to kirk-men; and that ſuch demains and menſal-lands of the ſaids benefices, as were never ſet in feu or rental by the ancient titulars, before the act of annexation, nor by the King, and were then poſſeſſed by any of the Lords of erection, ſhould be feued to them and no others, for ſuch feu-duties as his Majeſty's commiſſioners ſhould appoint; they did thereby alſo ſubmit to his Majeſty, what ſatisfaction he ſhould give them for the feu-duties, and other conſtant rent of the ſuperiorities reſigned; and all rights of tithes that they had, that his Majeſty might appoint the quantity, rate and price thereof, to be paid by the heritors to the ſaids titulars of erection, with a burden of annuity to the King, excepting the teinds of the ſurrenderers own proper lands, being always ſubject to his Majeſty's annuity: which ſubmiſſion his Majeſty accepted, and there followed thereupon an inſtrument of reſignation at *Whitehall*, *May* 14. 1628. There was alſo a ſubmiſſion made by the biſhops, of all teinds belonging to them, or their patrimonial kirks, providing they be not damnified in their benefices, as they were then poſſeſſed, either in quantity or quality, whether the ſamine were paid in rental-bolls, or drawn teind; ſo that their ſubmiſſion did only reach to teinds that were in tack, or other uſe of payment, and whereof the biſhops or beneficed perſons, were not then in poſſeſſion by rental-bolls, or drawn teind, this ſubmiſſion was *in anno* 1628. There is alſo a ſubmiſſion by the burrows of their teinds, in the ſame year, and a fourth ſubmiſſion by ſeveral other perſons having right to teinds at the ſame time.

The King did pronounce his decreet-arbitral, upon the ſubmiſſion of the Lords of erection, upon the 2d of *September* 1629, whereby he ordains the Lords of ere-

ction to have ten years purchaſe for the feu-duties, and *for* all their conſtant rents, conſiſting of victual or money, the victual being reckoned at an hundred merks the chalder, deducing ſo much of the feu-duties as were equivalent to the blench-duties, contained in the infeftments of erection, for which nothing was to be paid; and allowing the Lords of erection to retain the feu-duties until they were redeemed. His Majeſty did alſo decern, that each heritor ſhall have his own teinds; that ſuch as have right to other mens teinds, ſhall (*ſell the ſame to the heritor*) after valuation thereof, (whereby the fifth part of the conſtant rent which each land pays in ſtock and teind, is declared to be the teind, and where the teind is valued ſeverally, that the heritor ſhall have the fifth part of the yearly value thereof deduced, for the King's eaſe) and the price of the ſaid teind for an heritable right was made nine years purchaſe, and for other rights of teinds, inferior to heritable rights, proportionably according to the worth thereof, to be determined by a commiſſion to be granted by his Majeſty to that effect. There are alſo decreets by his Majeſty upon the other ſubmiſſions, to the ſame purpoſe; and by the 10th and 14th acts, *Parl.* 1633, the ſuperiorities of all kirk-lands are annexed to the Crown, except theſe belonging to biſhops, with the feu-duties of the ſaid ſuperiorities, reſerving to the Lords and titulars of erections, who ſubſcribed the general ſurrender or ſubmiſſions, their feu-duties till they be redeemed at ten years purchaſe, and reſerving to them the property holden of his Majeſty, for payment of the feu-duties contained in the old infeftments preceeding the annexation *.

By *two letters referred to, act* 12. *P.* 1633, *the firſt letter regiſtrate in the books of Secret Council, Feb.* 9. 1626, *the other regiſtrate July* 21. 1626, the King reſtricted his general revocation in *October* 1625, to the annulling all pretended rights to the property of the Crown, as well annexed as not annexed, whereof an account hath been made in exchequer, and of the principality unlawfully diſponed by his predeceſſors, againſt the laws and acts then ſtanding; and to the annulling of erections, and other diſpoſitions of whatſoever lands, teinds, patronages and benefices, formerly belonging to the kirk, and ſince annexed to the Crown, and any other lands and benefices, mortified to pious uſes, and of regalities, and heritable offices, and the changes from ward to blench or taxt-ward, ſince the year 1540. But ſince that time there hath been great alterations in the matter of patronage; for as to the riſe and original of patronage, it hath been before there were Chriſtian Emperors, Kings or States; and while congregations and their miniſters were not under the protection of law, but might have been hindered and diſturbed in divine worſhip, then they obtained the protection of ſome potent neighbour, who might endeavour to defend them from violence, whom they owned as their patron; but when they came to be protected by law, and by Chriſtian magiſtrates, with a parochial church or congregation, they became judges who ſhould be patrons; and not only according to conſent, as before, but according to the greateſt benefit; and there were no kirks without patrons, except patrimonial kirks of prelates, or common kirks, which were ſerved by the prelates or monks, or other perſons named by the prelates and their chapters, or by the plurality of the members of the collegiate or college churches: the churches alſo of deans were patrimonial, and named by the prelate and chapter; but when prelacies and monaſteries were aboliſhed, and the common kirks were diſſolved, all kirks became patronate, and the King became patron wherever the right of another patron did not appear **; and therefore no tacks of teinds could be ſet by incumbent

* This right of redemption competent to the Crown, was diſcharged P. 1707, c. 11.——By act 29. P. 1690, the ſuperiority, of all lands which before the abolition of epiſcopacy held of prelates, biſhops or their chapters, or of deans, ſub-deans, arch-deacons, or other beneficed perſons, is declared veſted in the Crown. By act 32. P. 1690, and act 11. P. 1698, the ſmall vaſſals of ſuch church lands are relieved, in a great meaſure, of the expence of infeftments from the Crown.

** Edition 1ſt ſtates here at ſome length the queſtion whether the Crown or Lords of erection have right to patronages, which formerly belonged to the clergy, and mentions a caſe where that queſtion was debated between the L. of *Watertoun* and officers of ſtate, in *November* 1677, with regard to a common kirk of an abbacy.

incumbent miniſters for longer time than three years, without conſent of the patron, as ſaid is.

The King having erected the kirk-lands (fallen to the Crown by the Reformation) into baronies, and gifted the ſame to ſecular perſons, he did frequently therewith gift the patronage of kirks; and tho' their gifts bore not expreſsly the patronage, yet the Lords of erection have always preſented as patrons, which hath been controverted by the King, but hath never yet come to a determination. In *anno* 1649, *act* 39. patronage was totally aboliſhed, and in recompenſe thereof the *patrons* had the benefit of the teinds, which were not diſponed by the King, but with the burden of miniſters ſtipends, and augmentations, and alſo with the burden of tacks and prorogations; after the expiring of which, they would have the full benefit of the teind; but the *Parl.* 1649 being reſcinded, patrons were reſtored to the ſame condition in which they were formerly; yet by act 9. *Parl.* 9. *Charles* II. it is declared, that the miniſters ſhall have no further right to the teinds, than they had before the act 1649. But now epiſcopacy being aboliſhed, the King is patron of all the biſhops patrimonial kirks, and the kirks of their deans; and likewiſe the power of preſentation being taken from patrons, the way of now calling miniſters is ordered by act 23. *Parl.* 1690, whereby it is ſtatute and declared, "That for ſupplying vacant churches with miniſters, that the heritors of "the pariſh being Proteſtants, and the elders, are to name and propoſe a perſon "to the whole congregation, to be approven or diſapproven by them, and that "the diſapprovers give in their reaſons to be cognoſced by the preſbytery; and "if application be not made by the elderſhip, and heritors to the preſbytery, for "the call and choice of a miniſter, within ſix months after the vacancy, that the "preſbytery may plant a miniſter *jure devoluto*, for which the patron is to have "ſix hundred merks, and right to the teinds of the pariſh which are not heri-"tably diſponed, they being obliged to ſell the ſame to the heritors at ſix years "purchaſe: but any ſuperiorities which did belong to the benefices of bi-"ſhops or miniſters, are declared to belong to the King, and the feu-duties "to be retained till they be redeemed by ten years purchaſe." Hence this act is not purely eccleſiaſtick; for the call and preſentation is not only by the ſeſſion, but by the heritors, and magiſtrates of burgh; and therefore is directly under the cognizance of the civil authority: neither is it clearly expreſſed, whether the elders, heritors, and magiſtrates ſhould conſent ſeverally, or as conveened to a diet of meeting; nor is it determined who ſhould conveen them: but the kirk-ſeſſion being an eccleſiaſtick judicature, ſhould only act in their meeting, and the heritors cannot act in the ſame meeting, of which they are not members; ſo likewiſe the magiſtrates of burgh act in their council; and from the nature of the truſt, the heritors ſhould alſo act in a meeting of their own, conſulting their reaſons, and determining by the plurality of thoſe preſent, upon an intimation to all concerned; yet there is nothing determined what ſhall be done in caſe theſe meetings differ; but doubtleſs any of them may appeal, and the civil authority may cognoſce whether the act of Parliament be rightly obſerved yea or not; all which a ſhort time may eaſily adjuſt *.

TITLE

* By act 10. *Annæ*, *c.* 12 the right of preſenting miniſters is reſtored to all ſuch patrons as have not upon receiving from the heritors the 600 merks, appointed by the act 23. P. 1690, ſubſcribed a renunciation of their right. —If the patron neglect to preſent for ſix months, the preſbytery have the right *jure devoluto*. By act 5. *Geo.* I. *c.* 29. It is declared, that the preſenting a perſon who hath not taken the oath of abjuration, or who is paſtor of another pariſh, or who ſhall not accept, does not interrupt the running of the ſix months.

TITLE IX.

Tacks, where, of Rentals, tacit Relocation and Removing.

I. *The nature of tacks.*
II. *How tacks become as real rights, effectual againſt ſingular ſucceſſors.*
III. *Who may grant tacks.*
IV. *Tacks require writ.*
V. *The tenor of tacks.*
VI. *The effect of obligements to ſet tacks.*
VII. *Tacks become real rights by poſſeſſion.*
VIII. *Tacks in wadſets after redemption become valid.*
IX. *The effect of tacks.*
X. *Tackſmen in poſſeſſion need not diſpute the ſetter's right, being heritable proprietar.*
XI. *The effect of tacks, whereof the tack-duty is payable to creditors.*
XII. *Tacks are good active titles for mails and duties.*
XIII. *The effect of tacks ſet to huſband and wife.*
XIV. *Kinds of tacks.*
XV. *Rentals.*
XVI. *The effect of aſſignations or ſub-tacks of rentals, or other tacks.*
XVII. *If rentals can be renewed by tutors, and are good againſt donatars.*
XVIII. *The effect of rentals in court-books, or rental-books only.*
XIX. *The endurance of rentals.*
XX. *The effect of graſſums.*
XXI. *How far rentals become void by alienation, aſſignation or ſub-tack.*
XXII. *Effects of ſub-tacks.*
XXIII. *Tacit relocation.*
XXIV. *Tacks fall in eſcheat ſingle or liferent.*
XXV. *Tacks ſleep during ward and non-entry of the ſetter, and are valid againſt his life-rent-eſcheat.*
XXVI. *Tacks are* ſtrictiſſimi juris, *and extend not to voluntary aſſignies, or to the power of granting ſub-tacks, or removing tenants, but when expreſſed, except tacks for liferent, or equivalent.*
XXVII. *Tacks without iſh are null.*
XXVIII. *How far tacks to endure till a ſum be paid, are valid againſt ſingular ſucceſſors.*
XXIX. *Tacks without a tack-duty not good againſt ſingular ſucceſſors.*
XXX. *Tacks are valid, tho' not expreſſing the entry.*
XXXI. *Tenants muſt labour and not waſte or open the ground for any minerals.*
XXXII. *Tacks become void by two years not-payment of the tack-duty.*
XXXIII. *Or not finding caution to pay the tack-duty bygone, and in time to come.*
XXXIV. *Or by the tenant's renunciation.*
XXXV. *By contrary conſent of both parties.*
XXXVI. *By deeds contrary to the tack.*
XXXVII. *Or by removing.*
XXXVIII. *Summar removing without warning, in what caſes ſuſtained.*
XXXIX. *The old way of removing tenants.*
XL. *Warning of tenants to remove.*
XLI. *The active title in removings.*
XLII. *Exceptions againſt removings, not inſtantly verified, are not receivable till caution be found for the violent profits.*
XLIII. *Defences againſt removing, and replies thereto.*
XLIV. *Violent profits.*
XLV. *Succeeding in the vice of tenants removed.*

A Tack of itſelf is no more than a perſonal contract of location, whereby land, or any other thing having profit or fruit, is ſet to the tackſman for enjoying the fruit or profit thereof, for a hire, which is called the tack-duty; which therefore did

did only oblige the ſetter and his heirs, to make it effectual to the tackſman, but did not introduce any real right, affecting the thing ſet, and carried therewith to ſingular ſucceſſors; but ſo ſoon as the thing ſet ceaſed to be the ſetter's, the tack could only defend the tenant till the next term of removing[d].

II. Thus it was with us until the ſtatute, *Parl.* 1449, *cap.* 18. whereby purchaſers, and ſingular ſucceſſors were diſenabled to break the tacks ſet to the tenants: by this ſtatute, tacks become as real rights, affecting the ground; and becauſe they cannot come the length to be eſteemed as rights of property, they are ranked here amongſt ſervitudes perſonal; for as liferent-rights are real rights, putting a ſervitude upon hereditaments to the perſon of the liferenter, during life, whereof a liferent-tack is a kind; ſo other tacks do ſubject the thing ſet to the tackſman for a time, and affect the ſame, though it paſs to ſingular ſucceſſors; albeit the ſtatute only expreſſeth, "that buyers ſhall not break tacks," and is in favour of the poor labourers of the ground, for whoſe ſecurity it was chiefly intended; yet it is extended againſt all ſingular ſucceſſors, whether by ſale, exchange, appriſing, adjudication, or any other way, as the ſtatute bears, "that tackers ſhall "remain with their tacks, in whoſe hands ſoever the lands come;" and alſo in favour of all tackſmen, *whether they be labourers of the ground or not*, whereby tacks are now become the moſt ordinary and important rights; and if the great favour of this ſtatute made them not in other things to be ſtrictly interpreted, they would render infeftments of ſmall effect.

That we may proceed orderly in this matter, we ſhall conſider; *Firſt*, The conſtitution of tacks. *Secondly*, The extent and effect of them. *Thirdly*, The kinds of them. *Fourthly*, The reſtrictions and defects of them. *Fiftkly*, The avoiding and removing of them. As to the *Firſt*, Tacks are alſo called aſſedations, as a ſetting or ſettling of the tenant in the land; the *Engliſh* call them leaſes, as letting the tenement to the tenant; ſome tacks are alſo called rentals, as being the conſtitution of a fixed rent, and they are of longer endurance than ordinary tacks, being of one or more liferents, and have ſomewhat ſpecial in them, of which hereafter[dd].

III. As to the conſtitution of a tack, conſider; *Firſt*, Who may conſtitute it. *Secondly*, Of what. *Thirdly*, How. For the firſt, to the conſtitution of an effectual tack, the ſetter muſt not only have all the capacities requiſite to contract, but he muſt have right to the thing ſet, and power to adminiſtrate; which being, tacks may either be granted by commiſſion, if it be ſpecial, as to tacks, or at leaſt as to matters of greater importance with a general clauſe for others; or otherwiſe by tutors, curators, or other adminiſtrators of the affairs of others, concerning whom *Craig lib.* 2. *Dieg.* 10. §. 1. moveth and removeth this doubt, whether tutors, *&c.* may ſet tacks for longer time than during their office, which he reſolveth negatively, even though it were without the minor's detriment, continuing the antient tack-duty, ſeeing he is ſo far hurt as not to have the free diſpoſal of his own. The ſubjects whereof tacks are ordinarily ſet, are lands; but it may be any other thing having fruit or profit, as a fiſhing, an office or a caſuality.

IV. As to the manner of conſtituting tacks, they muſt be conſidered in themſelves; *Firſt*, As perſonal rights. *Secondly*, As by the ſtatute becoming real. As they are perſonal rights, the conſent of the ſetter, and tackſman agreeing in the rent is ſufficient: but as tacks are become real rights, there is a neceſſity of writ, except in a tack of one year, which may be verbal; but if the agreement be for more years, the ſetter may reſile; and though the tackſman be in poſſeſſion, if he reſile, *the agreement* will have no effect as to ſubſequent years, *July* 16, 1636, *Keith*; the like though the ſetter had builded houſes conform to the agreement; yet the penalty of paying a year's rent by the failzier to the obſerver, was found to ſtand, *July* 15. 1637, *Skein*.

[d] See above, I. 15. 4. [dd] Below § 15. *et ſeq. h. t.*

V. The writ requiſite to conſtitute a tack, requireth not many ſolemnities; but if the thing ſet, the parties, the rent and the time, be clear, the tack will be valid: it was ordinarily granted by the ſetter to the tackſman for ſuch a duty, without any mutual obligement upon his part, like unto a charter; but becauſe the tenant not being bound, might at the end of any year before *Whitſunday*, renounce ſuch a tack and be free, as being in his favour; therefore they are now ordinarily by way of contract, whereby the tackſman, as well as the ſetter, is obliged to ſtand thereto.

VI. *As in other perſonal rights, ſo in tacks, an obligement in writ to grant a tack, expreſſing the ſubſtantials of it, is equivalent*; *as Craig* ſaith in the fore-cited place[d], that *pactum de aſſedatione facienda, & ipſa aſſedatio parificantur, præcipue ſi poſſeſſio ſequatur*, which is unqueſtionable as to the ſetter and his heirs; and was alſo found againſt a ſingular ſucceſſor, by a perſonal obligement *of a father-in-law* in a contract of marriage, providing lands to *the* wife, and warranting the ſame free of all teinds, except ſuch a quantity, which *the father-in-law* was *bound* to pay, *by a tack he had of theſe teinds*, whereby a poſterior aſſignation to the *ſaid* tack of theſe teinds was excluded, *March* 20. 1629, *L. of Finmouth.* Here the obligement of the *father-in-law* was found equivalent to an aſſignation to his tack of the teinds in queſtion. The like of a decreet-arbitral, decerning a tack to be granted: this was in a ſpuilzie, *Hope*, ſpuilzie, *Crawfurd contra*

VII. As a tack becometh a real right, it muſt neceſſarily be cled with poſſeſſion, but requireth no ſeaſin nor inſtrument, or other ſolemnity, *July* 11. 1627, *Wallace*, *Had. Jan.* 22. 1611, *L. of Pitſligo contra L. Philorth.* The like though the tackſman was in poſſeſſion, yet not by virtue of the tack, but by virtue of a wadſet, though the tack was renewed the time of the wadſet, *Hope*, removing, *Ord contra tenants of Fydie**; and a poſterior tack being firſt cled with poſſeſſion, was preferred to a prior tack, *June* 23. 1627, *M'millan.*

VIII. Yet a tack after redemption of wadſet-lands, is valid againſt ſingular ſucceſſors, as a part of the reverſion; though it attain no poſſeſſion before the ſetter be denuded, unleſs it be uſurary; being far within the true value, whereby the creditor hath more nor his annualrent, *Parl.* 1449, *cap.* 19. [e]

IX. As to the extenſion and effect of tacks, they are little leſs than of infeftments, for thereby the tackſman is maintained againſt all parties having intereſt till the tack be out-run, and he be warned; even though ſet by a liferenter, it will maintain the tenant againſt the fiar, either from removing till warning, or from paying more than the liferenter's tack-duty, though it be ſmall, *Had. June* 26. 1610, *Bruce contra Bruce.* Yea, though the tack-duty was eluſory ſet by an appriſer of a liferent, to a *conjunct* perſon being no labourer of the ground, *Feb.* 1. 1631, *Blaus.* The reaſon why tacks by liferenters are effectual, for the year in which the liferenter died; is becauſe by act of Parliament, tenants can only be warned to remove forty days preceeding *Whitſunday*; ſo that if the liferenters live till thirty nine days before *Whitſunday*, their tenants cannot be removed, but brook *per tacitam relocationem*, till the new time of warning.

X. A tack hath alſo the benefit of a poſſeſſory judgment upon ſeven years peaceable poſſeſſion, as an infeftment, without neceſſity to diſpute the ſetter's right, *July* 13. 1636, Biſhop of *Edinburgh.* *This* was found where the tack did bear to be granted by the ſetter as heritable proprietar, otherwiſe, a tack by a liferenter tenant or donatar might claim the benefit, *Dec.* 1. 1676, *Home.*

XI. A

* This deciſion, as obſerved by *Hope*, does not ſeem to relate to the doctrine of this paragraph; but rather to the powers of a reverſer, to ſet or renew a tack of wadſet-lands. The deciſion is obſcurely marked in theſe words; "In an action of removing by *Walter Ord contra the tenants of Fydie*, the Lords repelled an exception, founded upon a tack, ſet before *William Fraſer*'s wadſet, which thereafter expired and was renewed; becauſe my Lord after the wadſet could not renew an tack."

[d] *Craig*, II. 10. 10. [e] See below, II. 10. 10.

XI. A tack ſet by an heritor for a tack-duty to be paid to his creditors, was found a real right effectual to the tenants; but whether it would be found a real right in favour of the creditors, in the ſame cauſe, it was firſt determined *negativè*, and thereafter *affirmativè*: but it is not like, the Lords would continue it, not being the habile way to ſecure creditors, and being a great mean of inſecurity to purchaſers [ee], *Feb.* 13. 1627, *Samuel.* The negative is alſo obſerved by *Hope*, tacks, *Andrew Collew contra Pariſhioners of* *Nov.* 28. 1634, *Moriſon contra tenants of Orchardtown.*

A tack, *ſet in ſatisfaction of a debt*, was preferred to an appriſing, whereof the denunciation was ſix days after the date of the tack, though the appryſing was led before poſſeſſion upon the tack, *March* 25. 1628, *Blackburn.*

XII. A tack is a ſufficient title for mails and duties, and againſt all poſſeſſors, and it is obligatory againſt the ſetter's heir for the profit of the land, though the tackſman was never in poſſeſſion, nor uſed diligence therefor during the ſetter's life, which was a long time, *Had. July* 13. 1610, *Porterfield contra Ker*; and in ſome caſes, it is a good title for removing [f].

XIII. A tack ſet by a huſband and his wife, whereof the duty was payable to the longeſt liver of them two, was found to give her right to the tack-duty after his death againſt his heir, though ſhe had no other right of the lands, and was otherwiſe ſufficiently provided, *Feb.* 14. 1637, *Home.* A tack ſet to a man and his wife for nineteen years, found to belong to the wife as liferenter, if ſhe ſurvive, and not to be diſpoſable by the huſband without her conſent, *Spotiſ.* marriage, *Gourley contra M'gill* *.

XIV. As to the third point propoſed, concerning *the* ſeveral kinds of tacks, they are either verbal or by writ, liferent-tacks, or for certain years, ordinary tacks or rentals, principal tacks or ſub-tacks, expreſs tacks, or by tacite relocation; and theſe which are ſet by wadſetters to the granters of the wadſet, are called back-tacks, amongſt which there are few ſpecialities but what concerns rentals, ſub-tacks, or tacite relocations.

XV. A rental is a tack ſet to kindly tenants, which are the ſucceſſors of the antient poſſeſſors, or thoſe who are received by the heritor, with the like privilege as if they were ancient poſſeſſors: and therefore, when tacks are ſet to perſons, acknowledging or conſtituting them kindly tenants, they are equiparate to thoſe that are ſet expreſsly under the name of rentals.

XVI. Such tacks are underſtood to comprehend more kindneſs and friendſhip in the tenant to his maſter, than other tenants; and therefore the rentaller may not aſſign them, nor introduce a ſub-tenant, unleſs the rental bear expreſsly that power; but muſt himſelf remain upon the ground as *colonus*, the ſame being in his own labourage. And rentals are ſtrictly interpreted as to this point, but are more favourably extended than other tacks, as to any other point; becauſe of the kindneſs and friendſhip deſigned to the rentaller thereby: and no tack is accounted a rental unleſs it bear ſo, or that the tenant is acknowledged as kindly tenant. And albeit after the expiring of rentals, their ſucceſſors have no right to maintain them in poſſeſſion; yet frequently of favour they are continued, and pay graſſums at the renovation of their rentals, wherein they have ordinarily conſiderable eaſe. Ordinary tacks muſt contain an expreſs and terminate endurance, otherwiſe they are null, not only as to ſingular ſucceſſors, but even as to the ſetter and his heirs, becauſe they are not conſtitute *habili modo.* And therefore, if they have no time, they laſt but for a year; and if they have no determinate time of iſh, they laſt no longer; and they do not ordinarily give power of aſſignation or ſub-tack, unleſs *this* be expreſſed: yet the granting of them does not annul the tack, but only the aſſignation or ſub-tack without warrant, but they annul rentals, like to the alienations of ward-vaſſals [g].

XVII.

* This deciſion does not relate to the doctrine here laid down.

[ee] See below, §. 28. *h. t.* [f] See below, § 41. 2. *fin. h. t.* [g] See below, § 21. *h. t.*

XVII. Rentals can be granted by none but the heritor of the ground; but if they be renewed by tutors for the accuſtomed graſſums, it may be accounted as an act of lawful adminiſtration, much rather than that tutors ſhould have power to expel the kindly tenants. It hath not come in controverſy, whether donators of ward, non-entry, or liferenters, may expel kindly tenants: or whether this title would not be relevant *againſt theſe*, to defend in removings, tho' *good* gg againſt the heritor; wherein this would make for them, that all theſe temporary poſſeſſors have not *plenum dominium*, and can but make uſe of the fee as the proprietars did, tho' they may out-put and in-put ordinary tenants, *Nicol.* removing, *La. Langtoun contra her tenants.*

XVIII. Rentals do require writ, not only as a probation, but as a ſolemnity in their conſtitution: ſo a rental in the ſetter's rental-book, was not found valid againſt a ſingular ſucceſſor, *July* 5. 1625, *L. of Aitoun*; yet ſuch a rental was found valid againſt the ſetter, or a tackſman made by him, *Feb.* 4. 1629, but inſerted, *July* 5. 1625, *Maxwell.*

XIX. Some old deciſions ſuſtain rentals only for a year, when they mention no endurance, tho' they be ſet expreſsly as rentals, which doth not quadrate to the nature and deſign of rentals, whereby the rentaller being entered, is only to be underſtood to be for his life; and his ſucceſſors ever to be in his maſter's power, to renew or not to renew, according to the rentaller and his ſucceſſor's carriage, except the contract be very clear and expreſs; and therefore a rental ſet to the rentaller and his heirs, without expreſſing a certain number of heirs, was found only to ſtand during the life of the ſetter and rentaller living together, *July* 5. 1625, *L. of Aitoun*; *Hope*, rental, *Lo. Seatoun contra his tenants*; Nicol. *Corſbie contra Donaldſon.* And where a rental bore to heirs indefinitely, the right of the firſt heir was ſuſtained by the cuſtom of the barony, *March* 15. 1631, *E. of Galloway.* And a rental bearing to the rentaller's heirs heritably, *ad perpetuam remanentiam*, was ſuſtained as to the firſt heir of the rentaller, without neceſſity to alledge cuſtom ſo to ſet, *March* 13. 1632, *Achannay* *.

XX. Graſſums do preſume kindlineſs, and in ſome baronies theſe are renewed, both at the death of the heritor, and at the death of the tenant; but more ordinarily at the death of the tenant only; yet in either caſe, if the graſſum be received from the tenant, and thereby he be acknowledged by writ as a kindly tenant, he cannot be removed by the heritor or his heirs, even tho' he had not a formal rental; becauſe the matter is not entire by receipt of the graſſum; and therefore there is no *locus pœnitentiæ*, upon reſtoring thereof, eſpecially as to the ſucceſſors of old tenants, paying graſſum before: and therefore rentals expreſsly ſo granted, or to tenants conſtitute kindly tenants, tho' they contain no iſh, ſhould not be annulled for want of an iſh, which is implied in the nature of a rental to be a liferent; and it would be far contrary to that favour that in other caſes is allowed them, to ſuſtain them but as verbal tacks, laſting for a year; upon this ground it is, that a rental granted to a man and his wife, *during their lifetimes*, not bearing the longeſt liver, nor any iſſue, was yet found to conſtitute them both rentallers during their life, and the wife ſurviving to enjoy the ſame, *March* 5. 1629, L. of *Ley* younger.

XXI. Rentals do ordinarily contain a clauſe, not to ſubſet, aſſign, or annalzie, which if it be contraveened, not only the aſſignation or ſub-tack is void, but the rental itſelf, *Hope*, rentals, *Hamilton contra Boid.* The like being ſubſet, as to a part, *pro tanto*, *Hope*, rentals, *Lo. Douglas contra Walkingſhaw.* Yea, tho' the ſub-tack was only granted for certain years, and theſe expired before the purſuit, *Hope*, rentals, *E. of Roxburgh contra Ker.* This is ſo far extended, as being in the nature of a rental without any ſuch clauſe, that it falleth in whole in the ſame manner, as ward-lands recognoſce by alienating or ſub-ſetting the whole, or major part, if poſſeſſion follow, and that by exception or reply,

* This deciſion may be conſidered as contrary to that above quoted, *July* 5. 1625, *Aitoun*, and appears more agreeable to juſtice.

gg F. not.

ply, *March* 15. 1631, E. of *Galloway*. Tho' the alienation was by excambion, and was conditional, "if the heritor conſented," elſe to be null *: the like where the rentaller had given a diſpoſition of the rental, whereupon the acquirer was in poſſeſſion, which was found to annul the rental, albeit it bore aſſignies, and to exclude a ſub-tack by the rentaller to that ſame party, granted *after the diſpoſition, but* before any controverſy moved, *Feb.* 21. 1632, *L. Johnſtoun* **. The like by a ſub-tack, tho' the ſub-tenants offered to repone the rentaller, *Nov.* 13. 1622, *Bonar*. The like upon an aſſignation of a rental, tho' it contained a power to ſub-ſet, and in-put and out-put tenants, *March* 21. 1623, *L. of Craigie Wallace*. But this taketh no place, if the ſub-tack be ſet to the rentaller's eldeſt ſon, who was to ſucceed, *Hope*, rentals, *E. of Roxburgh contra Gray*. It will alſo be elided if the heritor receive duty from the aſſigny as aſſigny, *Hope ibi*, *L. of Craigie contra his tenants*. But it will not be inferred by the rentaller's entering another in poſſeſſion, without granting him a right in writ, *July* 5. 1625, *L. of Aitoun*, laſt of *Jan.* 1633, *L. of Cleghorn*; unleſs the rental contain an obligement to put no other in poſſeſſion; and then it *will* become null by granting tolerance, and that by exception againſt the perſon having tolerance, without calling the rentallers, *July* 15. 1628, *La. Maxwel*. A rental ſetting the keeping of a houſe, yard and others, to the rentaller and his heirs, as kindly tenants, was not found null by the rentaller's ſuffering the decay of the houſe and yard, whereby the rentaller failed in his duty, and in the cauſe of granting the rental, *Jan.* 29. 1628, *D. of Lennox*.

XXII. A ſub-tack is that which is granted by the principal tackſman to his ſub-tenant, who doth not thereby become tenant to the ſetter of the principal tack. This is competent to tackſmen, where lands are ſet to them or their ſub-tenants, or that they have power to out-put and in-put tenants; and it is like a ſubaltern infeftment, and it hath the ſame effect to defend the poſſeſſion as the principal tack itſelf, if it be cled with poſſeſſion, and cannot be taken away by any renunciation granted by the principal tackſman, tho' his tack bore not aſſignies, (but tho' it be not obſerved, it hath born either aſſignies or power to in-put tenants or ſub-tenants) *July* 14. 1625, E. of *Mortoun*: yea, when the principal tack was reduced for not-production, the ſub-tackſmen not having been called, the ſub tack was ſuſtained as a defence, notwithſtanding the reduction, ſeeing the heritor had conſented to the ſub-tack, *Dec.* 13. 1626, E. of *Galloway*. This is the effect of a ſub-tack *paſſivè*, but *activè* it is not a ſufficient title to purſue without inſtructing the principal tack, unleſs it had been acknowledged by the defender.

XXIII. Tacit relocation is that which is preſumed to be the mind of both parties after expiring of a tack, when neither the ſetter warneth, nor the tackſman renounceth; for other ſignifications of the alteration of their minds will not ſuffice, theſe being the habile ways of voiding tacks, which is now much more ſtrengthened by the ſtatute, prohibiting tenants to be put out without warning before *Whitſunday*: but where warning is not requiſite, other competent ways of evacuating the tack will be ſufficient; as inhibition in teinds, or actions for removing ſummarily from fortalices, coal-heughs, *&c.* Yea, tho' warning hath been uſed, if it preſcribe by three years not purſuing thereupon, it hath no effect even againſt tacit relocation, *Had. June* 26. 1610, *Bruce contra Bruce* ***. There is a kind of tacit relocation, by taking the rent before the hand, during which time, as *Craig* [g] obſerveth in the fore-cited place, the ſetter cannot remove the *tenant* for theſe years. *The like if he take an herezeld, he cannot remove the defunct's*

* This deciſion does not prove that alienation of the major part is ſufficient, but it was ſo found, *March* 21. 1623, *L. Craigie Wallace*.

** This deciſion is in ſome meaſure contradictory to thoſe which immediately follow, by which a ſub-tack was found to annul a rental, in the ſame manner as an aſſignation or diſpoſition; but here an ordinary ſub-tack was ſuppoſed valid.

*** This deciſion does not prove the doctrine in ſupport of which it is quoted.

[g] *Craig* II. 10. 11. & II. 8. 32.

ſucceſſors for the year enſuing, in both which caſes he is underſtood to relocate tacitly by theſe deeds. Tacit relocation will be ſufficient after a verbal tack, or where the tack is preſumed upon uſe of payment, tho' none can be ſhown or proved: yea, tacit relocation was ſuſtained for more years than the ſetter could expreſsly ſet; and is ordinarily, in the caſe of tacit relocation upon liferenters tacks, which continue ſtill after their death, till warning, and was ſo found in a tack of teinds to a patron, *longer than the beneficed perſon's* right to ſet, *Jan.* 16. 1663, *E. Errol.*

Tacit relocation can only defend the tenant, being natural poſſeſſor, but not poſſeſſing by his ſub-tenant, nor the ſub-tenant, (alledging on the tenant's right) if he *himſelf* be warned; but he muſt alledge, that he is ſub-tenant to a tenant, who hath a tack for terms to run, *March* 6. 1632, *La. Lauriſton, Jan.* 30. 1663, *Riccarton. The contrary was found, Dec.* 2. 1628, *Whitefoord.* Relocation is valid againſt the donatar of a ward, till warning or citation, which was ſuſtained, tho' the tack-duty was eluſory, and that the tack then ſleeped, *March* 13. 1627, *L. Lee.* But tacit relocation is no relevant active title *for mails and duties or removing* againſt any, but thoſe who have right from the tackſman, tho' they had acknowledged the ſame by payment to him for years anterior, *Dec.* 12. 1621, *L. Lag.*

XXIV. By what hath been ſaid, it may appear, that the force and effect of tacks is ſo great, by reaſon of the foreſaid ſtatute and cuſtom, extending the ſame, that it would ſwallow up all heritable rights, and make infeftments uſeleſs, unleſs tacks had their own retrenchments and defects, making infeftments neceſſary. As *firſt*, tacks not being liferent tacks, fall in ſingle eſcheat, and theſe fall by liferent-eſcheat, *Parl.* 1617, *cap.* 15.

XXV. *Secondly*, Tacks have no effect againſt ſuperiors in ward-lands, but ſleep during the time of wards, non-entries, *&c.* for infeftments feu are then valid only in ſome caſes: yet tacks are valid againſt liferent eſcheat, which is a caſuality falling, not by the nature of fees, but by ſtatute or cuſtom [h].

XXVI. *Thirdly*, Tacks are *ſtrictiſſimi juris*, and no further extended than is expreſſed; and therefore are not extended to aſſignies, unleſs expreſſed: and therefore tacks granted to women fall by their marriage, which is a legal aſſignation, and cannot be annulled; yet may revive by the huſband's death, being unexpired [i]. Upon the ſame ground a tack not bearing to aſſignies, was not found to accreſce to a relict, as infeft with abſolute warrandice, as *jus ſuperveniens authori, June* 18. 1680, *Hume*, which is to be limited thus, that it doth not exclude legal aſſignations by appriſing and adjudication, but only voluntary aſſignations, *Hope hic, Lo. Elphingston contra Lo. Airth*; *November* 16. 1680, *Drummond and Archbiſhop of St. Andrews.* Liferent-tacks alſo may be aſſigned, not mentioning aſſignies, *Feb. ult.* 1637, *Hume*; *July* 16. 1672, *Duff.* The like when it is of more value than a liferent-tack, as being of many nineteen years, *Spotiſ. hic, Roſs contra Blair.* The like holdeth in the power of making ſub-tacks, or out-putting and in-putting of tenants, or removings, which are not competent thereupon, unleſs expreſs, or unleſs it be againſt thoſe who had the poſſeſſion from the tackſman; except in liferent-tacks, and thoſe of greater importance.

XXVII. *Fourthly*, Tacks cannot be perpetual; and therefore neceſſarily muſt have an iſh, or elſe they are null, *July* 17. 1688, *Oſwald* *. What privilege is herein granted to rentals, is ſhown before, § 16. *h. t.*

XXVIII. It hath been much controverted, and variouſly decided, whether a tack ſet for payment of the annualrent of a ſum, be valid againſt ſingular ſucceſſors, which were in effect a wadſet-tack, which ought not to be ſuſtained; ſeeing the habile way of wadſet of heritable rights is only by infeftment, and it would make the ſecurity of land much more uncertain, if tacks which need not regiſtration were valid againſt ſingular ſucceſſors [ii].

XXIX.

* This deciſion not found.

[h] See above, II. 4. 66. [i] *Craig*, II. 10. 6. [ii] See above, § 11. *h. t.*

XXIX. *Fifthly*, Tacks are not valid as real rights againſt ſingular ſucceſſors, unleſs they have a tack-duty; yea if they have one, but in the tack itſelf it be wholly diſcharged, yet the tack is valid; but the diſcharge of the tack-duty will never be valid againſt the ſetter's ſingular ſucceſſor, *Jan.* 31. 1627, *Roſs.*

XXX. But the want of an entry vitiates not a tack; for when there is no entry, the date or the next term is the entry, *Dec.* 4. 1629, *Oliphant.*

XXXI. *Sixthly*, All tenants are burdened with neceſſity to enter and labour the ground, that the maſter may have ready execution, *Feb.* 27. 1623, *Randiſfoord*; and not to rive out meadow or greens never ploughed, or deſtroy moſſes, or deteriorate the ground worſe than he found it, *Feb.* 6. 1633, *L. Haddo*: and muſt leave the houſes as good as at his entry, *Had. Feb.* 27. 1610, *contra* all which are without expreſs proviſion[k]: neither may the tenant open the ground for winning of any mineral, coal, or clay for pipes, without that power be expreſſed, *Feb.* 15. 1668, *Colquhoun.*

It remains now to conſider how tacks are deſtitute and taken off; and firſt, as to the point of right; next, as to poſſeſſion. As to the point of right, we ſhall not ſpeak of the nullities of tacks, by which they were never truly conſtitute, and ſo needs not be deſtitute: but when they have once a real being, they ceaſe; *Firſt* by any deed contrary to the tenor or nature thereof, as hath been ſhown before in rentals, which is not ſo in ordinary tacks, unleſs there be a clauſe irritant, and that be declared, and ſo is not competent by exception, *Spot. hic*, *Stevinſon contra Barclay.*

XXXII. *Secondly*, They become void by not-payment of the tack-duty, in the ſame manner as a feu-right by the delay of two years, unleſs the tackſman offered payment in that time.

XXXIII. *Thirdly*, If the tackſman be purſued to find caution for the duties reſting, and in time coming, if he find no caution, the tack becomes void, and he may be removed ſummarily without warning; this was alſo ſuſtained againſt a back-tack in wadſets, tho' having no clauſe irritant, *Hope*, wadſets, *Diſchingtoun contra L. of Pitmedden*; *idem*, *Hamilton contra E. of Argyle.* It was alſo ſuſtained, tho' the duty was ſmall, the ground pleniſhed, and but one year reſting, *Feb.* 27. 1627, *Lawſon.* But it is not ſuſtainable where there are no bygones reſting: neither was it ſuſtained, unleſs a year were reſting the time of the citation, at leaſt at litiſconteſtation, albeit the tackſman was bankrupt, and in priſon for debt, *Jan.* 3. 1672, *La. Binnie.*

XXXIV. *Fourthly*, Tacks ceaſe by the expiring of the terms thereof, and the ſetter's warning, or other deeds, to take off tacit relocation, or the tenant's renunciation; the form whereof is, the tenant forty days before *Whitſunday* ſubſcribes and delivers to his maſter a renunciation of his tack and poſſeſſion, conſenting that he enter *brevi manu*, without hazard of ejection; whereupon there muſt be taken an inſtrument of renunciation in the hands of a nottar, as a ſolemnity requiſite, which is ſufficient to inſtruct the over-giving, as being the habile way approved in law; albeit in other caſes not approved in law, inſtruments of nottars prove not the deed of the party, in this caſe it avoideth the tack, and is probable by inſtrument, if the tack be expired; but during the tack the inſtrument will not prove the acceptance of the renunciation.

XXXV. *Fifthly*, Tacks are taken off by the contrary conſent of both parties, tho' they be not expired, as when they are really left by the tenant, and poſſeſſed by the maſter: or when by writ they are renounced and accepted; for verbal renunciations may be reſiled from before they be perfected in writ, in the ſame manner as verbal tacks may, and much more promiſes to renounce; this way of renunciation is expreſs and direct.

XXXVI. *Sixthly*, Tacks are taken away by tacit and implied renunciation, and by paſſing therefrom, as by taking a poſterior tack for fewer years, and making uſe thereof; albeit but a minute, not by contract, nor ſubſcribed by the tackſman, nor in his hand, but his acceptance proved by witneſſes, and by paying conform

[k] See above, I. 15. 6.

conform, *Jan.* 17. 1632, *E. of Lauderdale.* By accepting a poſterior factory of the ſame lands, *Hope*, action of reduction, *E. of Tillibairn contra Dalziel.* By paying a greater duty, *Had. Feb.* 27. 1610, *Gosford contra his tenants*; *Lethem contra his tenants.* But not by paying of more preſents, *ibid. Hamilton contra tenants of Libberton.* Neither by ſub-tenants paying a greater duty, without warrant of the principal tenant, *Had. June* 5. 1611, *Pharnieherſt contra miniſter of Innerkeithing.* Alſo by taking an heritable right of the ſame thing; but it holds not, if the heritable right were reduced, for then the tack revives, *Dec.* 11. 1634, *Leſmore contra Hutcheſon.* Neither was it taken off by a poſterior appriſing in the tackſman's perſon, ſeeing it was ſatisfied and declared extinct againſt him, *Had. Feb. ult.* 1623, *Semple contra tenants of Cloſburn* *.

XXXVII. Tacks are taken off as to poſſeſſion, by removing of the tenants, either voluntarily, as is before expreſſed; or more ordinarily, judicially by proceſs of removing, which is moſt frequent and important; and therefore is reſerved to be ſpoken of together in this place, tho' there be diverſe kinds of removings, having reſpect to diverſe titles; for tho' removing be competent againſt all poſſeſſors, whether poſſeſſing without any title, or by an inſufficient title, as an invalid infeftment, or the like, yet the *chief uſe thereof* is for removing of tenants.

XXXVIII. Removing is either ſummary without warning, or ſolemn upon warning; again ſummary removing is either by paction or law; by paction, when it is ſo agreed by the tack or other writ, that the tenant ſhall remove at ſuch a term without warning, which will be ſufficient at that time. (This will hold upon diſpoſitions, whereupon the diſponer may be compelled to remove ſummarily without any ſuch expreſs clauſe, which was alſo extended in favour of appriſers, againſt their debtors poſſeſſing a houſe, *Jan.* 18. 1623, *E. Lothian.*) But it is more queſtionable, whether it will be ſufficient at any time thereafter, if the tenant be ſuffered to poſſeſs, *per tacitam relocationem*; eſpecially, ſeeing the ſtatute for warning is a publick law, introduced for the good of poor tenants, whoſe ruſticity is excuſable, if they advert not to anterior pactions; *nam pacta privatorum non derogant juri communi*, yet on the contrary, *cuique libet renunciare juri pro ſe introducto:* betwixt which, I conceive this temperament will hold, that ſuch pactions, tho' (not) recent, may be effectual at the preciſe term, or at any term or time thereafter upon intimation, if it be ſo agreed upon in writ; (for promiſes in this caſe may be reſiled from, as before is ſhown) but in either caſe the tenant muſt have intimation before the term, which will ſuffice without the ſolemnities of warning; but it muſt be of that length, that the tenant may provide for himſelf, and remove his goods, which will be in the arbitriment of the judge; and I ſuppoſe that they will walk moſt fairly and ſafely, who ſhall intimate the ſame to the tenant forty days before the term; or otherwiſe, all the effect is like to be, that he will be decerned to remove at the next *Whitſunday* after the proceſs, without violent profits, as uſes to be done when there is any probable excuſe for the tenant's not removing.

Summary removing is competent by law without paction, in all caſes where the ſtatute appointing warning, takes no place; which is chiefly regulated by the reaſon of the ſtatute, that tenants be not put at unawares to ſeek their habitations, at an unſeaſonable time of the year; and therefore, it is not neceſſary in ſeveral caſes. *Firſt*, Where the poſſeſſor is not tenant, but a vitious poſſeſſor; or where the poſſeſſor hath nothing but an inſufficient infeftment, or tolerance; for the ſtatute is only in favour of tenants, who are liable for mails and duties. *Secondly*, Warning was not found neceſſary for removing poſſeſſors from a tower or fortalice, though

* The queſtion here was only whether tacks ſet by an appriſer infeft were good againſt a ſecond appriſer, after the ſetter's appriſing was found extinguiſhed by intromiſſion; and it was found that the tacks were effectual till the ſetter's infeftment was redeemed and renounced, or reduced.

tho' ſet in tack, *Hope*, removing, La. *Saltoun contra Livingſton*, or from a coal, *Ibid. Wolmet contra Niddrie*, *Preſton contra Cockpen*, or from the poſſeſſion of a liferenter's houſe or land, which was in the liferenter's poſſeſſion, after the liferenter's death, and that upon ſupplication, it was obtained without proceſs, *Hope*, liferent *contra* *and March* 5. 1628, *Haltoun ſupplicant*. And this was competent at the inſtance of a liferenter againſt thoſe who continued the poſſeſſion of a former liferenter, after her death, *Jan.* 12. 1622. La. *Kincaid*. The like, but to take effect at *Whitſunday* after the proceſs, againſt a liferenter's ſervant, poſſeſſing without a tack in writ, and alſo without violent profits, *Feb.* 16. 1628, *Thomſon*. But if the poſſeſſion from the liferenter be by virtue of a tack, the poſſeſſor muſt be warned; as hath been ſhown amongſt the effects of tacks [l]. Removing is alſo competent by force of law upon a proceſs, to find caution for the rent, or to remove, of which before [ll]. As to what is ſpecial in tacks of teinds, it hath been conſidered in that title.

The prime kind of removing is that which is ſolemn upon warning; for clearing whereof, we ſhall *firſt* conſider the order pre-required. *Secondly*, The intereſt of the purſuer. *Thirdly*, The exceptions of the defender. *Fourthly*, The effects of Removing.

XXXIX. The order of removing of old was thus [m]; the maſter of the ground did only verbally intimate to the tenant to remove at the next *Whitſunday*; and the only ſolemnity requiſite was, that before the ſaid term, he appeared before the door of the tenant, and broke a lance there, as a ſymbol of his breaking the tacit relocation betwixt them; whereupon the ſecond day after *Whitſunday*, he came *brevi manu*, and expelled the tenant: or at leaſt laid out ſome of his goods to complete the ſolemnity of his removing [n]. Hence aroſe many quarrels, violences and breaches of the public peace; as when the tenant had any *defence* reaſon or pretence for which he could not *be* removed, or otherwiſe was unwilling, and not compelled by law or public authority, but by private force.

XL. For remeid whereof, that excellent ſtatute concerning warning and removing of tenants was made, *Parl.* 1555, *cap.* 39. Preſcribing the order of removing thus; "That the maſter of the ground give a precept of warning in writ, "commanding his officer (which may be any perſon he pleaſeth, for whoſe name "a blank is left in the precept,) to go forty days preceeding *Whitſunday*, and "intimate to the tenant that he remove himſelf, his family, ſub-tenants, goods "and gear, at the ſaid term, and leave the tenement void and red, that the "warner may enter in poſſeſſion:" this may be done either perſonally, or at his dwelling-houſe.

Secondly, The precept muſt authoriſe the officer to make the ſaid denunciation, forty days before the term upon the ground of the land, *and to* leave a copy thereof affixed thereupon; and by the ſame ſpace, it muſt be done at the kirk-door, at the time of diſſolving the congregation, from the firſt ſermon, leaving a copy thereof affixed upon the kirk-door; all which muſt be done before two witneſſes required for that effect, and executions made conform by the officer, which without any other inſtrument or ſolemnity doth ſufficiently prove, unleſs it be improven. Upon this order the purſuer hath a privileged action upon ſix days warning only, without continuation, *Parl.* 1555, *cap.* 39. and that becauſe of the neceſſity of diſpatch, that the new tenant, who hath taken, may be put in poſſeſſion, and the land not left waſte, both to public and private detriment. This order muſt be uſed, tho' the term of the tack be not at *Whitſunday*, but at *Martinmaſs* or *Candlemas*; and it will not ſuffice to be made forty days before theſe terms, *June* 15. 1631. *Ramſay*. The reaſon hereof is, becauſe the warning is appointed that the tenants may timeouſly provide for themſelves, which cannot be but before *Whitſunday*, the ordinary time lands uſe to be ſet. If the parties removed,

[l] See above, § 23. *h. t.* [ll] See above, § 33. *h. t.* [m] See below, IV. 26. 6. [n] *Craig* II. 9. 4.

moved be out of the country, it will ſuffice to warn them upon the ground, and at the kirk-dor upon forty days; but the citation *in the proceſs of removing*, muſt be upon ſixty days, which is conſequent from the ſtatute, which preſcribes nothing different from the ordinary courſe of law, in the caſe of parties out of the country, and it was ſo decided, *Jan.* 11. 1622, L. *Faldenſide*. *Feb.* 20. 1666, *M'brair*. This ſtatute reacheth not warnings from tenements within burgh, which are regulated by the cuſtom of burgh: where the town-officer by command of a bailie, tho' without writ, warneth only at the tenement, forty days preceeding *Whitſunday*, and in evidence thereof, uſeth to chalk the door°, this was extended to a houſe within burgh of barony, *July* 18. 1634. *Hart*. For there the reaſon of the ſtatute for warning, that poſſeſſors may provide lands to go to, when fuel may be caſt, holds not. Nor was warning before *Whitſunday* found neceſſary, for removing a tenant from a ſoap-work, *Nov.* 21. 1671, *Riddel*. Now in place of *Whitſunday*, the warning muſt be forty days before the 15th of *May*, becauſe *Whitſunday* being a moveable term, it did oft run far in ſummer, when removing tenants did eat up the intrant's meadows, *Parl.* 1690, *cap.* 39. *.

XLI. We come now to the title, requiſite for removing, which muſt be a real right of the ground, except the queſtion be againſt a party who is perſonally obliged to remove; and therefore, *Firſt*, there needs no title againſt ſuch parties, who had the poſſeſſion from the purſuer; for theſe can never queſtion his title, whoſe intereſt depends thereupon, as to right or poſſeſſion, unleſs they be decerned to acknowledge another. *Secondly*, A perſonal or incomplete right is a ſufficient title for removing againſt the granter of it, or his heirs, if it contain a clauſe to remove, or put the purſuer in poſſeſſion, expreſsly or by conſequence. *Thirdly*, Infeftment of property or liferent is a ſufficient title in removing, and that upon production of the ſeaſin only; where the defender ſhows no better right; but the ſeaſin muſt be both before the warning and the term, except in the caſe of heirs, this being a poſſeſſory judgment, and a continuance of the predeceſſor's poſſeſſion; ſo that the tenant cannot be in doubt or hazard to quit the poſſeſſion, as he may be in other caſes, where he may be liable, both for the rent and rendering the poſſeſſion, to another party; and ſo it was ſuſtained at the inſtance of an heir, though his retour and ſeaſin were after the warning, *Had. Feb.* 9. 1610, *E. of Kinghorn contra Arbuthnot*; *alſo* in the caſe of an appriſer, whoſe appriſing was before the warning, it was found valid, though the infeftment was after, *Hope*, removing, *Small contra tenants of Balterſaw*; *the like* againſt the debtor, from whom the lands were appriſed; but to take effect at *Whitſunday* thereafter, and without violent profits, *Dec.* 18. 1632, *Dalrymple*. And removing was ſuſtained, at the inſtance of an heir retoured and infeſt, purſued upon a warning uſed by his predeceſſor, tho' his infeftment was after the term, *July* 28. 1637, E. of *Haddingtoun*. It was alſo ſuſtained at the inſtance of a fiar, *after the liferenter's death*, upon a warning made by the liferenter and fiar jointly, *Nov.* 27. 1629, *Ramſay*. But a removing was not ſuſtained upon a warning made by the fiar, before the liferenter's death, no not to take effect at the next *Whitſunday*, without a new warning, *June* 30. 1669, *Agnew*.

Tho'

* By act of Sederunt, *Dec.* 4. 1756, it is provided, That where a tack contains an obligation upon the tenant to remove, without warning, he may be charged with horning forty days before any *Whitſunday* after his tack expires, and ejected by the Sheriff ſix days after the term. That in other caſes, a proceſs againſt the tenant, called before the Judge-ordinary forty days before the term, ſhall be equivalent to the ſtatutory warning and proceſs of removing. That either of theſe two methods of removing, or the ſtatutory method, uſed againſt a principal tackſman; ſhall be effectual againſt ſubtenants or aſſignies, unleſs where the aſſignation has been intimated. That the Judge-ordinary ſhall be competent to judge in declarators of irritancy againſt tackſmen, for not payment of two years tack-duty, and ſhall have power to decern tackſmen who are one year in arrear, or have left the farm unlaboured, to find caution for arrears and for five years to come, or to remove ſummarily. No advocation or ſuſpenſion ſhall be paſſed, but by three Lords during the vacation, and the whole Lords during the Seſſion, and caution muſt be found in ten days after paſſing, for implement, and for damage and expence. In all queſtions of removings, the Lords are to proceed ſummarily.

° *Craig*, II. 9. 9.

Tho' infeftment be the beſt title for removing, yet it muſt be limited. It takes no place being upon infeftment, proceeding upon a precept of *clare conſtat*, *Hope*, *hic*, *Stevenſon contra Stevenſon*; and that in reſpect this precept is but the aſſertion of the granter: yet if either the predeceſſor of that heir was in poſſeſſion, or the ſuperior himſelf, it would ſuffice. And for the ſame cauſe an infeftment upon the owner's reſignation, is not ſufficient without poſſeſſion. It holds not in baſe infeftments, not cled with poſſeſſion, (unleſs the author's right be inſtructed or acknowledged) if the defender have any title requiring reduction, to avoid it.

Fourthly, A tercer's ſervice and kenning to her terce, is a ſufficient title in removing.* *Fifthly*, The courtſey of *Scotland* is a good title for removing after a wife's death, without any ſeaſin or ſolemnity; *alſo* the huſband's *jus mariti*, before her death, which will be effectual, though ſhe die before ſentence or proceſs, to the effect, that the huſband may get the benefit of the violent profits, for the time preceeding her death, though he cannot attain the poſſeſſion. *Sixthly*, An executor may inſiſt for a removing upon a warning uſed by the defunct, to the effect he may obtain the violent profits, due before the defunct's death. *Seventhly*, A tack is a ſufficient title for removing, if it contain expreſsly the power to out-put and in-put tenants, or if it be a liferent-tack, or for nineteen years or above; as hath been now ſhown amongſt the effects of tacks[p]; but this muſt proceed either upon the ſetter's right, or a poſſeſſory judgment in the ſetter or tackſman.

Removing was not ſuſtained upon an incomplete right, as upon an appriſing, tho' the ſuperior was charged, and the letters had been found orderly proceeded againſt him, to infeft the appriſer; and the objection only proponed by tenants, pretending no right, *March* 25. 1628, *Lockhart*, *yea tho' the removing was againſt the debtor himſelf*, *Feb.* 20. 1629, *Galloway contra Bog-miln*. Which will not hold as to appriſings led ſince the year 1661, whereby the act between debtor and creditor, declares an appriſing with a charge effectual. The like holds in adjudications[q]. But in the caſe of the ſuperior's purſuing upon the vaſſal's liferent-eſcheat, it muſt be declared, *Hope*, removing, *Butter contra Harvie*. And ſo conſequently in all other rights of ſuperiority, where declarator is required. And tho' the ſuperior needs ſhow no title, unleſs the vaſſal diſclaim him, yet his donatar purſuing upon a liferent-eſcheat, was not admitted till the ſuperior's ſeaſin was produced, *Hope*, *removing*, *M'culloch contra tenants*: and it is ſo in all caſes wherein the ſuperior or the vaſſal are ſingular ſucceſſors, and ſo have ground to doubt, and cannot be put to diſclaim.

XLII. We come now to the exceptions againſt removing; to ſpeak nothing here of common exceptions, or of the purſuer's want of a ſufficient title, which are rather objections than exceptions, and are ſufficiently cleared by what we have ſaid upon the titles *for* removing. It muſt be adverted, that before the defender can have any exception admitted to his probation, he muſt find caution for the violent profits, if he ſuccumb; and that by the ſaid ſtatute, *Parl.* 1555, *cap.* 39. juſtly introduced in reſpect of the contentiouſneſs of parties to keep poſſeſſion; yet this will not hinder objections againſt the titles or other defences being inſtantly verified, and not making delay, it being the motive of that act to prevent delays.

XLIII. Theſe exceptions, tho' they be many, may be thus marſhalled; they are *Firſt*, againſt the order and warning. *Secondly*, Upon deeds done by the purſuer. *Thirdly*, Upon the intereſt of the defender's maſter. *Fourthly*, Upon the defender's own intereſt. *Fifthly*, Upon obedience. For the firſt, every point of the warning

* MSS add here "and tho' theſe were after the warning, yet before the term they ſeem to have the ſame "reaſon to be ſuſtained, as the infeftment of an heir, the huſband's death being notorious, and the tercer being "notourly reputed his wife."

[p] See above, § 26. *h. t.* [q] See below, III. 2. 24.

ing now related, is ſo neceſſary, that the omitting of any one affordeth a ſufficient defence.

Removing may be excluded by deeds done by the purſuer, either by any perſonal obligement not to remove, or *by* any deed importing the ſame; as a diſpoſition or obligement to infeft, which are ſufficient againſt him, but not againſt his ſingular ſucceſſors; or if he renounce, or paſs from the warning or action, either directly, or by deeds importing the ſame; as taking rents before the hand, or taking a herezeld as to the year enſuing [r], *March* 20. 1629, *Auchinleck*: or by accepting the old accuſtomed mails for terms after the warning, *Hope hic, Carrouſie contra Mairns and Keith*; or by receipt of taxation for terms ſince the term of removing, *ibid.* —— *contra* ——; or by accepting ſervices contained in the tack, for the terms after the warning; but this is not relevant, if the ſame be at the command of the purſuer's factor or grieve, without ſpecial order, *March* 5. 1629, *L. of Lie younger*: neither by accepting preſents, tho' accuſtomed, not being ſpecial in the tack, theſe being interpreted gratuitous, as before is ſhown [rr].

Removing is alſo elided by preſcription, upon three years forbearance to purſue; and that by the ſtatute 1579, *cap.* 82. for thereby the purſuer is preſumed to paſs from his warning; but theſe three years are not accounted *anni continui*, but *anni utiles* from the warning, without accounting the time betwixt the warning and term, but from the term to which the warning was made; becauſe none can be ſaid to delay to purſue, before he be neceſſitate to purſue, which is not till after the term; it was ſo decided *Feb.* 6. 1629, *La. Borthwick*. But removing may be ſuſtained before the term, that it may take effect preciſely at the term; otherwiſe many tenants may be diſappointed, who take, upon the warning of other tenants, their rooms, and renounce their own, or are warned therefrom; and ſo removing was ſuſtained before the term, to take effect then, *Nov.* 21. 1671, *Riddel*. But the proceſs being once intented, it continues till the great preſcription of forty years, except ſuch as are not wakened every five years, for ſuch preſcribe in ten years by the act 9. *Parl.* 1669 *.

The exceptions of removing on the intereſt of the maſter of the ground, are very frequent and various; for it is ordinarily proponed and ſuſtained, that the defenders are tenants by payment of mail and duty to a third party, who is not warned nor called; neither are they put to diſpute *the validity of* their maſter's right, which holdeth, whether his right be an infeftment, liferent-right or tack; and tho' the tenant hath been put to condeſcend what the right is, and that *in ſpecie* it is a valid right, *yet* he needs not diſpute the particular defects of it, nor the competition of it with any other right [s]. This exception is alſo elided by this reply, that the defenders had acknowledged the purſuer by payment of mail and duty. It is alſo elided by alledging, that the defender's maſter's right was reduced at the purſuer's inſtance, *Had. Dec.* 12. 1622, *Spalding contra Fleming*. The like where his right was reduced at the inſtance of the purſuer's author, *Spotiſ. hic, Maxwel contra tenants of Glaſſock, E. of Nithiſdale contra his tenants*.

The exceptions againſt removing upon the defender's own right, are either in reſpect of his right to the lands in queſtion, or to the other lands brooked by him *pro indiviſo* with it; for the firſt, there are as many ſuch defences as there are rights competent for defending poſſeſſion; and they are either founded upon the benefit of a poſſeſſory judgment [t], which how competent, may be ſeen at large *B.* II. *title, infeftment*, which needs not to be here repeated **; or if that be not competent, the defender muſt found himſelf upon the point of right, which ordinarily infers a competition of rights; but in either caſe the defence will

* By act 14. P. 1685, the former act 9. P. 1669, is explained, and all actions upon warnings are declared to preſcribe in five years, if not wakened in that time.

** It appears from the MSS, that this ſubject was fully treated above, II. 3. 73. *med.* but it was thought proper afterwards to be left out in the printed editions.

[r] See above, § 23. *h. t.* [rr] Above, § 36. *h. t.* [s] See *Dec.* 9. 1664. *Inglis.* [t] Above, II. 7. 22. Below, IV. 3. 47, &c.

will not be ſuſtained upon any right, if the poſſeſſion was not attained thereupon, but upon the purſuer's right; which poſſeſſion muſt be reſtored, and the defender left to his action upon the other right, as accords; as if after redemption of a temporary right, whereby the defender entered in poſſeſſion, he ſhould defend upon another right, which will not be ſuſtained in this poſſeſſory judgment, againſt him or his ſucceſſor, from whom he had the poſſeſſion, *Nov.* 22. 1677, *Stuart of Caſtlemilk* [u].

The exception *pro indiviſo* [uu] is very pregnant, and taketh not only place in ſolemn removings, but in the action to find caution for mails and duties, or to remove, tho' the excipient had taken tacks from the purſuer, *Dec.* 6. 1623, —— *contra Carmichael.* Yet it was not found relevant, to ſtop removing from the purſuer's part of a coal-heugh in lands undivided, becauſe the coals are diviſible by meaſure, as they are raiſed out of the coal-pit, *Spotiſ.* coal-heughs, *Somervel contra Dickſon.* Neither was it found ſufficient to maintain a relict in poſſeſſion of a houſe, which could not be divided, whereof ſhe had a third part, and poſſeſſed the other two thirds *pro indiviſo*; but the fiar having the two thirds, was to be preferred to the poſſeſſion, paying her the third of the mail, upon condition that if he ſet the tenement, ſhe ſhould be preferred, giving as much mail as another, *Jan.* 26. 1665, *Logan.* But if more tenants poſſeſs *pro indiviſo*, if they have different dwellings, that defence will not be ſuſtained, either as to that houſe, or the ſhare of the poſſeſſion.

The laſt exception againſt removing is, obedience by voluntary removing, conform to the warning, and leaving the land void and red at the term, without neceſſity of renunciation in writ, *March* 2. 1637, *Keith.* But the alledgeance of obedience was not found relevant upon an exception, bearing, "That the "land was left void and red at the term," ſeeing that it bore not, "That the "poſſeſſion was offered to the charger;" in reſpect that at that time of his removing, another party entered in his vice, *Jan. penult.* 1624, *Greenlaw* (here there was not only a warning, but a decreet of removing) *for* [w] a party may paſs from, and not inſiſt in a warning; therefore the tenant's actual removing is not ſufficient without renouncing or offering the void poſſeſſion, that the warner may enter therein; for otherwiſe he is not ſecure, but another *by* entering the vice may put him to a new action, tho' not *de facto* entered. But the obedience muſt be full, according to the warning by the defender's removing himſelf, his family, ſub-tenants and cottars, goods and gear, ſo that the purſuer may enter in poſſeſſion; and therefore decreet would be obtained againſt the principal tackſman, and the letters ſtill put to execution againſt him, till all theſe be removed; and if the purſuer pleaſe, he may purſue them to remove, without other warning than what was made to the principal tackſmen; ſo it was ſuſtained againſt a ſon upon a warning againſt his father, even after his father's death, *Jan.* 27. 1630, *Hume.*

As to the laſt point, concerning the effects of decreets of removing, it is not only the attaining poſſeſſion of the land itſelf, but ſometimes alſo the corns growing thereupon, as being a part thereof, being a violent poſſeſſion, *Hope*, ſpuilzie, *Eliot contra Lo. Buckcleugh.* Yea, of the hay of that crop, tho' ſeparated and ſtacked by the perſon removed, *Hope*, ſpuilzie, *Sir Bewis Balmuir contra Williamſon.* But the main effect is, the obtaining the violent profits of the land, until the poſſeſſor's obedience; and that both againſt thoſe who are warned, and againſt thoſe who ſucceed in the vice of warned or removed tenants.

XLIV. Violent profits [ww] are ſo called, becauſe they are ſuch profits as are due by, and for violent poſſeſſion, whatſoever way it be, by warning and removing, ejection, intruſion, or ſucceeding in the vice, and they are oppoſite to ordinary profits, which were due by tacit relocation, or were formerly accuſtomed to be

[u] See above, II. 1. 27. Below, II. 10. 23. [uu] See below, IV. 3. 12. 2. [w] F. but. [ww] See below, IV. 29. 1. & *ſeq.*

paid. Violent profits are purſued for by a ſeveral action, after the decreet of removing is obtained; wherein the decreet of removing is both a ſufficient title, and probation of the violent poſſeſſion againſt the parties removed therein, and their poſſeſſion needs not again be proved, and their defences hindering the purſuer to obtain poſſeſſion, would not be ſufficient, unleſs they offer to prove the purſuer himſelf was in poſſeſſion, or others by his warrant, *Had. June* 19. 1610, *Monro contra L. Balnagoun.* Neither will any other thing but real obedience, by giving, or at leaſt *by* offering the void poſſeſſion, take them away, tho' the land lie waſte. But violent profits were alſo found competent againſt thoſe who were not warned, againſt whom decreet of removing was not obtained, to wit, againſt any who ſuſpended the decreet, and thereby hindered the *purſuer's* attaining poſſeſſion, *Hope*, mails and duties, *Ker of Fairnieherſt contra Turnbull.* Yea, a party obtaining poſſeſſion by a decreet of removing, after litiſconteſtation in the reduction of the decreet, was found a violent poſſeſſor, and liable to violent profits himſelf, *Hope*, poſſeſſion, *Gordon of Abergeldie contra L. Forbes.* As to the quantity of violent profits by the cuſtom of burgh, it is the double mail of the tenements within burgh, *Hope*, mails and duties, *Buchan contra Seaton* [x]. But in lands it is the greateſt profits that the purſuer can prove he could have made. And tho' in caſes of violence, the quantities and prices are ordinarily probable by the purſuer's oath, *juramento in litem*, becauſe he ought to have not the ordinary value, but *pretium affectionis*, as that which themſelves accounted to be their loſs; yet here probation muſt be uſed: but if it be not full, the purſuer's oath may be taken. Violent profits are alſo ſuſtained againſt all defenders *in ſolidum*, as in ſpuilzie [y]; but when diverſe *defenders* compeared, and proponed partial objections againſt removings, and ſuccumbed, they were found liable for the violent profits of the lands in the exceptions, ſeverally, *Hope*, mails and duties, *Wallace contra Blair*; otherwiſe partial exceptions are not here competent, *Hope*, exceptions, *L. Balnagoun contra Monro.* Neither will any exceptions be admitted, which *were* competent and proper in the decreet of removing, relative to right or poſſeſſion, *but* ſuſpenſion or reduction *ought to be intented thereon.* The like as to violent profits againſt ſucceſſors in the vice, *March* 22. 1623, *L. Hunthill.*

XLV. Succeeding in the vice is a kind of intruſion, whereby after warning any perſon comes in poſſeſſion, *either* by conſent of the parties warned, or their fault in not offering the void poſſeſſion; but if the poſſeſſion be taken without the maſter's conſent any other way, it is an ordinary intruſion; againſt ſuch there needs no warning but a ſummary proceſs, as in other intruſions, having the ſame probation; for in both, the poſſeſſion muſt be proved, which with the warning is ſufficient; but can have no effect till decreet of removing be obtained againſt the tenant warned.

Tho' violent profits be the ordinary effect, both in removing and ſucceeding in the vice, theſe (*actions*) will proceed as to attaining poſſeſſion, and no violent profits be obtained, when there is any colourable title, which might have made the warned party reaſonably doubt of the purſuer's intereſt, or of his own right, *Hope*, removing, *Ord contra tenants.* But this uſeth ordinarily to be ſo provided in the decreet of removing, and will be hardly ſuſtained thereafter, by re-canvaſſing the defences competent in the removing, that it may appear whether there were a probable ground in them or not; or at leaſt the defender would proteſt for the reſervation as to the violent profits; for if this were again ſuſtained, it would bring over-head all the many intricate defences competent in removings; of which formerly: therefore in the removing purſued by the E. of *Argyle contra L. Macnaughton*, the Lords repelled the defences, but declared that they would have conſideration thereof, as having probable ground to debate, and would modify the excreſcence of the violent profits, over and above the ordinary profits, *July* 16. 1674.

TITLE

[x] See above, I. 9. 27. 2.

[y] See above, I. 9. 5. 5.

TITLE X.

Wadſets, where, of Reverſion, Regreſs and Redemption.

I. *Infeftments for ſatisfaction of ſums, principal and annual, or for relief, are proper feudal impignorations, conſiſtent with the diſponer's property.*--Debita fundi.--*Apprifings and adjudications during the legal.*--Pacta de retro vendendo.

II. *The conſtitution of wadſets.*

III. *The nature of reverſions.*

IV. *Kinds of reverſions.*

V. *Solemnities requiſite in reverſions.*

VI. *The effect of clauſes irritant in reverſions*; or pacta legis commiſſoriæ.

VII. *Reverſions are* ſtricti juris.

VIII. *Kinds of wadſets.*

IX. *Proper wadſets.*

X. *The effect of tacks to take place after redemption, contained in reverſions.*

XI. *Improper wadſets.*

XII. *Regreſs.*—*A wadſet redeemed, whether it is heritage or conqueſt.*

XIII. *Diſcharges of reverſions and renunciations of wadſets.*

XIV. *Wadſets become legally extinct by declarator of expiring thereof, or by the order and declarator of redemption.*

XV. *The order of redemption of apprifings or adjudications.*

XVI. *The order of redemption upon conventional reverſions.*

XVII. *Premonition.*

XVIII. *Conſignation.*

XIX. *Declarators of redemption.*

XX. *The effect of declarators of redemption.*

XXI. *Defences againſt declarators of redemption.*

XXII. *Requiſition.*

XXIII. *How far other rights to the lands may be reſerved in redemptions or renunciations.*

A Wadſet, as the word inſinuates, being the giving of a wed or pledge in ſecurity; it falleth in conſideration here as the laſt of feudal rights: for pledges are the laſt of real rights, as before in the title *Real Rights* is ſhown; where it was alſo cleared, what was the antient cuſtom of impignoration of moveables, which ſhall not be here repeated, but only what is proper to the impignoration of immoveables and heritable rights, by the feudal cuſtoms and our own.

I. That which doth moſt properly agree to the nature of a pledge or wadſet with us, is where any infeftment or ſecurity is granted in ſecurity of a ſum of money, or for relief of cautionry, or any other ſum, which bears expreſsly, "That the land or right is diſponed for ſecurity or relief;" and therefore needs expreſs no reverſion; for it is neceſſarily implied, that ſo ſoon as relief or ſatisfaction is obtained, the infeftment granted in ſecurity ceaſeth; ſo that if the granter of the infeftment, or any other bound in the principal obligation, either make payment, or the receiver thereof by his intromiſſion be ſatisfied, *ipſo facto*, the infeftment is extinct: yea, if the debtor, granter of the infeftment and ſecurity, ſhould inſtruct compenſation, as it would extinguiſh the principal bond, ſo would it in conſequence the infeftment for ſecurity thereof. This infeftment being really a pledge, it is conſiſtent with the infeftment of property in the debtor, as two diſtinct kinds of rights; and thereby the debtor is not denuded, even altho' the infeftment for ſecurity were publick by reſignation; becauſe it is not a reſignation ſimply *in favorem*, but *ad effectum, viz.* for ſecurity; and therefore, when the debt is ſatisfied, the debtor needs not to be re-inveſted, but his former infeftment of property ſtands valid [a].

It is alſo a wadſet, when an infeftment of property, or any other real right is burdened with any ſum of money; for thereby that right is impledged to the

[a] See below, III. 2. 38.

the perſon, to whom ſuch ſums are due, which differeth from the former in this, that the infeftment for ſatisfaction of ſums, is immediately effectual for mails and duties, or removing, or for maintaining poſſeſſion of the profits till the ſum be paid: but ſums wherewith a real right is burdened, have not theſe effects until adjudication be uſed upon the ſums, and infeftment or a charge thereupon, which is drawn back to the date of the ſecurity burdened, and is preferable to prior adjudications upon perſonal debts [b]; in the ſame way as adjudications upon infeftments of annualrent, have effect from the date of the infeftment of annualrent. Theſe adjudications may be deduced at the inſtance, not only of the firſt creditor, but of his heirs and ſucceſſors, or any his or their aſſignys voluntary, or judicial by arreſtment and decreets for making furthcoming; and if the ſum burdening be tailzied to diverſe perſons, or diverſe heirs, in ſeveral caſes; adjudications may proceed at any of their inſtances, having right for the time; and whatſoever way the ſum burdening be paid or ſatisfied, the rights following thereupon are extinct *ipſo facto*, and the proprietor needeth no reſignation. But when a right is burdened with another real right, the right burdening hath immediate acceſs, as if it were a right of property, and both it and the former right for ſums burdening real rights, are preferable to the rights burdened; and even the real rights burdening, do imply a reverſion to the owner of the right burdened, if they be for ſecurity of ſums.

Like unto theſe in all points are infeftments upon appriſing, which are truly *pignora prætoria*, whereby the debtor is not denuded, but his infeftment ſtands; and if the appriſing be ſatisfied within the legal, it is extinguiſhed, and the debtor needs not to be re-inveſted; and therefore, he may receive vaſſals during the legal; and if he die, the apparent heir intromitting with the mails and duties during the legal, doth thereby behave himſelf as heir, as was found, *Feb.* 21. 1663, *Hamilton*. Which holds alſo in adjudications, by the late act of Parliament, now come in place of appriſings.

But ſecurities for ſums have been of a long time taken frequently in another way, *viz.* by ſimple alienation, *titulo venditionis*, with a reverſion, which is but *pactum de retro vendendo*, ordinarily taken apart; that if the creditor were not ſatisfied, he might force the debtor to paſs from his reverſion; and ſo his right ſtood abſolute, which gave the occaſion to theſe kinds of ſecuriries; and alſo becauſe during popery, all annualrents for the uſe of ſums were diſcharged as uſury; and therefore creditors bought annualrents, and gave reverſions to the debtors, which was the ſame thing in another *way*. As to theſe wadſets, we are to treat thereof in this place; and firſt, as to the conſtitution of wadſets; and next as to the deſtitution or extinction thereof.

II. As to the conſtitution of a wadſet, it muſt be according to the thing or right impignorated; for a tack or liferent, or an aſſignation to theſe, or any other ceſſible right, may be given in wadſet for ſecurity, and under reverſion; but the ordinary wadſet is by infeftment of property, or of annualrent; the conception whereof is not under the name of impledging, impignoration, hypothecation, or the like, but in the terms of diſpoſition, or infeftment, whereby the property of the thing wadſet paſſeth, and is eſtabliſhed in the wadſetter, but under reverſion to the conſtituent, whereby it hath two parts, the infeftment and the reverſion. The infeftment in wadſets, is in all points like to other infeftments, whether they be infeftments of property or of annualrent, or whether they be public, holden of the conſtituent's ſuperior, or baſe, holden of the granter himſelf; ſo that all the ſpecialities of wadſets reſolve in the reverſion.

III. A reverſion is a paction and condition, or proviſion for redemption of any thing alienated, upon ſuch terms as are agreed upon [c], which of itſelf is no more than

[b] See above, II. 3. 58. 2.

[c] See above, I. 14. 4.

than a perſonal obligation, whereby the wadſetter is obliged; until by that excellent ſtatute, *Parl.* 1469, *cap.* 27. It is declared, that the reverſion ſhall be effectual, not only againſt the firſt wadſetter himſelf, but all his ſucceſſors in the wadſet lands; whereby reverſions are accounted as heritable and real rights, effectual againſt ſingular ſucceſſors, in the ſame way that tacks are made real rights, by the ſtatute thereanent. The *Engliſh* by reverſion, do not underſtand a right of redemption, but a right of ſurvivancy or ſucceſſion; as the reverſion of an office, is a title to that office, after the removal of the preſent incumbent. And that which we call a wadſet, they call a morgage; for a gage is a pledge which is really engaged: and morgage is a pledge, the redemption whereof dieth, or is extinct, if it be not uſed at the time, and in the manner agreed upon by the parties; ſo that with them in their morgages, not only clauſes irritant, or *pacta legis commiſſoriæ*, are valid; but if the proviſion for redemption, be for a definite time, that being elapſed, the morgage becomes irredeemable by their common law; what remeid may be had in the chancery upon equity, I know not.

IV. Before we come to the ſolemnities requiſite for conſtituting reverſions, it is neceſſary to diſtinguiſh the ſeveral kinds thereof. Reverſions are either legal, ariſing from law and ſtatute, and not from conſent of parties, as are the legal reverſions of appriſings and adjudications; or they are conventional, by the conſent of parties, which are either incorporate in the body of the wadſet-right, or apart. They are alſo either principal reverſions, or eiks to reverſions; and they are either ſolemn and perfected, or only inchoated, ſuch as promiſes, bonds and conditions for granting reverſions.

V. Legal reverſions require no other ſolemnity, than what is requiſite to the legal conſtitution of the right whereupon they follow. The common ſolemnities requiſite for reverſions and other writs of old, was only the ſeal of the granter, without neceſſity of his ſubſcription. But by the act of *Parl.* 1555, *cap.* 29. It is required, that all reverſions, bonds and obligations for making of reverſions, be not only ſealed, but ſubſcribed by the granter's own hand, and if he cannot write, by his hand led at the pen by a Nottary, or otherwiſe, they make no faith; unleſs the ſame by conſent of parties be regiſtrate in the books of a Judge Ordinary, or that it be a reverſion within burgh, contained in the inſtrument of reſignation and ſeaſin of lands by the bailie and town-clerk. And by the act of *Parl.* 1579, *cap.* 80. reverſions, aſſignations and diſcharges thereof, and eiks thereto, or other writs of great importance, are ordained to be ſubſcribed and ſealed by the principal parties; or if they cannot write, by two Nottars before four witneſſes deſigned, elſe to be null and of no faith *. But the matter of reverſions is perfected by the act of Parliament, 1617, *cap.* 16[d]. Ordaining all reverſions, regreſſes, bonds or writs for making reverſions, aſſignations and diſcharges of the ſame, to be regiſtrate in the regiſter of ſeaſins and reverſions within ſixty days of their dates, otherwiſe to have no effect, ſave only againſt the granters thereof, but not againſt their ſingular ſucceſſors acquiring perfect and lawful rights: but this was not requiſite in infeftments of burgage-lands within royal-burghs, nor in reverſions incorporate in the rights of wadſet. Upon conſideration of this inconvenience and inſecurity of burgage-lands, the Lords by act of Sederunt, ordained the burghs to take ſufficient caution of their town-clerks preſent and to come, to inſert in their books all ſeaſins given by them of tenements within burgh, and all reverſions or bonds for granting reverſions, aſſignations thereto, and diſcharges thereof, renunciations and grants of redemption, and that within ſixty days after the giving of ſeaſin, or preſenting to them of the reverſions or others foreſaid, under the pain of the damage of parties, acquiring *bona fide* for onerous cauſes, that they may incur, by ſuch latent rights; declaring, that ſuch

* By act 5. P. 1681, The witneſſes muſt alſo ſubſcribe and the writer be deſigned.
[d] See above, II. 3. 20.

ſeaſins and reverſions, not inſert in manner foreſaid, *ſhall* be eſteemed as latent and fraudulent, keeped up of purpoſe to inſnare lawful purchaſers; which act of ſederunt is dated, *Feb.* 22. 1681. But now by act of Parliament 1681, *cap.* 11. a regiſter for reverſions is appointed, as well for theſe in burgh, as for theſe without burghs. So that, as by the firſt act reverſions are made effectual, by *the two* laſt they are made evident, that acquirers may be ſecured againſt latent reverſions; and by the regiſtration, or being in the body of the wadſet, the neceſſity of ſealing is taken off, and in deſuetude. It is alſo conſequent from theſe laſt acts, that not only formal and ſolemn reverſions in the body of the wadſet, or regiſtrate, are effectual againſt ſingular ſucceſſors; but alſo bonds and writs for making of reverſions: otherwiſe there needed no ordinance to regiſtrate theſe for the purchaſer's ſecurity, if of themſelves they could *not* affect purchaſers [e]: but promiſes of reverſions are nowiſe effectual againſt ſingular ſucceſſors unleſs they have been brought into writ, at leaſt by decreet before theſe ſucceſſors right; becauſe being only probable by oath of party, the oath of the author will not prove againſt his ſingular ſucceſſor. Neither will declarations, backbonds, or conditions of truſt, be comprehended under reverſions; but they remain obligements perſonal upon the perſon intruſted, unleſs they contain expreſs obligements to re-diſpone, which is a reverſion, albeit it be not formal; or if it bear, to denude in favour of the diſponer, or any other; but if it be but in truſt to his behoof, tho' thereupon, *via actionis*, the truſtee might be compelled to denude, yet it is no reverſion; and however (*conceived*, *they have*) no effect againſt ſingular ſucceſſors, unleſs they be regiſtrate as aforeſaid; except in ſo far as they may be grounds of reduction againſt the parties intruſted, or their ſingular ſucceſſors, partakers of the fraud.

VI. It is alſo frequently provided in reverſions, that if the condition of the reverſion be not performed betwixt and ſuch a time, the reverſion ſhall expire; and ſometimes it is provided ſo to be, *ipſo facto*, without declarator. This is a clauſe irritant, irritating or annulling the reverſion, which in the civil law is called, *Pactum legis commiſſoriæ in pignoribus*, and is thereby rejected and void as an uſurary paction, whereby the wadſetter getteth more than his juſt intereſt as a penalty; which therefore, as in other caſes, ought to be modified to the juſt intereſt; eſpecially ſeeing indigent debtors, thro' neceſſity of borrowing money, will be eaſily induced to ſuch clauſes [f]. And therefore a backbond for redemption of a tenement, bearing ſuch a clauſe irritant, was found null two years after the term, and after a decreet of removing, all meliorations being ſatisfied, *July* 8. 1636, *Cleghorn*. Yet ſuch clauſes irritant are effectual upon the failzie committed, unleſs they be purged by performance, which is ordinarily received, when offered at the bar, in the declarator of the expiring of the reverſion: ſo it was found purgeable at the inſtance of the reverſer's creditors, *March* 19. 1631, *Scot*. Yea, tho' the payment was not preſent, a time was granted before the extract of the decreet of declarator of the expiring of the reverſion, that in the mean time, the failzie might be purged by interpoſition with the parties, *Feb.* 7. 1628, *Pringle*; but no ſuch time was granted where *the irritancy was incurred by not-payment after* requiſition upon nineſcore days; but decreet was given, unleſs preſent payment were made, *July* 19. 1625, *Nairn*. But clauſes irritant in reverſions are only thus qualified in real impignorations: but when the reverſion is of a true ſale, not in ſecurity, but for an equivalent price, or where it is granted after the right related to, and not for implement of a promiſe or condition made at that time, it is valid; for only *pactum legis commiſſoriæ in pignoribus*, is rejected in law [g]. And therefore the irritancy was not found purgeable before the declarator, where the reverſion was of lands diſponed for a competent price by a true ſale, *Jan.* 17. 1679, *Beatſon*.

A bond *of reverſion* bearing, that failing heirs-male of the granter, and of his brother's body, that the heirs-female ſhould denude in favour of a ſiſter's ſon, upon

[e] See above, II. 7. 1. *fin.* [f] See above, I. 13. 14. Below, IV. 18. 3. & 4. & 5. IV. 5. 7. [g] See above, I. 13. 14. I. 14. 4.

upon payment of a certain ſum, being regiſtrate in the regiſter of reverſions, was found valid againſt a ſingular ſucceſſor, as a conditional reverſion; and *that it was* not a ſubſtitution, albeit the *obligation* was granted *not by a purchaſer or wadſetter in favour of his author*, *but* by an heritor, *to whom* the land was never wadſet, but became redeemable by this bond; and was not prejudged by a poſterior liferent granted by that heritor in favour of his wife, which would have been effectual, if it had been a ſubſtitution; but the ſum upon *payment of* which the heir-female was obliged to denude, was ordained to be re-imployed for the wife in liferent, *Jan.* 16. 1679, *L. Lambertoun* *.

VII. As to the nature of reverſions, they are *ſtricti juris*, and not to be extended beyond what is expreſſed, and ſo not to be extended to the aſſignies of the reverſer, when not expreſſed, yea, not to his heirs, unleſs it be ſo expreſſed; but where the heirs of the reverſer were not expreſſed, without (*however*) adjecting the ordinary clauſe of paying the debt to the wadſetter by the reverſer, any time during his life, (and ſo heirs *were* not found omitted *dedita opera*, but by negligence) they were not excluded, *Jan.* 9. 1662, *E. Murray* [h]. And a reverſion taken by a father diſponing to his ſon, found to be extended againſt the heirs of the ſon, tho' heirs were not mentioned, *Feb.* 6. 1630, *Muir*. This was adviſed in abſence. And the day of conſignation being appointed eight days after the term, the conſignation was not ſuſtained at the term itſelf, tho' theſe days were introduced in the reverſer's favour, *July* 12. 1634, *Lo. Balmerino*: yet where the reverſion bore the premonition to be at the pariſh-church, it was ſuſtained, being uſed only perſonally, *Dec.* 11. 1638, *Finlayſon*. And where the reverſion did bear conſignation at the creditor's houſe in *London*, it was ſuſtained, being at his ſucceſſor's houſe in *Edinburgh*, *Feb.* 1. 1667, *creditors of Murray*.

VIII. The conſtitution or nature of wadſets being thus cleared, as to the kinds thereof, wadſets are either proper or improper; and they are either publick or baſe.

IX. A proper wadſet is, where the fruits *and profit* of the thing wadſet are *ſimply* given for the annualrent of the ſum, and the hazard or benefit thereof, whether it riſe or fall, is the wadſetter's; and there hath never been any caſe decided finding ſuch proper wadſets uſurary upon exorbitancy of profit: but by the act of Parliament 1661, *cap.* 62. betwixt debtor and creditor, all wadſets before that act, tho' proper, are ſo altered, that if the perſon having right to the reverſion offer ſurety and demand poſſeſſion, the wadſetter muſt quit poſſeſſeſſion, or elſe reſtrict himſelf to his annualrent, and count for the ſuperplus, and that not from the act of Parliament or citation, but from the offer of ſecurity; which was not ſuſtained at the inſtance of a ſingular ſucceſſor in the right of reverſion, not having produced his right to the reverſion at the requiſition: and tho' it was produced in the proceſs, the wadſetter was not found obliged to reſtrict or cede the poſſeſſion, becauſe he was in natural poſſeſſion by labourage, till he were warned before Whitſunday, *Feb.* 20. 1679, *Bruce*; the reſtriction was alſo ſuſtained, tho' there was a clauſe in the wadſet renouncing the uſurper's act, and all ſuch acts made or to be made; *and the* exception in the act of Parliament 1661, (*in ſupport of ſuch renunciations*) *was found to* relate only to (*the*) preceeding clauſes *of that act*, and not to this clauſe anent wadſets, which is poſterior, *Jan.* 29. 1662, *L. Lamington*; *Feb.* 21. 1666, *Lo. Borthwick*; *Feb.* 21. 1666, *Ogilvie*. In theſe caſes it was conſidered, that there was no clauſe in the uſurper's act for making proper wadſetters comptable, and therefore the renouncing that or the like acts, did not hinder compting by this act; only from the offer to find caution,

* In this caſe the bond of reverſion might in one ſenſe be ſaid not to have been granted by a purchaſer in favour of his author, becauſe the reverſer had indeed never been infeft in the lands; but the granter of the reverſion had acquired right to the lands only by purchaſing appriſings which were in the perſon of the reverſer; upon which the granter was infeft.

[h] See below, III. 5. 5.

tion, made by inſtrument or judicially, in caſe the wadſetter chuſed not to quit the poſſeſſion, he became comptable.

X. But where in wadſets there is a condition of reverſion, that a tack ſhould be granted for years after redemption, that tack was not found taken away by the act debtor and creditor; but *yet* that if it were in the terms of the old act, *Parl.* 1449, *cap.* 19. far within the true avail, it were uſurary and null [i], *Feb.* 15. 1666, *Lo. Ley*; *Feb.* 17. 1672, *Douglas*: in which caſe the tack was ſuſtained, if it were not much within the worth of the land, as it was the time of granting the wadſet, albeit it were much within the worth the time of the redemption; becauſe there is a juſt deſign in ſuch tacks to encourage the wadſetter to meliorate the wadſet lands, and be at expences therefor, ſeeing he will retain the ſame after the redemption, for the old rent they were worth when wadſet, and the rent expreſſed in the tack will be preſumed to be the true rent, unleſs the contrary be proved. But ſuch a wadſet *being* granted to a brother for his portion, wherein the wadſetter was excluded from poſſeſſion *thirty ſix years* during a liferenter's life, the tack was ſuſtained, *Jan.* 21. 1662, *Polwart*.

XI. If there be a back-tack of the land, granted by the wadſetter to the reverſer, or for his behoof, or a proviſion to compt for the profits of the land, or to hold the land at ſuch a rent, it is an improper wadſet.

XII. A publick wadſet, which is holden of the conſtituent's ſuperior, requireth, beſides the reverſion, a regreſs, which is an obligement upon the ſuperior to receive and enter the reverſer his vaſſal again upon the redemption: the neceſſity whereof is, becauſe by the infeftment, tho' in wadſet, the conſtituent is denuded, and the ſuperior hath a new vaſſal, in whoſe place he is not obliged to accept any other but by his own conſent,—*Craig*, *lib.* 2. *dieges.* 6. § 25. moveth this queſtion, whether a publick wadſet, being redeemed, and the reverſer re-ſeiſed therein, it would be accounted heritage or conqueſt. And tho' it ſeem conqueſt, becauſe it is a new infeftment, and not the old, yet he well reſolveth, that if it return to the perſon, or the heirs of him, who was firſt infeft, if it was heritage before, it remaineth ſo; but if an aſſigny to the reverſion and regreſs be infeft, it is truly conqueſt.

XIII. It remaineth, now to conſider the deſtitution of wadſets, and how they ceaſe, and this is either by conſent or by law; by conſent, either when the reverſion is diſcharged, whereby the infeftment becomes irredeemable, and ceaſeth to be a wadſet; which diſcharge of the reverſion is not effectual againſt ſingular ſucceſſors, unleſs regiſtrate conform to the ſaid act of *Parl.* 1617, *cap.* 16; or otherwiſe by voluntary *renunciation* of the wadſet, which muſt be regiſtrate by the ſaid act, or elſe it prejudgeth no ſingular ſucceſſor in the wadſet: yet it is not effectual to denude the wadſetter, who remains in the fee of the wadſet, till the reverſer get a reſignation *ad remanentiam*, if *the* wadſet *be* holden of the granter himſelf, or be *re-ſeiſed* by the ſuperior, if the wadſet was public, *and an renunciation without a new infeftment is not ſufficient*, *Hope*, alienations, *Kinroſs contra Durie* *, *Nov.* 23. 1627, *Dumbar contra Williamſon*. But if the reverſer or his predeceſſor was infeft, a renunciation may exclude the renouncer's right, but will not eſtabliſh it in the perſon of the reverſer, but he muſt brook by his own right, *Hope*, alienation, *Hamilton contra M'adam* **. Where wadſets are taken holden of the ſuperior, regreſſes are alſo taken from the ſuperior, and new infeftment thereupon to the granter of the wadſet: but when reverſions are carried by aſſignations, appriſings or adjudications to thoſe who were never infeft, they muſt not only have a renunciation from

* This deciſion, is obſcurely marked by *Hope*, in theſe words: "The Lords found that a ſingular ſucceſſor "infeft by aſſignation, could not have right to the reverſion, where the wadſet was proved to be holden of "the ſuperior, and confirmed, or, by reſignation except the party to whom the reverſion was granted was deceaſed "after the order of redemption, *March* 10. 1621, *Kinroſe contra Durie*."

** The deciſion is in theſe words: "Found, that a renunciation made in favour of the party infeft, is ſufficient to denude, *June* 16. 1629, *Hamilton contra M'adam*."

[i] See above, I. 15. 7. 3. II. 9. 8.

from the wadſetter, but a procuratory of reſignation, that thereby they may be infeft; in which caſe the wadſet right is not extinct, but conveyed, and the wadſetter is their author, and may not refuſe procuratories of reſignation, or charters for confirmation upon redemption of the wadſet by the aſſigny, or adjudger, to put the wadſet right in the aſſigny; and a renunciation will not be ſufficient, [becauſe the aſſigny to the reverſion needs not be infeft to carry the right of reverſion; but muſt be infeft by the wadſetter, being ſatisfied of his ſum; who muſt grant precepts of ſeiſin for infefting the reverſer holden of the wadſetter; and if infeftments follow thereupon, and the ſeiſin be regiſtrate, there is no neceſſity of renunciation or grant of redemption].* Yet renunciations or grants of redemption being regiſtrate, exclude poſterior deeds of the wadſetter, who yet continues in the fee, and the caſualities will fall by his death, or deeds; but declarators of redemption do fully denude the wadſetter, and in that they differ from voluntary redemptions **.

XIV. Wadſets are taken off legally, when the reverſion is annulled, as by declarator of expiring thereof; for thereby the infeftment becomes irredeemable; but is chiefly by a legal redemption, which doth require an order of redemption, and a declarator thereupon, which muſt be diverſely uſed in legal reverſions, and in conventional reverſions.

XV. The order of redemption of appriſings and adjudications, by virtue of the legal reverſion, is valid by premonition and conſignation, and inſtruments taken thereupon, wherein there is not appointed a determinate time upon which the premonition muſt be made, or a determinate place where the conſignation muſt be made, nor the perſon of the conſignatar; but the premonition may be upon any number of days, ſufficient for (*receiving*) the conſignation; yea, tho' it were the ſame day of the premonition, as *Craig* [ii] obſerves: but if the creditor be perſonally apprehended, the conſignation muſt be in the way moſt to his advantage, which therefore he may preſcribe, being either near the place of premonition, or the lands wadſet, or the pariſh-church where they ly, which *Craig* accounteth competent places; or if he chuſe any other more advantageous to the conſigner, it will be ſufficient: but if he chuſe none, the premoniſher muſt either conſign that day where he finds the creditor: or if he uſed premonition at his dwelling-houſe, he muſt conſign, either at the appriſer's dwelling-houſe, or pariſh-kirk where the lands ly, as ſaid is. If the creditor be out of the country, or have no certain abode, letters of premonition will be obtained from the Lords *periculo petentis*, for premonition upon ſixty days at the croſs of *Edinburgh*, and for conſignation to be made in *Edinburgh*: yea, the order was ſuſtained for redemption of an appriſing near expiring, albeit the *order and* conſignation was only *uſed* at *Edinburgh*, and not at the pariſh-kirk where the lands ly, or at the debtor's dwelling-houſe, he being out of the country, *Feb.* 22. 1631, *Murray*: but where the party was in the country, this order, by ſummons of premonition and citation perſonally taken thereupon, not being by inſtrument of premonition, was found void, *July* 23. 1622, *E. Deſmont*, where an inſtrument of premonition was found neceſſary, tho' no determinate time be requiſite; in theſe caſes the legal hath not been near expired; but that a new formal order might have been uſed. Yet the

* This ſentence is not explained by the MSS or the 1ſt edition. The method of executing voluntary renunciations of wadſets, when the right of reverſion comes to a perſon not infeft in the lands, is here explained. It is then neceſſary that the aſſigny ſhould, upon redemption, obtain a conveyance of the wadſet-right itſelf with procuratory or precept, and upon that conveyance procure infeftment in the lands to be holden of the wadſetter himſelf, or of his ſuperior, who may be either the reverſer or the original ſuperior, *Feb.* 9. 1628, *Simſon*. By this, the right to the wadſet and the right to the reverſion are conſolidated in the aſſigny's perſon, without granting a renunciation in his own favour, and his right to the lands is as compleat as that of a wadſetter becomes by a diſcharge of the reverſion.

** Wadſets holding of the reverſer are extinguiſhed by renunciations regiſtrate, or by declarator; but ſuch as hold of the reverſer's ſuperior, ſeem to require infeftment upon reſignation to denude the wadſetter and to prevent the caſualities from falling by him, whether the redemption be voluntary or by declarator. *Jan.* 10. 1665, *Campbel*; Gosford, *June* 25. 1675, D. *of Lauderdale*. The contrray was found as to the effect of declarators, *Hope*, wadſet, *July* 25. 1616.

[ii] *Craig*, II. 6. 4. *et* 24. III. 2. 22.

exorbitancy of appriſings hath made the ſlendereſt orders of redemption to be ſuſtained, as if the appriſer had been in poſſeſſion, whereby a previous compt was neceſſary, to know what ſums were to be offered or conſigned, a ſummons for compt and reckoning, and for accepting what was reſting, being uſed within the legal, hath always been ſuſtained, as was found, *July* 2. 1625, Doctor *Kincaid*. And a conſignation *in general* of a ſum for redeeming of ſeveral appriſings *in the defender's perſon, without ſpecifying the particular appriſings*, made by a ſingular ſucceſſor, was ſuſtained, becauſe the inſtrument bore " an offer to conſign the ſums " in all the appriſings, whereto *the defender* had then right, *upon their* being *con-* " *deſcended on*, in the proceſs," *Feb.* 12. 1631, *Murray*.

XVI. The redemption of wadſets upon conventional-reverſions, is by an order of redemption, conſiſting of premonition, or requiſition and conſignation, which is made effectual by an action of declarator of redemption thereupon.

XVII. Premonition is an act or deed, whereby the reverſer or his procurator premoniſheth the wadſetter, conform to the tenor of the reverſion, to appear at the place of conſignation, and receive ſatisfaction according to the reverſion; and if it require the wadſetter to come to the place of conſignation and receive his money, it is called a requiſition: and in either caſe, it muſt neceſſarily be done by way of inſtrument: this inſtrument uſeth to bear, production of the reverſion: yet a premonition was ſuſtained without that, ſeeing the reverſion was contained in the wadſetter's own ſeiſin. And a premonition was not found null, tho' the procuratory was not produced, where the procuratory was not called for, *Jan.* 18. 1662, *Veatch* *. But a requiſition was found null, becauſe it bore not " a pro- " curatory produced the time of requiſition," albeit another inſtrument of the ſame nottar did bear " a procuratory produced," and that in reſpect the queſtion was not *betwixt* a wadſetter and a reverſer, neither party having damage, but betwixt a donatar of the ſingle eſcheat, and the creditors of the wadſetter; ſo that if the Lords ſupplied the not production of the procuratory, the ſum conſigned would become moveable, and fall to the fiſk; therefore the Lords refuſed to ſupply the procuratory, and found the requiſition null, and the wadſet unredeemed, *Jan.* 12. 1677, creditors of *Wamphray*. Which for the ſame cauſe would hold, if the queſtion had been betwixt the heir and the executor of the wadſetter; for in either of theſe caſes, the formality of the requiſition has the importance of the whole right: and where the reverſion was in the wadſetter's own hand, and craved to be exhibited the time of the conſignation, the premonition was found good without it, *Hope*, wadſets, *Lo. Yeſter contra Scot*. The like in a redemption at an appriſer's inſtance, who appriſed the reverſion, *Feb.* 19. 1662, children of *Wolmet*. The like in a ſingular ſucceſſor to a reverſion redeeming, *Feb.* 17. 1663, *Montgomery*. Here the reverſion was in the wadſet right, which was in the defender's own hand.

Premonitions when they are by a procuratory do alſo expreſs the production of an procuratory; yet an order was ſuſtained, tho' it bore no mention of an procuratory; but this was declared not to be drawn in example, in reſpect the purſuer had ſuſtained great trouble by actions againſt the defender for recovery of his reverſion from him, Feb. 21. 1635, *Earlſton*.

Premonition may be done, either perſonally, or at the wadſetter's dwelling-houſe. But it was found null, when the dwelling-houſe was not deſigned *in the inſtrument of premonition*, *Dec.* 13. 1626, *E. Buccleugh*. Premonition muſt be uſed againſt the tutors and curators of minors, either generally at the market-croſs, or otherwiſe to the tutors and curators perſonally, *Dec.* 17. 1629, *L. Carnouſie*. And a requiſition was found null, becauſe not made to tutors and curators, by letters from the Lords, but only by an inſtrument taken at the market-croſs, *June* 15. 1680, *Gordon*. *Where requiſition was made ſpecially to one who was reputed tutor it*

* In this caſe, it was offered to be proved by the defender's oath, that the procuratory had been ſhown, tho' not ſo mentioned in the inſtrument, and this proof was by the court found neceſſary.

it was ſuſtained, *Hope*, wadſets, *Carnouſie contra Fraſer*. A premonition was ſuſtained, tho' the reverſion bore, "That it ſhould be done at the pariſh-kirk," and it was done perſonally, which was accounted more, *Dec.* 11. 1638, *Finlayſon*.

XVIII. Conſignation [z] muſt alſo be done by way of inſtrument, bearing the tenor of the premonition, and the production of the reverſion and procuratory, in the ſame way, as it is before ſaid of the premonition, and the coming to the place and day, according to the reverſion and premonition, which may be any time of the day, in the hour of cauſe; and therefore the wadſetter muſt attend that day, from mid-day to ſun-ſet [a], becauſe the reverſer may come at any time of the day: and upon the wadſetter's not appearing, or not renouncing, the particulars contained in the reverſion, are to be conſigned according thereto, upon publick intimation, by calling the wadſetter, if abſent, at the moſt patent door, which muſt be done according to the reverſion *in forma ſpecifica*, and not *per æquipollens*, *Hope*, wadſets, *Lo. Sanquhar contra Crichton*. Yet it was ſuſtained upon the conſignation *inſtead* of money, of a diſcharge of the like ſum due by the wadſetter, in reſpect it was due by an article in the contract of wadſet, *Jan.* 2. 1667, *Hog*. Conſignations uſe to bear, "the numeration of the money." Yet it was ſuſtained, bearing "the production of all and haill the ſum contained in the re-"verſion," *March* 10. 1630, *Grierſon*. Here the wadſetter did not appear, or at leaſt did not require numeration. It muſt alſo contain an offer "of what is ge-"nerally in the reverſion, and of what the defender can further condeſcend and "clear," whereof the reverſer was probably ignorant, as the dues competent in appriſings, *Hope*, wadſets, *Nov.* 17. 1620,---*Feb.* 12. 1631, *Murray contra Yeſter*; and therefore a redemption of teinds upon conſignation of the principal ſum, and offer of what ſhould be cleared to be reſting of teind-bolls, *aſſigned for payment of the annualrent*, as the prices ſhould be modified by the Lords, was ſuſtained, being made good at the bar, *Feb.* 21. 1623, *Cunninghame*. Yea, the order of redemption of an appriſing was ſuſtained, tho' the bygone annualrent and penalty were not offered or conſigned, the ſame being offered at the bar, as they were found due and modified, *Hope*, wadſets, *Nov.* 17. 1620. A conſignation was alſo ſuſtained, as made through the wadſetter's default, who offered not a ſufficient renunciation, tho' the conſigner did not offer the draught of a ſufficient renunciation to the wadſetter to ſubſcribe, albeit the wadſetter appeared, and was willing to receive the money, and offered a renunciation, which the Lords at diſcuſſing of the cauſe, found not ſufficient, and found the conſigner was not obliged, even in that caſe, to offer the draught of ſuch a renunciation, *July* 12. 1634, *Lo. Balmerino*.

XIX. The order of redemption being lawfully uſed, the action thereupon is a declarator of redemption, becauſe it is the order that conſtitutes the redemption, and the declarator but finds and declares it to be orderly proceeded, and decerns the wadſetter to denude himſelf conform thereto; and therefore, tho' the reverſion be perſonal, excluding aſſignies, if that perſon once uſe the order, he may aſſign it, and diſpone the lands as redeemed; and the aſſigny at any time, even after his death, will have intereſt to declare, *March* 3. 1630, *Murray*; *July* 29. 1623, *E. Mariſchal*. Declarator of redemption was ſuſtained upon an order uſed againſt a defunct, and the declarator purſued againſt his apparent heir, without a charge to enter heir [b], or a new order, *Dec.* 11. 1638, *Finlayſon*. But in the decreet of declarator of redemption againſt the apparent heirs, they cannot be decerned to denude, unleſs they were charged to enter heir; yet the declarator itſelf would be ſufficient to extinguiſh the wadſet even againſt ſingular ſucceſſors: but it would not convey the right of wadſet to the redeemer; and therefore, if he were not infeft, or heir to a perſon infeft in the wadſet lands, it would be neceſſary to charge the apparent heir to enter, to the effect he might denude and diſpone; and therefore a declarator of redemption againſt an apparent heir, did bear, "That the ſums ſhould not be given up till the apparent heir were "infeft and reſign," *Jan.* 10. 1665, *Campbel*.

It

[z] See above, I. 18. 4. [a] MSS. and firſt Edition read "from ſun to ſun." [b] See III. 5. 23. *fin*.

It was alſo ſuſtained at the inſtance of an appriſer of the reverſion, without calling *the heir of* him, from whom it was appriſed, *tho' infeft*, but only the wadſetter, *Dec.* 17. 1629, *Carnouſie*, in reſpect that the appriſing was a legal aſſignation of the right of reverſion granted by the wadſetter's author, [and there has been no interveening ſingular ſucceſſors: But in redemptions againſt ſingular ſucceſſors in wadſets, whoſe rights do not inſtruct that they are derived from the granter of the reverſion, the purſuer muſt inſtruct that the granter of the reverſion ſtood infeft in fee; otherwiſe that ſingular ſucceſſor will not be obliged to acknowledge the reverſion; and becauſe the ſucceſſors of the firſt wadſetter would have warrandice againſt the firſt wadſetter or his heirs, if they had diſponed the lands without reſerving the reverſion; therefore in that caſe, only the firſt wadſetter or his heir, if he can be condeſcended upon, having any viſible eſtate, have been of old accuſtomed to be called; which is not neceſſary in other caſes, and hath been the ground of that deciſion--*July* 9. 1630, *Fiſher*, where it was found neceſſary to call the heirs of the granter of the reverſion, if the defender could condeſcend upon them; for the antient cuſtom hath been to have more reſpect to the heir of the granter of the reverſion, than to the ſingular ſucceſſor, preſent poſſeſſor of the wadſet, as *Craig* obſerves *, *lib.* 2. *Dieges.* 6. § 13. ſo that ſometimes redemption hath been ſuſtained upon premonition and citation, only of him who granted the reverſion, or his heir: but ever ſince, the preſent heritable poſſeſſor of the wadſet muſt neceſſarily be premoniſhed and cited, and but ſeldom the granter of the reverſion or his heir; as where the granter of the reverſion was immediate author to the ſingular ſucceſſor, againſt whom the order was uſed, as in the former caſe; his own rights behoved to acknowledge the right of the granter of the reverſion, who was common author, and might intimate the plea to him; but could not be obliged ſo to do, where his own rights ſhew no right from the granter of the reverſion.] **

A redemption being voluntary without proceſs, was ſuſtained againſt a ſubwadſetter's right, being a liferent by the wadſetter to his wife, albeit it was regiſtrate; yet the redeemer was not obliged to know it; but it was found taken away without any order againſt her, or citation of her, *July* 27. 1665, *Hamilton.* Redemption upon a roſe-noble uſed upon the Sabbath-day, albeit the inſtrument of *premonition*, did not bear "the reverſion was ſhown, nor read," was ſuſtained, *Spotiſ.* redemption, *L. of Newark contra his ſon*; but this would not be drawn in example amongſt ſtrangers, where the wadſet is redeemable upon conſiderable ſums. For tho' conſignation upon the Sabbath-day by a father againſt his ſon, be ſuſtained, *fieri non debuit*, *ſed factum valet:* yet the wadſetter cannot be obliged to attend and perform the requiſites of conſignation, by numeration of money, peruſal of writs, and ſubſcribing a renunciation upon the Sabbath-day. Redemption was ſuſtained without neceſſity to the purſuer to uplift the ſums conſigned from the conſignatar, and re-produce them at the bar, unleſs it were inſtructed he had taken them up, *Dec.* 7. 1631, *Grierſon*, where the extract was ſuperſeded till the conſignatar was charged ſummarily upon letters granted upon the inſtrument of conſignation, to exhibit the conſigned money, but no annualrent was found due after conſignation. An order uſed by an aſſigny was ſuſtained, tho' he ſhewed not his aſſignation till the proceſs of declarator, yet ſo as the wadſetter was not comptable for the rents, but from the production of the aſ-

ſignation,

* *Craig* declares the antient cuſtom to have been to call the heritable poſſeſſor. He mentions indeed a deciſion, of which he diſapproves, where the heir of the granter of the reverſion, only, was found neceſſary to be called

** In place of what is incloſed by the parentheſis, MSS. D. and G. immediately after the deciſion *Dec.* 17. 1629. have theſe words, "But redemption was not ſuſtained, without calling the granter of the reverſion, or "ſome to repreſent him; tho' the wadſet belong now to a ſingular ſucceſſor, providing the defender condeſcend "upon the perſon repreſenting the granter of the reverſion, *July* 9. 1630. *Fiſher.*" The author ſeems here to have miſtaken the import of the firſt deciſion here quoted, *Dec.* 17. 1629, *Carnouſie*, as if there it had been determined, that there was no neceſſity to call the granter of the reverſion, or author of the preſent wadſetter, whereas that deciſion relates to the calling the heir of the reverſer. The whole of this obſcure paſſage ſeems to be an attempt to reconcile that deciſion with the other deciſion which immediately follows, *July* 9. 1630, *Fiſher*, where the heirs of the granter of the reverſion were appointed to be called.

signation, *Feb.* 19. 1674, *Lo. Borthwick.* Yet redemption was not sustained at the instance of an heir, not being entered at the time of the order, tho' entered before declarator, *Jan.* 19. 1672, *Lo. Lovat and Kintail.* But if the redeemer uplift the consigned money, he must produce the same with the annualrent, and will have right to the rent during that time, *Dec.* 8. 1671, *Forest*; *No.* 29. 1672, *D. of Buccleugh.* Redemption was not elided, because the sums were consigned in the hands of the redeemer's own servant, and taken up from him, seeing it was offered at the bar, and no special provision in the reversion, anent the consignatar, *Hope*, wadsets, *L. of Drum contra Wishart.* The like tho' there was an instrument of another nottar, *bearing*, contrary to the instrument of redemption, *that the wadsetter attended at the place of consignation*, *Had. July* 18. 1610, *E. of Kinghorn contra Kincaid.*

XX. The effect of declarator of redemption is, that it makes the redeemed lands belong to the redeemer, and makes the sum consigned moveable, and to belong to the wadsetter's executors, if he have accepted the consignation, or if declarator do follow in his lifetime; but if declarator do follow after the wadsetter's death, the consigned sums will not belong to his executors, but to his heir, who remained proprietar of the wadset: but if the declarator past in the wadsetter's life, it did take away the real right of wadset, so the money came to be in the property of the wadsetter, as moveable, and fell to his executor, which till a declarator, was not so, seeing the order might be passed from, *Dec.* 19. 1629, *Laury*; where it was found, that the consignatar was obliged to re-deliver the consigned money to the consigner, his heirs or assignies, passing from the order, tho' the wadsetter, to whose use it was consigned, was not called. The like was found, that till declarator the consigned sums remain in the property of the consigner, and belong not to *the* executor of the wadsetter, but to his heir: or where declarator of redemption was after the wadsetter's death, *Jan.* 21. 1673, *Nicol*; *June* 18. 1675, *L. Ley.* The like *June* 21. 1626, *Murray*; tho' here the consigner entered in possession of the wadset lands before declarator, which *was not found* a sufficient owning of the redemption, and so to make the consigned sum moveable.

Upon declarator of redemption, letters will be obtained summarily against the consignatar, to re-produce the consigned money, *Dec.* 7. 1631, *Grierson.* But tho' the instrument of consignation will instruct the consignation against the wadsetter[g]; yet it will not prove against the consignatar, without his oath, or writ subscribed by his own hand, *Jan.* 14. 1630, *Laury.*

XXI. Redemption was not elided by a singular successor, obtaining infeftment of the wadset lands after the order, or at least the infeftment being base, not cled with possession till after the order, tho' it was cled with seven years possession before declarator, *and had a decreet of mails and duties thereupon against the redeemer because he had not thereupon obtained declarator, neither was the redeemer found obliged to call that singular successor*, *Dec.* 23. 1658, *Dick contra Campbel. Here the possession was accounted vilious, as being in re litigiosa. The like*, *Hope*, *wadsets*, &c. *E. Errol contra tenants.*

XXII. Wadsets are also taken off by premonition or requisition, requiring the sums upon which the wadset is granted, which makes the sums moveable, and the infeftment of wadset void; yet so that the requirer may pass from his requisition, and the infeftment revives, *Jan.* 29. 1635, *Hamilton*[h]. But after decreet or charge for the sum, the requisition cannot effectually be past from, but the sum becomes moveable. The requisition may be also past from indirectly, by uplifting the duties of the wadset-lands, for terms after the requisition, *Hope*, *de creditoribus*, *Wallace contra L. Edzel* *; or taking posterior terms of annualrent from the principal or cautioner. Requisition requires also the same solemnities that premonition requires; and therefore it was not sustained, where the procurator designed no *proper person* nor place to pay the money required, *nor did the*

* By this decision, as marked by *Hope*, the contrary of what is here laid down was determined.—The author's doctrine is supported by a late decision *July* 12. 1625, *Henryson contra E. of Linlithgow.*

[g] See below IV. 42. 9. [h] See above II. 1. 4. *fin.*

inſtrument of requiſition bear that the nottary was deſired to read the procuratory or that he read it, tho' the inſtrument was mended at the bar, as to the reading of the procuratory, and the truth of it referred to the defender's oath, which the Lords admitted not, the inſtrument being otherwiſe when produced in judgment *, *Feb* 7. 1628, *Maxwel. This was in the expiring of a reverſion for not payment upon requiſition.* The like where the requiſition mentioned not the production of the procuratory, tho' it bore not to be called for, *Nov.* 13. 1622, L. *Baſs.* This was in a requiſition only to validate a charge: the contrary was found, where it bore, "that "the procurator's power was *ſufficiently* known to *the nottar*," *Jan.* 19. 1665, *Stuart*: Here there was an appriſing deduced upon the requiſition, *and therefore it was acknowledged by the party.* The like where the procuratory was not called for, and was in the procurator's hand, and with it the writ which was the warrant of the requiſition, which was ſhown, *June* 28. 1671, *Hume.*

XXIII. Declarators of redemption, or renunciations, or grants of redemption, do ordinarily bear, "that the wadſetter renounceth all right to the wadſet-lands;" and albeit he have a diſtinct right, it will not ſtop the declarator, nor oblige the redeemer to debate thereanent in that proceſs: nor will it ſtop the entring the redeemer in the poſſeſſion, in which the defender entred by the wadſet [i]; but that right will only be reſerved: *Nov.* 2. 1677, *Stuart* of *Caſtlemilk:* and if the wadſetter condeſcend upon, and give evidence of any other right beſide the wadſet, it will be particularly reſerved, or the renunciation will only bear, "all right by "virtue of the wadſet." In the caſe of redemption of an appriſing, the renunciation was reſtricted to the right in queſtion, *Feb.* 22. 1631, *Murray.* Declarators of redemption do decern the wadſetter to renounce, and reſign all right to the wadſet-lands, unleſs a right diſtinct from the wadſet could be inſtructed, which will be excepted, or an evidence given for ſuch a right, which thereupon will be reſerved: but a general reſervation of other rights was not ſuſtained, but a declarator of redemption was found a ſpecies of declarator of right; after which, no right competent and omitted, will be ſuſtained, which was then known, *Feb.* 2. 1676, D. *Lauderdale.*

TITLE XI.

Extinction of Infeftments, where, of Reſignation *ad remanentiam*, Recognition, Diſclamation, Purpreſture, and other Feudal Delinquences.

I. *The form of reſignations* ad remanentiam.
II. *They may be by procurators, or* propriis manibus.
III. *Inſtruments of reſignation prove not without other writ.*
IV. *Reſignations* ad remanentiam, *valid without regiſtration, till the year* 1669.
V. *Reſignations ſubject to all burdens by the vaſſal affecting the fee.*
VI. *How far ſuperiors may refuſe reſignations* ad remanentiam. *Reſignation can alone take away an irredeemable infeftment.*
VII. *Reſignation by him who hath no right valid with conſent of him who hath right.*
VIII. *How infeftments become extinct by ſucceſſion.*
IX. *The original of the extinction of fees by delinquence.*
X. *Recognition by alienation of the ward fee.*
XI. *Recognition by infeftments* à ſe.
XII. *Whether recognition can be incurred by deeds in minority, or on death-bed.*
XIII. *Whether recognition can be incurred by ſub-feudation.*
XIV. *Our cuſtom in this point.*

XV.

* The reference to oath, here mentioned, is not taken notice of by Dury, who collects this deciſion.

[i] See above II. 9. 43. *med.*

XV. *In what caſes other feus of ward-lands, infer not recognition.*
XVI. *Recognition has place only in ward-holdings.*
XVII. *Recognition is not incurred, unleſs the major part be alienated, either at once, or by parcels.*
XVIII. *Recognition is not incurred by alienation to the vaſſal's apparent heir.*
XIX. *Whether recognition be incurred by alienations, on condition that the ſuperior conſent.*
XX. *Inhibition excluded not recogtion, but this is now regulated by act of parliament.*
XXI. *Recognition is not excluded by the vaſſal's drunkenneſs, when he alienated.*
XXII. *How the ſuperior's conſent may be adhibited to alienations, to ſave from recognition.*
XXIII. *How far the King's confirmation without a* Novodamus, *takes off recognition.*
XXIV. *Recognition is taken off by homologation.*
XXV. *Recognition excludes all infeftments, tacks, or ſervitudes by the vaſſals.*
XXVI. *Servitudes by preſcription are not excluded by recognition.*
XXVII. *In recognitions who muſt be cited, and who may compear.*
XXVIII. *The title and order and proof in declarators of recognition.*
XXIX. *Diſclamation, how incurred.*
XXX. *Purpreſture, how incurred.*
XXXI. *Feudal delinquences adduced by the feudiſts for reſolving of fees.*
XXXII. *Attrocious deeds againſt vaſſals fidelity to their ſuperiors, reſolving their fees.*
XXXIII. *How far the ignorance or weakneſs of the vaſſal excuſes, with other exceptions for the vaſſal.*
XXXIV. *Whether the delinquence of the ſub-vaſſal infers recognition.*

WE are not here to ſpeak of the common ways of extinction of infeftments, and other rights, *ſuch* as do extinguiſh the ſubject matter, as preſcription, forfeiture, homologation, or acceptance of incompatible rights; neither, of thoſe ways by which an infeftment is extinct as to one, but is conveyed to another, which falleth in conſideration amongſt conveyances of rights: but only of thoſe ways proper to extinguiſh infeftments, and make the right to ceaſe, and to return to the ſuperior; and theſe are two, either by conſent of the vaſſal, or by law.

I. Infeftments are extinct by conſent, by reſignation made by the vaſſal, who ſtands infeft in the lands, to his ſuperior, *ad perpetuam remanentiam*, to which there is neceſſarily required as a ſolemnity thereof, an inſtrument of reſignation in the hands of a nottar: for in the ſame way that their conſtitution was perfected by an inſtrument of ſeiſin, their deſtitution is conſummated by an inſtrument of reſignation, which no other writ nor acknowledgment of the vaſſal, of the being thereof, will ſupply, much leſs will the deeds done, be otherways proved; and as in ſeiſins there muſt be a tradition or delivery of poſſeſſion by ſome token or ſymbol, as by earth and ſtone, *&c.* So in the inſtrument of reſignation, there muſt be a re-delivery of the poſſeſſion by an accuſtomed ſymbol, which ordinarily is by delivery of ſtaff and baſton *; yet in this they differ, that the delivery of the ſeiſin muſt be upon the ground of the tenement, naturally or by union; but the reſignation may be any where: and as ſeiſin may be given, either to the vaſſal or his procurator; ſo may the reſignation be either to the ſuperior himſelf or to his commiſſioners, authoriſed to that effect.

II. And tho' inſtruments of reſignation uſe to be by procurators, warranted by a procuratory

* A reſignation was ſuſtained tho' made by the ſymbols of earth and ſtone, in place of ſtaff and baſton, becauſe it had been the cuſtom in ſome places to make uſe of theſe ſymbols *Feb.* 7. 1708, *Calderwood.* Upon that occaſion however an act of ſederunt was made *Feb.* 11. 1708, diſcharging the uſe of any other ſymbol in reſignations than ſtaff and baſton.

procuratory of reſignation: yet as there may be ſeiſins given by the ſuperior, *propriis manibus*, ſo may there be reſignations by the vaſſal himſelf.

III. But in both, the inſtrument of reſignation alone is not ſufficient, as being but the aſſertion of a nottar [k], but they muſt have for their warrant a diſpoſition, or other adminicle; and therefore, it is ſtatute, *Parl.* 1563, *cap.* 81. That where ſuch reſignations are by procurators, the procuratories be ſubſcribed by the party or nottars; and if the reſignation be *propriis manibus*, that the inſtrument be ſo ſubſcribed, otherwiſe to be null; becauſe the ſubſcription of the inſtrument, is in that caſe the only probation of the warrant thereof: but if there be a diſpoſition or obligement to infeft, the inſtrument of reſignation, tho' not ſubſcribed by the reſigner, will be ſufficient, as warranted by the diſpoſition or obligement.

IV. But ſeiſins and reſignations did formerly differ in this, that ſeiſins muſt be regiſtrate within ſixty days after their dates, *Parl.* 1617, *cap.* 16. But ſo needed not inſtruments of reſignation *ad remanentiam*; for tho' by that ſtatute, renunciations of wadſets are to be regiſtrate, it was not extended to renunciations of irredeemable rights *ad remanentiam*, theſe being either omitted by inadvertency or of purpoſe, in favour of ſuperiors, that rights may be taken with their conſent: yet in ſo far that excellent ſtatute was defective, till the late act of *Parl.* 1669, *cap.* 3. whereby inſtruments of reſignation are null, if not regiſtrate within ſixty days [l]. By which, and others to that purpoſe, purchaſers in *Scotland*, may better know the condition of thoſe with whom they contract about infeftments, and be more ſecure of lurking rights, than any where, ſo far as I can learn, in the world [ll].

V. By this reſignation ſo made, the property is conſolidated *with the ſuperiority, without any further requiſite, but it is ſo conſolidated*, as it was the time of the reſignation, and is affected with all real burdens, or *debita fundi*, that validly affected it before; as feus, tacks, annualrents, ſervitudes: for tho' all ſuch burdens as are not warranted by the ſuperior's conſent, or by law, ceaſe when the fee returns to the ſuperior, either for a time by ward, non-entry, *&c.* or for ever by recognition; yet when it returns thus by conſent, it comes *cum ſuo onere*, which is very juſt and fit, ſeeing elſe ſuch ſecurities might eaſily be evacuated, by voluntary reſignations in the ſuperior's hand. There is another reſignation, which is called *in favorem*, being for new infeftment to the reſigner or ſome other; but thereby the fee is not extinct, but either renewed or transferred, and therefore it ſhall be conſidered hereafter.

VI. *Craig* upon this head [m], very fitly moveth and ſolveth this queſtion, Whether the vaſſal may renounce and reſign his fee to the ſuperior, tho' he be unwilling, and inſtances two caſes; Firſt, in a vaſſal's holding a very inconſiderable parcel of land ward, did thereby become obnoxious to his ſuperior for the value of his tocher, having relation to the whole eſtate, which tocher did much exceed the worth of the tenement: and yet a reſignation thereof being judicially offered, the ſuperior was ſuffered to refuſe it, unleſs the value of the marriage were firſt paid [mm]: The other of a burgeſs, offering to renounce his burgeſs-ſhip for ſhunning a great taxation put upon him: and therefore ſolveth the caſe upon the common axiom, *Cuique licet renunciare favori pro ſe introducto:* and therefore the fee of its nature being gratuitous in favour of the vaſſal, may be renounced; but that will not prejudge the ſuperior of any caſuality befalling to him before the renunciation, but will have only effect *ad futura*: and therefore a vaſſal judicially diſclaiming his ſuperior, was not admitted ſo to do, to exclude the liferent already fallen, *March* 26. 1628, *Douglas*.

No contract, obligation or perſonal right, nor any leſs than an inſtrument of reſignation, will take away infeftment; for tho' theſe may be ſufficient againſt the

[k] See above, II. 3. 19. [l] See above, II. 3. 21. [ll] See above, II. 3. 22. [m] *Craig*, III. 1. 9. [mm] See above II. 4. 48.

the granters thereof, *and their heirs* by a perſonal objection, whereby they cannot come againſt their own deed: yet truly, the real right ſtands in the perſon infeft, and they are not denuded thereby; and ſo a renunciation, without the ſolemnity of an inſtrument of reſignation, will not ſuffice to obliterate an irredeemable fee [n]; tho' it may be ſufficient to evacuate any perſonal right; as ſervitude not requiring infeftment; yea, or a liferent, tho' conſtitute by infeftment, becauſe it is communicable to no other perſons by infeftment, and therefore paſſeth by aſſignation or reſignation. The reaſon hereof is, becauſe by the common cuſtom of nations, real rights cannot paſs by ſole conſent, without attaining poſſeſſion in the way preſcribed by law: and therefore this ſymbolical poſſeſſion, which alone the law alloweth as ſufficient, either in the conſtitution or deſtitution of fees, muſt be adhibited, and the real poſſeſſion of the tenement itſelf will not ſuffice in either caſe, as is before inſtanced in ſeaſins [o] by ſeveral deciſions: ſo a renunciation without a formal reſignation, was not found relevant to take away the infeftment renounced againſt a ſingular ſucceſſor, *Nov.* 23. 1627, *Dunbar*. And reſignation cannot be effectual, if the reſigner be not infeft; for he who is not inveſted, cannot be diveſted.

VII. *Craig* diſcuſſeth this queſtion alſo in that place [oo], Whether conſent of one who is infeft, and thereby hath right, will validate the reſignation of another, who is not infeft and hath no right [p]: which he determineth in the affirmative, with good reaſon; for though the conſent alone would not be ſufficient, yet ſeeing the form of the reſignation is done, tho' in the name of him who hath no right, yet by conſent of him who hath right, here is both the ſubſtance and ſolemnity of the act; and it is alike, as if the reſignation had been by the conſenter, which I doubt not will hold, tho' the conſent be but adhibited in the beginning of the diſpoſition or contract: and tho' the conſenter doth not diſpone expreſsly for all right he hath, as is ordinary for further ſecurity, yea, if the conſent be not repeated in the procuratory of reſignation, or mentioned in the inſtrument of reſignation; for if it be expreſſed generally in the entry of the diſpoſition or contract, it reacheth to every article thereof, and all done conform thereto. Conſent hath the ſame effect in the conſtitution of fees; and ſo the conſent to an annualrent, by a party having right and infeft, was found to validate the annualrent, tho' the diſponer was not infeft; and ſo did exclude a tack ſet by the conſenter afterward, *Dec.* 15. 1630, *Stirling*. Yet, if more perſons ſhould diſpone for their ſeveral rights, without conſenting one to another, if any of them be omitted out of the procuratory or inſtrument of reſignation, in whom truly the right ſtandeth, nothing will be validly done, tho' that party be alſo in the diſpoſition: and this is the reaſon, why when many perſons diſpone or reſign, they do it all with one mutual conſent; for thereby each of their rights doth contribute to the deed of the reſt; *and tho' ſome of them were omitted in the procuratory, or inſtrument of reſignation, the deeds would be valid.*

VIII. Infeftments are alſo extinct, when the ſuperior adjudgeth or appriſeth from his vaſſal; for thereby it was found, that the property was conſolidated with the ſuperiority, *Spotiſ.* compriſing, *Stevinſon contra L. Craigmillar*. Or if the ſuperior ſucceed as heir to the vaſſal, *June* 21. 1634, ——*ſupplicant*; in which caſe, tho' the ſuperior upon ſupplication obtained precepts out of the chancellary, to infeft him in the fee, it was thought, as ſuperior, he might have infeft himſelf as vaſſal [q]: but he would not have been ſo ſecure by a declarator of conſolidation, upon the ſuperior's ſpecial retour, as heir to his vaſſal in the lands; becauſe that way would make a defect in the ſecurity of land-rights by the regiſters, in which decreets of conſolidation are not required to be recorded; whereas the ſuperior's ſeiſin, either on the King's precept or his own, behoved to be regiſtrate; and if the ſuperior acquire the property by appriſing or adjudication, the allowance thereof

[n] It is otherwiſe as to redeemable rights. See above II. 5. 15. II. 10. 13. Below III. 2. 38. [o] See above, II. 3. 16. 4 Below, III. 2. 6. [oo] *Craig*, III. 1. 29. [p] See below, III. 2. 9. [q] See above, II. 4. 4. Below, III. 2. 23.

muſt alſo be regiſtrate [r]. The like effect will follow, if the vaſſal become heir, or ſingular ſucceſſor to the ſuperior, whereby, being infeft in the ſuperiority, he may as vaſſal reſign to himſelf as ſuperior *ad remanentiam.*

IX. It is more diſputable, how, and under what conſideration fees are extinct, otherwiſe than by conſent; ſome hold that they are extinct by the atrocious delinquency of the vaſſal againſt the ſuperior, as the penalty or puniſhment thereof; and others conceive, that acknowledgment and fidelity being neceſſarily included in all fees, (as is ſhown before) tho' it be not expreſſed, ſo this is implied as a legal reſolutive or irritant clauſe, that if the vaſſal fail in his duty, his fee becomes void. And others hold, that fees being of their own nature gratuitous, *therefore*, even tho' there be a cauſe onerous, not being underſtood as adequate, they retain the nature of a donation, and as all donations are revocable *propter ingratitudinem*, ſo are theſe. Which ſoever of theſe be the ground, the conſequences and effects are much to the ſame purpoſe. But I incline to the middle opinion; for unleſs it were evident by law, that the penalty of that delinquence were ſuch and ſo applied, it would hardly be conſiſtent upon *the firſt* ground; ſeeing otherwiſe, as has been ſhown before of delinquences, the puniſhment is public, and would belong to the magiſtrate: and therefore, for ſeveral delinquences, forfeiture of fees is introduced, without benefit to the ſuperior, who as a private party, can have no more but a reparation equivalent to the damage ſuſtained by him; and ſo the alienation of the fee, without his conſent or *the* encroaching upon the border of his property, would not infer for its reparation the return of the fee, how great ſoever. And for the laſt *ground*, tho' fees of their nature be gratuitous, yet they are oft-times for an equivalent price, and ſo the leſs ingratitude can be alledged; yea, tho' it be true, *Si ingratum dixeris omnia dixeris*, yet fidelity and truſt is a much ſtronger bond than gratitude; and the breach thereof hath the moſt powerful conſequence, betraying of truſt being moſt hurtful and hateful to mankind; and therefore, ſeeing fidelity is neceſſarily and properly in all fees, and is eſſential thereto, and inſeparable therefrom, it looketh likeſt the ſureſt ground from whence the eviction thereof may flow; and if it be truly gratuitous, it is an aggravating circumſtance, making the deed more odious. But whatſoever it be, it is agreed by all, that the deed muſt be of knowledge, moment and atrocity. Tho' there be many ſuch heaped up by the feudiſts, yet many of them have no place with us, where ſuch deeds are rare; and therefore the deciſions thereupon are few: and certainly our fees being ordinarily onerous, are not evacuated but by ſuch as are either named or known in law, or which are very atrocious. There be three ſuch ways of extinction, which have peculiar names in law, recognition, diſclamation and purpreſture. Of which therefore in the next place.

X. Recognition [s] is the ſuperior's returning to own the fee; and therefore may be extended to all the ways by which it returneth through the vaſſal's infidelity, as is hereafter expreſſed; but the leaſt culpable, and yet moſt ordinary way of incurring recognition, is by the vaſſal's diſponing irredeemably, or under reverſion his fee holden ward: for by this he renders himſelf incapable to ſerve his ſuperior, and in a manner renounces and diſclaims him. This kind of alienation makes recognition of ward-lands *; but fees feu or blench do not recognoſce by ſuch alienations, but by the atrocious infidelity of the vaſſal. The neareſt cauſe of recognition, is the vaſſal's alienation of the fee without conſent of the ſuperior, which is a legal clauſe irritant, implied in the nature of proper fees or ward-holdings, tho' it be not expreſſed; that if the vaſſal alienate the fee, without the ſuperior's conſent, it ſhall return to the ſuperior. Whether the riſe hereof be from the perſonal obligation of fidelity only, which the vaſſal oweth to the ſuperior, or from the obligement of gratitude and ſervice, or from that peculiar choice of the perſon and

* Ward-holding being now aboliſhed by act 20. *Geo.* II. *cap.* 50. Recognition has no longer place in our law

[r] See above, II. 3. 22. [s] See below, IV. 14.

and race of the vaſſal, which the ſuperior hath made, contrary to which, a ſtranger cannot be obtruded upon him; neither can the vaſſal withdraw himſelf from his fidelity, or render himſelf unfit for his ſervice, or from all theſe; yet in this moſt do agree, that the neareſt cauſe of recognition is the alienation of the fee. So then, the main difficulty is, what is meaned by that alienation by which recognition is incurred; *Craig*[y] declareth, that this alienation cannot be by naked contract or diſpoſition, till ſeiſin follow; for theſe being but perſonal and incomplete rights, do not alienate the fee from the vaſſal, but only conſtitute upon him a perſonal obligement ſo to do. It is alſo clear, that by infeftment granted by the ſuperior upon reſignation, there can be no recognition; becauſe the ſuperior's accepting of the reſignation, importeth his conſent; ſo that the queſtion will only remain, when the vaſſal granteth diſpoſition or charter *à ſe* to be holden of his ſuperior, and before the ſuperior's confirmation obtained, giveth ſeiſin, unleſs the ſuperior do confirm the ſeiſin: or otherwiſe, *when* the vaſſal granteth a ſubaltern infeftment to be holden of himſelf.

XI. As to the firſt caſe, it ſeems there can be no recognition incurred by infeftments granted by the vaſſal to be holden of his ſuperior, becauſe, if theſe be *confirmed, the ſuperior hath conſented, and if* not confirmed, the right is null, and there is no alienation nor tranſmiſſion of property, but the vaſſal granter of the infeftment remains ſtill proprietar; and therefore ſuch an infeftment is equivalent, as if the vaſſal did alienate upon condition that the ſuperior ſhould conſent; and if he did not conſent, the infeftment to be null: in which caſe, moſt feudiſts do agree, that by ſuch infeftments there is no recognition; and this reaſon is the more fortified, that *Craig* in the fore-cited place relateth, that an infeftment null for want of regiſtration, was not found to infer recognition, in the caſe of the King's Advocate againſt *M'kenzie* and *Bain*. For ſolution of this difficu ty, it is not to be denied, that if a ſeiſin be null by defect of any ſubſtantial or eſſential, neceſſarily requiſite to ſeiſin or ſymbolical delivery of poſſeſſion, there would follow no recognition; as if there were no tradition of earth and ſtone, or ſymbol requiſite, or not by the ſuperior, or his baillie, or not to the vaſſal, or his procurator, or not upon the ground of the land naturally, or by union. But tho' ſeiſin may be null, by defect of ſome accidental ſolemnity introduced by ſtatute or cuſtom, and not neceſſarily involved in the nature of ſeiſin; as the indiction, or year of the Prince's reign, tho' law ſhould declare the ſeiſin null for want of theſe, yet, the vaſſal performing the eſſential requiſites, the feu falleth in recognition: and therefore, there ſeemeth no ground to follow that deciſion adduced by *Craig*, excluding recognition upon the nullity of the ſeiſin for want of regiſtration. But as to the caſe propoſed, the ſuperior's confirmation is not eſſential to the vaſſal's ſeiſin; neither is it ſo required by the common feudal cuſtoms, as with us: for thereby, if the ſuperior did acquieſce, approve or homologate the ſeiſin granted by a vaſſal to a ſtranger, the ſame would be valid without a formal confirmation in writ; albeit by our cuſtom, ſuch infeftments till confirmed are null, not only as to the ſuperior, but as to all other third parties, and ſo is become as a ſubſtantial of the infeftment; yet not being truly eſſential by the common feudal cuſtoms, it doth not exclude recognition; and as *Craig* in the fore-cited place rendereth the reaſon, that infeftments by the vaſſal, *à ſe*, not confirmed, infer recognition, is, becauſe he hath done all that in him is to alienate the fee, there being no act remaining to be performed by him or his procurator; and therefore, in the declarator of recognition, purſued at the inſtance of *Hamilton La. Carnegy, contra Lo. Cranburn. Jan.* 30. and *Feb.* 5. 1663, upon the E. of *Dirletoun's* diſponing of the lands of *Innerweek* holden of the King ward, to *Cranburn*, and infefting him therein to be holden of the King; this defence was not found relevant, that the ſeiſin was not confirmed, and ſo null, tho' done upon death-bed, accepted for a minor abſent and inſcient, and now recalling and reducing *it*.

XII. For

[y] *Craig* III. 3. 25.

XII. For in ſuch caſes as *in* rebellion, or eſcheat, there is no privilege of minority, nor deeds upon death-bed *which are valid* * againſt the ſuperior tho' done by a minor, except the deeds upon death-bed be in prejudice of the heir, and be reduced by the heir *ex capite lecti*. But in this caſe, *Dirletoun*'s heir did not quarrel the diſpoſition made by him, as done upon death-bed, but did take a gift of recognition from the King. But where the gift of recognition was not granted to the heir-male, who was heir in the inveſtiture; but to an heir-female, the heir-male proponing, that the alienation was upon death-bed, and ſo null as to him: the Lords found, that if the diſpoſition was upon death-bed, the defence was relevant and competent by way of exception, the declarator of recognition not being a poſſeſſory judgment: but where the diſpoſition was in *leige pouſtie*, and was delivered with a precept of ſeiſin ſimply, without reſervation not to take ſeiſin baſe upon the precept, which imported a warrant to take ſeiſin thereupon; it was found, the taking ſeiſin, when the diſponer was upon death-bed, upon that precept ſubſcribed and delivered in *leige pouſtie*, did infer recognition, *July* 20. 1669, *Barcley*.

XIII. *The other caſe inferring recognition by alienation, is by* ſub-infeudation *or granting ſubaltern infeftments of the fee. Concerning which* it is much debated amongſt the feudiſts, whether *thereby* recognition be incurred, or whether it be comprehended under alienation; becauſe *in libris feudorum*, albeit alienation of fees be expreſsly prohibited, yet in the ſame place, as *Craig* [z] obſerveth, ſubfeudation is allowed; *and* by ſubfeudation, neither the perſonal preſtations betwixt ſuperior and vaſſal are altered, ſeeing the vaſſal continues vaſſal, and liable to all theſe; neither is the real right and intereſt of the ſuperior in the fee itſelf diminiſhed; but he hath the ſame acceſs thereto, as if there had been no ſubfeudation: yet ſubfeudation in all caſes is accounted alienation; and where alienation is prohibited, ſubfeudation is underſtood, *and alſo long location*; *much more emphyteoſis*, or feu-farm, which is at leaſt a perpetual location. For ſolving this difficulty, it muſt be remembered, that *feuda* are *localia*, regulable according to the cuſtom of the ſeveral places, and according to the nature of feudal-rights, and common feudal-cuſtoms, where ſpecial cuſtoms are not; and therefore, there is no queſtion of this point in *France*, or moſt places in *Germany*, where alienation of fees many ways is allowed: but in *Italy* and other countries, where the common feudal cuſtoms rule ordinarily according to the feudal-books, the doubt remaineth, which may be cleared thus: *Firſt*, Tho' in ſome caſes alienation be extended to location, yet it is not ſo by the common feudal cuſtoms. *Secondly*, If the ſubfeudation be a real feu-farm, whereby the feu-duty is conſiderable, and competent to entertain the vaſſal. Such ſubfeudation is thereby accounted only location; nor doth it infer recognition, being in effect no more than a perpetual location, whereby the antinomy in the feudal law is ſufficiently reconciled, that ſuch ſubfeudations are not alienations; but if the ſubfeudation be ward, blench, or in mortification, or tho' it be under the name of *emphyteoſis*; yet for an eluſory or an inconſiderable or unproportionable feu-duty, which by no eſtimation can be correſpondent to the profit of the fee, but within the half of the true worth; in theſe caſes the ſubfeudation is alienation, and inferreth recognition.

XIV. As to our cuſtoms in this point, they do agree *with* the common feudal cuſtoms, as to ſubaltern infeftments, blench, ward, or in mortification, or eluſory, or unprofitable feus **: but as to feus, by which the major part of the ward or

* Theſe words are evidently wanting, to compleat the ſenſe, and to make it correſpond with what follows. They are added in ſome meaſure upon the authority of MSS. D. and G. which read thus, "nor of deeds on "death-bed, valid, but againſt the heir tho' done by a minor."

** In place of what follows to the end of § 14. MSS read thus, "But where the feus were for a proportionable "feu-duty without diminution of the rental, which the lands paid the time of the feuing thereof, albeit not ſo "much as the lands might give at the full extent, theſe are expreſsly declared to infer no recognition, tho' not "only the moſt part, but the hail feu be ſo feued out, P 1503 c. 91." This ſtatute ſeems however to ſuppoſe, that at common law, recognition was the conſequence of ſub-feuing in the manner the ſtatute permits.

[z] *Craig*, III. 3. 22.

or fee is not taken away, tho' ſuch caſes have not occurred to be contraverted, they *ſeem* not *to* infer recognition, for if the major part be not alienated, ſubaltern infeudations, tho' blench, or in mortification, infer not recognition, when theſe rights are *disjunctim* of parts of the fee; there appears no reaſon, that the ſub-feudation of the whole, with a feu-duty equivalent to the half of the true rent, (whereby in effect the half is not alienated, ſeeing the *dominium directum* of the whole, and the profit of the half is retained) ſhould infer recognition, eſpecially now when generally fees are granted for onerous cauſes [zz].

XV. And by the ſtatutes allowing feus, *Parl.* 1457, *cap.* 71. it is provided, that the feu be ſet to a competent avail, which by the ſaid ſtatute is cleared to be without diminution of the rental; which is commonly interpreted the retour-duty, becauſe it was the public valuation and rate at that time. And by the ſaid ſtatute, ſuch feus are confirmed and declared not to be prejudged by the ward, without mention of the hazard of recognition, as not being conſequent upon ſuch feus. But this ſtatute being abrogated as to the leiges, *Parl.* 18. *Ja.* VI. *cap.* 12. all ſub-feus of ward-lands, holden of ſubjects without the ſuperior's conſent, are declared null and void: but there is no mention of recognition to be incurred thereby. And feus are only prohibited *by that act*, as being in prejudice of the overlords, who are not prejudged, if the major part be not alienated, ſeeing all ſubaltern infeftments, not exceeding the half, are allowed by law: and albeit the narrative of the act reſpects feus preceding it, yet the ſtatutory part is only as to feus granted thereafter.

The like prohibition is appointed for the King and Prince's vaſſals, *Parl.* 1633, *cap.* 16. The effect of this act, as to the vaſſals of the King and Prince, was ſuſpended till the next meeting of Parliament, and the vaſſals exempted therefrom in the interim, *Parl.* 1640, *cap.* 36. And the ſaid act was wholly repealed, *Parl.* 1641, *cap.* 58. And ſo remained until all theſe Parliaments were reſcinded, ſeeing the private rights of parties acquired thereby, by the general act reſciſſory are reſerved, *Parl.* 1661, *cap.* 15 [a]. But it hath been found, that alienations during theſe acts now reſcinded, and during the uſurpation, when wards were diſcharged, did infer recognition, if the vaſſal did not ſeek confirmation after the King's return, *Dec.* 15. 1669, *Maitland of Pitrichie*. The like was found in the recognition at the inſtance of Sir *George Kinnaird contra vaſſals of the Lo. Gray* *. The like, tho' the baſe infeftment inferring recognition was *in anno* 1643, when there was a ſtatute then ſtanding, allowing ſuch infeftments, ſeeing after reſcinding that ſtatute, no application was made to the King for confirmation, *Jan.* 7. 1676, *Cockburn* of *Ryſelaw*: but recognition was excluded where the vaſſal required the ſuperior to confirm the ſubaltern right *debito tempore*, and did purge the ſame, *upon the ſuperior's refuſing to confirm*, by procuring reſignations *ad remanentiam*, to himſelf from the ſub-vaſſals, *Feb.* 11. 1674, *Viſc. Kiſyth*. But recognition was not found againſt a pupil upon his tutors *granting* infeftment for him during the uſurpation, *July* 15 1669, *Jack*. Whereby it is clear, that theſe feus have no effect againſt the ſuperior, as to the ward or non-entry, more than tacks.

XVI. Whether the alienation be by infeftment, holden from, or of the vaſſal: there is no recognition with us, except in ward-holdings; yea, if the holding be dubious, and ſo a probable ground of error of the vaſſal, as being a payment of money in the *reddendo*, with ſervice "uſed and wont;" which tho' truly ward, yet becauſe the payment of money may render it dubious, *Craig* holdeth [aa], that it would not infer recognition; yet this will not give ground to think that alienation of lands, taxt-ward, would excuſe from recognition, becauſe ward is *there* more clear, and expreſſed *nominatim*, the caſualities thereof being taxed as the marriage and ward-duties; which taxing is but a liquidation, or location of theſe caſualities when they occur, and no alteration of the nature of the fee, and therefore in the ſaid purſuit, at the inſtance of La. *Carnegie*, *Jan.* 30. *and Feb.* 5. 1663,

* This deciſion not found.

[zz] See above, II. 3. 32. [a] See above, II. 3. 32. [aa] *Craig*, III. 3. 27.

1663, it was not found relevant to exclude the recognition, that the ward was taxed.

XVII. It is alſo clear, that alienation, whether by infeftment holden of, or from the vaſſal, not exceeding the half of the fee, inferreth not recognition, ſo much being indulged to the vaſſal for his conveniency or neceſſity; but where together, or by parcels, or by annualrent, the major part was alienated, not only that, which then was in the vaſſal's perſon falls under recognition; but as *Craig* holdeth in the fore-cited place, even the whole fee; ſo that parcels alienated validly, but without the ſuperior's conſent before, become void and return, *Feb.* 23. 1681, *Hay*. Yet this ſeems very hard, that what once was ſecure, without the fault of the proprietar, ſhould be loſt, and may yet deſerve conſideration. But tho' the vaſſal grant infeftments exceeding the half of the fee, yet if ſome of them were extinct before others were granted, ſo that there was at no time rights ſtanding together exceeding the half of the fee, recognition were not incurred. Deeds done by predeceſſors and their heirs, or authors and their ſucceſſors, are in this caſe conjoined. Upon the ſame ground an infeftment of the fee in liferent, would not infer recognition, becauſe it exceeds not the half of the value. Yea, recognition was found not incurred by granting an infeftment in warrandice; for warrandice is but a hazard in caſe of eviction, not equivalent to the half of the worth of the lands granted in warrandice, unleſs the right of the principal lands were manifeſtly defective, *Had. March* 6. 1611, *Cathcart contra Campbel.*

XVIII. Recognition is not inferred by an alienation to the vaſſal's apparent heir, by the ordinary courſe of law, as by a father to his eldeſt ſon; becauſe the fee will befall to the ſon after the father's deceaſe. Neither was it inferred by an alienation granted by a grand-father, with conſent of his ſon to his oye, who was *alioqui ſucceſſurus*, by the courſe of law, *Hope*, recognition, *Rae contra L. Kellie**. Yet recognition was found incurred by a vaſſal's infeftment to his eldeſt ſon, his heirs and aſſignies, the ſon having diſponed the major part to ſtrangers; ſeeing the father who was vaſſal, did not bind up his ſon from diſponing, by a clauſe irritant; neither did the ſon purge the alienations made by him, during his father's life, *July* 15. 1674, Sir *Charles Erſkine*. And recognition was found incurred by the infeftment of ward-lands, by a huſband to his wife in fee, failing heirs of his body; albeit the wife did not accept or make uſe of the ſame, but bruiked by a prior conjunct infeftment, *Feb.* 14. 1678, L. *Knock*. And recognition was found to be incurred by an alienation by the vaſſal to his brother, who for the time was his apparent heir, but not neceſſarily by the ordinary courſe of law, ſeeing the vaſſal might have had children of his own, and ſo his brother could not be called *alioqui ſucceſſurus*, unleſs it were by accident, *Spotſ.* recognition, *King's Advocate and his ſon contra E. Caſſils and L. Collane*. The like, *July* 29. 1672, Lo. *Haltoun*.

XIX. It is more queſtionable, whether recognition is incurred by a conditional alienation, bearing, " if the ſuperior conſent, or ſaving the ſuperior's right;" *Craig* following *Baldus* in the ſaid *lib.* 3. *diegeſ.* 3. § 26. declareth, that if ſuch clauſes be inſert *bona fide*, they infer not recognition; but contrarywiſe, if they be done fraudulently, as when the vaſſal ſeiſeth and poſſeſſeth a powerful perſon, whom the ſuperior cannot eaſily diſpoſſeſs, or his enemy, concerning whom there can be no doubt of the ſuperior's will; or if the ſuperior have declared his will in the contrary. But for further clearing of this point, diſtinction would be made of the nature and tenor of the clauſe, which may either be ſuſpenſive or reſolutive of the property or fee; in the former caſe, tradition is only made of the poſſeſſion, but the property is ſuſpended till the ſuperior's will be known; as if the vaſſal diſpone and poſſeſs another without ſeiſin, there could be no recognition; or tho' he poſſeſs him by an inſtrument of poſſeſſion, bearing expreſsly, " that he ſhould have " no

* By this deciſion as marked by *Hope* the contrary of what is here ſtated was determined. The learned author's opinion is however ſupported by a later deciſion, *March* 17. 1687, *Forbes contra Thoirs* obſerved by *Fountainhall*.

" no right to the property till the ſuperior's conſent were obtained ;" this were a ſuſpenſive clauſe, like to the *addictio in diem* in the civil law, by which only poſſeſſion and not the property was tranſmitted for that time ; and ſo till the purification of the condition, it could be no alienation : but when the clauſe is only reſolutive, not hindering the tranſmiſſion of the property, but reſolving or annulling the ſame, tho' tranſmitted ; in ſuch a caſe, ſuch clauſes do not exclude recognition, becauſe there is truly there an alienation, without the ſuperior's conſent, which is only to be diſannulled by his diſſent ; much leſs can ſuch general clauſes as *ſalvo jure cujuſlibet*, or *ſalvo jure ſuperioris*, avoid recognition.

XX. Recognition was found not excluded or burdened by inhibition againſt the ward-vaſſal, before the gift and declarator of the deed, inferring recognition, ſeeing the creditors inhibiting did not annul the infeftment ſimply, but in ſo far as it may be prejudicial to the ground of the inhibition, *and the creditor inhibiter did not purſue reduction before declarator of recognition.* *Dec.* 16. 1680, *Hay*, But now rectified by act 15. *Parl.* 1686.

XX. Neither was recognition excluded, becauſe the deed inferring recognition, was done when the diſponer was drunk, not being to ſtupidity, impeding reaſon, *July* 29. 1672, Lo. *Haltoun.*

XXII. To come now to the ſuperior's conſent, it may be either antecedent, concomitant, or conſequent to the alienation ; and it may be either expreſs or tacit, all which will be ſufficient to avoid recognition, albeit many of them will not be ſufficient to make a valid infeftment, if the ſame be granted by the vaſſal, to be holden from him of the ſuperior, which by our cuſtom is null till it be confirmed, *whereunto anterior conſent or homologation will not ſuffice* ; *Craig* in the foremention*ed place* (III. 3. 31.) relates the opinion of the feudiſts, whereunto he agrees, that if the vaſſal's fee be granted to him, his heirs and aſſignies whatſoever, that thereby there is granted, a general antecedent conſent of the ſuperior to his vaſſal, to alienate or aſſign to whom he pleaſeth : but the contrary was found in the caſe of the *La. Carnegie contra Lo. Cranburn*, *Feb.* 5. 1663, and that the diſpoſition to aſſignies did only import a power to aſſign the diſpoſition, before infeftment taken thereupon [b].

XXIII. There is no queſtion but the ſuperior's confirmation is ſufficient ; even the King's confirmation, tho' without a *novodamus*, albeit it may paſs in exchequer, without the knowledge and advertency of the recognition incurred, it was found ſufficient, being done before the donatar of recognition was infeft, *Hope*, recognition, *Rae contra L. Kellie.* Which confirmation doth ſecure againſt recognition, falling by that infeftment confirmed ; but doth not ſecure againſt recognition upon other *prior* ſubaltern infeftments not confirmed, which are not conſidered to be known by the King or his officers, without a *novodamus* ; and ſo imports but a paſſing from recognition by the infeftment confirmed, but not to import an abſolute ratification *pro omni jure*, *Feb.* 6. 1673, *Lo. Haltoun* *. The like was found *Feb.* 23. 1681, *Hay.* And a donatar of recognition, having granted precept of *clare conſtat*, acknowledging the vaſſal's right, was found thereby excluded ; albeit the precept did bear, to be in obedience, of precepts out of the chancellary, yet bore *quoniam clare conſtat*, &c. *June* 24. 1668, *Gray.* But the ſuperior's conſent is not inferred by granting charters for obedience upon appriſing, tho' before any infeftment of the donatar, *Hope*, recognition, *L. Lugtoun contra L. Lethindie.*

XXIV. The ſuperior's conſent by homologation [bb], is as ſufficient to avoid recognition, as if it were an expreſs conſent ; ſo if the ſuperior require the new vaſſal or ſub-vaſſal, to perform the ſervices due out of the fee, *or if he ſhould receive a reſignation*

* This deciſion is contrary to that obſerved by *Hope*, *Rae contra Kellie*, where it was found, that the confirmation of an infeftment, paſſed in exchequer, without a *novodamus*, but before infeftment on a gift of recognition, did exclude the recognition, incurred by prior deeds of alienation.

[b] See above, II. 4. 32. *pr.* [bb] See above, I. 10. 11.

reſignation of the fee made by him in favour of another; for thereby he acknowledges him vaſſal, as is obſerved by *Craig*, (III. 3. 35.) in the caſe betwixt the *L. Calderwood* and *Maxwel* of *Aikenhead*. Or if the ſuperior ſhould purſue the new vaſſal for the avail of his marriage, liferent-eſcheat, or other caſuality of the ſuperiority.

XXV. Recognition being incurred, ſo openeth and returneth the fee to the ſuperior, that no debt or deed of the vaſſal, doth burden the ſame, but theſe only which before that time were eſtabliſhed by conſent of the ſuperior; or authority of law, as appriſings, adjudications, feu-farms, *&c.* conform to the ſeveral acts of Parliament. But even ſuch being conſtitute after the alienation, whereby recognition is incurred, albeit *bona fide*, for onerous cauſes, before any diligence or declarator of recognition; yet they fall in conſequence with their author's right, *Had. Feb.* 4. 1610, *E. Buckcleugh contra Scot.* Recognition excludeth all tacks ſet by the vaſſal without the ſuperior's conſent, whether *prior* or *poſterior*, unleſs ſuch as are ſet for the utility and profit of all parties intereſted, having no advantage therein, as before hath been ſhown in the matter of ward and non-entry; for though tacks be eſtabliſhed by acts of Parliament againſt purchaſers, yet they are not ſo againſt ſuperiors.

XXVI. Recognition doth alſo exclude ſervitudes *introduced* upon the fee, by the vaſſal, without the ſuperior's conſent, as thirlage, *&c.* yet this will not reach ſervitudes, introduced by long cuſtom or poſſeſſion, and ſtrengthened by preſcription, wherein the conſent of all parties having intereſt, is preſumed, that they can never come in the contrary; for tho' it was moſt proper to the vaſſal to look to his fee, yet the ſuperior doubtleſs might have interrupted, which would have been ſufficient for his own intereſt. And preſcription being introduced to ſecure property, and put an end to pleas, will not be infringed but upon evident grounds, *Jan.* 26. 1681, *Edie* [c].

XXVII. Seeing recognition is excluſive of all intereſts depending upon the vaſſal; therefore all parties having intereſt may compear and defend, *Hope, de actionibus in factum, L. Lugtoun contra L. Lethendie.* But there is no neceſſity to call any ſave the vaſſal, ſeeing all other rights fall *in conſequentiam*, as was found in ſubaltern rights in the ſaid caſe, *E. Buccleugh contra Scot.* Tho' recognition be ordinarily by way of action, declaring the deed upon which it is incurred; yet a donatar of recognition being infeft thereupon, *and having reſigned in favour of another who was likewiſe infeft: this ſingular ſucceſſor of the donatar* was found to have ſufficient intereſt to purſue *a third party* ſucceeding in the vice *of a tenant*, in reſpect of a prior decreet of removing *againſt that tenant obtained*, upon the donatar's infeftment on the gift of recognition, without any preceeding declarator, *March* 22. 1623, *L. Hunthill.*

XXVIII. In declarators of recognition, the ſuperior's gift is a ſufficient title, without inſtructing the ſuperior's right, unleſs he be diſclaimed, or the vaſſals be ſingular ſucceſſors: but the King's gift is abſolutely ſufficient; and there will be terms aſſigned for proving the alienation of the major part, and incident diligences againſt all havers, for production of their infeftments, *ad modum probationis, Feb.* 17. 1671, *Gordon.* And whereas gifts of recognitions bear the particular deeds inferring the vacancy and return of the fee in the King's hands, becauſe general gifts are not allowable, the extracts of ſeiſins are ſuſtained *in initio litis*, to inſtruct theſe deeds; but warrant was granted to the defenders to improve the ſeiſins, or warrants thereof, and thereby to call for the principals, *Jan.* 26. 1681, *Edie.* And diligence by horning was granted to the defenders in the recognition, for production *of* the ſeiſins and warrants, *Feb.* 23. 1681, *Hay.* And declarator was ſuſtained upon production of the gift, tho' the donatar was not infeft; and tho' the heir whoſe right was in queſtion, was minor, and tho' his authors bound in warrandice were not called: for the privilege of minority hath no effect as to the ſuperior [d], and the defender ought to intimate the plea to his author, *Jan.* 28. 1681, *L. Lun.*

XXIX.

[c] See above, II. 7. 3.

[d] See above, § 12. *h. t.*

XXIX. Diſclamation is when the vaſſal denieth his ſuperior to be his ſuperior, which is diametrically oppoſite to that acknowledgment, which is neceſſarily implied in the nature of all fees, as there is in it the greateſt ingratitude; and therefore diſclamation, as being much more favourable upon the part of the ſuperior, and odious upon the part of the vaſſal, than recognition, is not reſtricted to proper fees by ward-holdings, but taketh place in all fees: and that not only when the vaſſal diſclaimeth the ſuperior as to the whole, or greater part; but if he diſclaim him to be ſuperior in any part of the fee, he loſeth the whole.

Diſclamation taketh no place if it proceed through ignorance upon any probable ground, which may ſeveral ways occur; Firſt, as to the whole fee, when the caſe is not betwixt the firſt ſuperior and the firſt vaſſal, but betwixt their ſucceſſors; as if the vaſſal ſhould deny a perſon to be his ſuperior's heir in that ſuperiority, through any doubtfulneſs of his being lawful heir, or of his being that heir to whom the ſuperiority is provided, as being to heirs-male or of tailzie: but much more when the ſuperior is ſingular ſucceſſor to the firſt ſuperior, or the vaſſal is ſingular ſucceſſor to the former vaſſal; in all which there be frequent and probable grounds of doubt and miſtake. Secondly, The ſame ground of doubt may be when the queſtion is about ſome part of the fee, as whether ſuch a piece of land, which is in queſtion, be a part of the fee or not; or as when the fiar hath ſeveral conterminous tenements, holden of diverſe ſuperiors, if he affirm any parcel not to be a part and pertinent holden of the ſuperior acclaiming, but of the other; in that caſe the vaſſal's not acknowledging the ſuperior, will not be accounted diſclamation, if the vaſſal have an infeftment, to which the ground in queſtion may be referred; but if he have none, and yet poſſeſs, it is of no import to excuſe from recognition: and therefore, tho' ordinarily it be held, that a ſuperior purſuing his vaſſal for any duty or caſuality, needs not inſtruct that he is ſuperior, or that the defender is his vaſſal, but that it proves itſelf, unleſs he diſclaim; as was found, *Hope*, ſuperior, *Viſcount of Stormont contra Grant* [dd]: *yet* that muſt be underſtood when the caſe is clear, and *even* when he is directly diſclaimed, yet he may chuſe either to make uſe of the diſclamation, or inſtruct his title, and ſo proceed, *March* 26. 1628, *Douglaſs*. The main queſtion is, whether diſclamation can be otherwiſe than judicially, *Craig* (III. 5. 3.) anſwers the caſe, *that* as to extrajudicial words, "Theſe are not ordinarily noticed in moſt caſes;" as extrajudicial confeſſions and the like; but as to extrajudicial deeds of the vaſſal, as if he ſhould take infeftment from any other than his ſuperior, it would be as real a diſclamation as any verbal one judicially could be; but under the ſame limitation, if it were done of knowledge, and out of contempt of the ſuperior.

XXX. Purpreſture or purpriſion, is the vaſſal's going without his bounds, and incroaching upon the property of his ſuperior; for purpriſers ſignify precincts and marches. The ground of it is from the fidelity and gratitude the vaſſal oweth to the ſuperior; and therefore ſhould not invade his inheritance; but this is not extended to incroachments upon the ſuperior's commonty, as *Craig* (III. 5. 9.) relateth the opinion of the lawyers in his time, in a purpriſion moved by the conſtable of *Dundee* againſt the town of *Innerkeithing*. But where the ſuperior hath the right of property, *yet* burdened and barred with a right of common paſturage, acquired by the vaſſal by conſent or preſcription, which tho' it marreth the effect of the ſuperior's property, ſo that he cannot Till or manure the ſame in prejudice of the paſturage, yet he remains direct proprietar; and if coal were found in that ground, it would be his alone; in which caſe, if the vaſſal ſhould rive out and labour that ground, whereof he got common paſturage, it would be purpriſion, as is clear in the caſe of the common moors, diſponed to none by the King in property; and therefore yet belonging to his Majeſty in property, the riving out, or appropriating whereof, is declared purpriſion, Parliament 1600, *cap.* 5.

[dd] See above, II. 4. 21.

Purpreſture muſt alſo be a known and manifeſt incroachment, as if a vaſſal ſhould exclude a ſuperior from a conſiderable part of a tenement; but when it is about marches it is not ſuſtained, unleſs they be clearly manifeſt by march-ſtones; or that there hath been an antecedent cognition of the marches; and therefore, the action is either turned into a cognition, or at leaſt before anſwer, a commiſſion is granted to cognoſce. Purpreſture is thought to be incurred by incroachment upon the highways, and public rivers, as belonging to the King; but it could be inferred againſt no other than his vaſſal; and it being ſo ordinary by courſe of time to change the high-ways, or rather for the high-ways to change, when there becomes any impaſſibleneſs therein, there are other ſtatutes appointed for ſecuring thereof upon far leſs certification than purpreſture; ſo that I conceive it could hardly be inferred upon that ground. Purpreſture was only found competent to be cognoſced by barons, comprehending ſuperior dignities; but by none of their vaſſals or ſub-vaſſals, *Parl.* 1477, *cap.* 79. But now it belongs only to the juriſdiction of the Lords of Seſſion, as all other recognitions do.

XXXI. *Craig* hath largely and learnedly treated of other feudal delinquences; adducing the feudal cuſtoms of the neighbouring nations, and the opinions of many learned feudiſts thereupon, both generally, and particularly enumerating the moſt ordinary delinquences, for which they hold vaſſals to loſe their fees; he doth alſo give his own opinion, how far theſe or the like would be ſuſtained with us, but adduceth little what had been ſuſtained. But this much in general, that *mitiores pœnæ nobis ſemper placuere:* and in concluſion, *lib.* 3. *dieges.* 6. § 21. he makes ſuperiors loſe their ſuperiority, and the ſame to befall to their vaſſals, for the ſame delinquences, for which the vaſſals loſe their fee, to their ſuperiors, except what concerns the honour and reverence due by vaſſals to their ſuperiors; which therefore will not conſiſt with attributing the feudal delinquences to ingratitude, which can hardly be underſtood to give riſe to the ſuperior's loſing his ſuperiority; and therefore it muſt be from that mutual friendſhip and fidelity betwixt the ſuperior and vaſſal, ariſing from the feudal contract. Since his time there hath ſcarce any thing been obſerved in relation to recognition, or amiſſion of infeftments upon feudal delinquences, except what concerns alienations of proper fees, or ward-holdings, without the ſuperior's conſent; or what may concern recognition, as it is implied in forfeiture: ſo that we are yet much left to infer the feudal delinquences, reſolutive of infeftments from the nature of theſe rights: and tho' *Craig* hath not gone near the length of foreign feudiſts, in aſſigning the ſpecialities reſolving fees; yet if we ſhould go his length, there would be found few unquarrelable rights of ſuperiority, or property in the kingdom, but which might, in a conſiderable time, give ground to extinguiſh the right, either of the ſuperior or vaſſal: and ſince no ſuch thing hath been moved upon either part, the general acquieſcence of the nation muſt make theſe delinquences reſolutive of infeftments, much narrower, and much more upon the vaſſal's part than the ſuperior's; for our cuſtom hath never given the vaſſal the right of the ſuperiority, upon the delinquences of the ſuperior.

All fees, yea, and liferents by infeftments, do neceſſarily imply an acknowledgment of the ſuperior, and fidelity to him, and thence only, and not from gratitude ought the cauſes of diſſolving fees be deduced: for tho' pure donations are diſſolved by atrocious ingratitude, yet the moſt proper fees were never pure donations, but were from innominate contracts, *do ut facias*, and the ſervices due thereby were not by way of gratitude, but by way of ſpecial contract: and there is moſt of pure donation in the moſt improper fees, ſuch as blench and mortification, which are almoſt allodial; and yet the feweſt reſolutive delinquences are in theſe; and feu-farms were at firſt granted for cultivating barren grounds, and paying a feu-duty, or canon out of them; and where they have a conſiderable rent, they are far from being purely gratuitous, and are rather perpetual locations. And in moſt fees of all kinds *there* are not only caſualities *and* profits, *but they are ordinarily granted by way of ſale for a competent price*; and therefore, the

the delinquences reſolving them, ſhould neither be extended nor eſteemed equal, but ſhould be much more ſuſtained in proper fees, or ward-holdings, importing perſonal or military ſervice, than in improper fees. Yet all infeftments being in the terms and tenor of fees, they muſt have a *reddendo* and acknowledgement of the ſuperior, and fidelity too, not only as obligements, but as reſolutive conditions implied therein; and therefore, wilful and open diſowning the ſuperior by diſclamation, or infidelity in breach of truſt, ſhould from the nature of the feudal contract reſolve the ſame.

XXXII. Tho' breach of truſt be a general term, the extent whereof is not determined; yet certainly it muſt import the vaſſal's being actor or acceſſory in conſpiring or in taking away the life of the ſuperior, or mutilating or wounding him, or in taking away his right of ſuperiority: under which acceſſion, may be juſtly comprehended, the not revealing to him of theſe hazards; but this would not reach to the revealing of any loſs or detriment the ſuperior might have in his other eſtate, or the concurring or acting againſt him therein. It may alſo be extended to the conſpiring, or acting, or not revealing theſe things which might infer upon the ſuperior infamy, equiparate to death or wounds; but it ſeems not to import a duty in the vaſſal to give counſel to his ſuperior, or not to reveal his ſecrets, neither inferring life, limb, nor fame; for tho' theſe be acts of gratitude and friendſhip, yet they are not implied in the fidelity of all vaſſals, but only ſuch as owe military and perſonal ſervice.

I ſhall not determine how far breach of truſt in improper fees, could extend to the wife, children, and family of the ſuperior. But proper and military fees by ward-holding, do not only import fidelity, but aſſiſtance and council to the ſuperior, by which the vaſſal can be acceſſory to no atrocious deed againſt the life and blood of the ſuperior, *nor to* [e] any infamy may befal him, or any great detriment in his eſtate: and ſo will reach to deeds of hurt or diſgrace to his wife or children by adultery, fornication, or atrocious violence upon their perſons, or attempts thereunto; and may alſo extend to the revealing of the ſuperior's ſecrets, or not defending him againſt his enemies, or ſuch as attack him, or deſerting him in that caſe; and in caſe of a neceſſary flight, by overpowering, in not crying for help and relief; and in lawful war, in not concurring with him, or deſerting him, while with any probability of prevailing, he ſtood in fight, if the vaſſal were then near him; but it will not import his concourſe *active* in private quarrels by force of arms, which are not warrantable.

XXXIII. In all caſes the ignorance of the vaſſal not being affected, or his weakneſs, will excuſe theſe delinquences, and (*alſo*) whatever he acteth in ſelf-defence, or upon provocation of the atrocious injury of the ſuperior, or by public authority, or in the ſervice of his prince, or any anterior ſuperior in ward-holding: or *when* [ee] the atrocious deeds *are* [f] paſt from by the ſuperior, by owning his vaſſal after the knowledge thereof, or by a conſiderable time's forbearance to quarrel the ſame; eſpecially when in the mean time, either the ſuperior or vaſſal dies; *but* [g] tho' death obliterates crimes as to the puniſhment; yet the right ariſing to the ſuperior in the fee, from the delinquence, as a reſolutive condition, is not excluded by the vaſſal's death, if the ſuperior were ignorant of the fact, or not in capacity to vindicate the ſame through public calamity, or his pupilarity or abſence; but by the mutual friendſhip and ſtrict union betwixt ſuperior and vaſſal, ſmall evidences will import the paſſing by former delinquences, eſpecially when not queſtioned, during the life of both parties.

There are multitudes of ſpecialities propoſed by *Craig*, as delinquences reſolving fees, not only in relation to the ſuperior, his perſon and family; but alſo of invading his houſe, beſieging the ſame, or entering it by force, or invading his property, (which is the ground of purpryſion, acknowledged by our cuſtom) or by denying or refuſing to ſhow the ſuperor the marches of the fee, or denying any part

[e] F. but againſt. [ee] F. unleſs. [f] F. be. [g] F. for.

part of it to be holden of him; or not ſhowing him his holding and inveſtiture, being ſolemnly called to that purpoſe (which takes no place with us; for our ordinary cuſtom for ſuperiors as well as others, is to purſue improbations of their vaſſal's rights, wherein the certification is not the loſs of the fee, but the preſumptive falſity of the writs) or the denying to do juſtice to ſuperiors; but alſo in relation to the fee, if he waſte or deteriorate it: yea, in relation to the vaſſal's own perſon, as if he fall in inceſt, or if he kill his brother, or commit any parricide, or if he contract friendſhip with the enemies of his ſuperior: and generally, whatever may make him unfit or unworthy to attend his ſuperior, or to be in his court: But none of theſe are implied in the fidelity of any vaſſal. There be alſo ſpecial grounds of reſolution or extinction of fees by the particular nature or tenor thereof, as feus become extinct *ob non ſolutum canonem*, and other fees are extinct by reſolutive clauſes, as to both which we have ſpoken already B. II. Title 3. *Infeftments of property*. § 51. 58.

Craig [gg] doth hold, that by the delinquence of vaſſals, conqueſt, or *feuda nova*, become extinct and return to the ſuperior; but heritage, or *feuda vetera*, do but become extinct as to the delinquent vaſſal, and his deſcendents, and is not returned to the ſuperior, but devolved to the next collateral of the delinquent vaſſal, deſcending from the firſt vaſſal, who would have ſucceeded, if the delinquent vaſſal had died without iſſue, and who muſt enter heir to the delinquent vaſſal's predeceſſor; but in this the intereſt of the ſuperior is too far reſtricted; for we have no cuſtom nor tenor to enter any perſon heir to a defunct, while a nearer heir is exiſtent, whatſoever his delinquence be, except parricide, *Parl.* 1594, *cap.* 224. He doth alſo move this queſtion [h], that if the vaſſal have committed a feudal delict againſt the ſuperior, and a public crime inferring forfeiture, whether the fee would fall to the King, or to the ſuperior, or if the firſt ſentence of forfeiture, or recognition would prevail: but does not determine it. Yet the firſt delinquence is ſufficient to extinguiſh the fee, if inſiſted in, and muſt give the preference; for the ſentence of forfeiture or recognition is but declaratory, and hath effect, not from the ſentence, but from the deed inferring it [hh]. There is no difference, whether the delinquence inferring recognition, was before the vaſſal was actually entered, or after; but it is more queſtionable, whether the recognition would be incurred by the deeds of the aparent heir in his predeceſſor's life; which could have no effect as to (*the deeds of*) collaterals, who are not *alioqui ſucceſſuri*, ſeeing they may be excluded by a deſcendent, which in men is always in hope: and if the heir apparent die before his predeceſſor, it can have no effect to exclude either his collaterals or deſcendents; and it is more probable, that tho' the heir apparent ſhould ſurvive, he would not be excluded, ſeeing feudal delinquences are now ſo little extended.

XXXIV. It hath been much and long debated, and is not yet decided, whether recognition can be incurred for any atrocious deeds done by ſub-vaſſals, whereby the ſuperior might claim the right of the ſub-vaſſal's fee to fall to him by recognition; or, whether recognition can only be incurred by the deeds of the immediate vaſſal. There was a caſe in queſtion, where a ſub-vaſſal roſe in rebellion againſt the King, whereby his fee, as all his other rights, were confiſcated to the King by forfeiture, which could but confiſcate them as they were in his perſon, with the burden of all real rights of liferent, annualrent, or other ſubaltern infeftments of the forfeited perſon: but if the forfeiture of the ſub-vaſſal did alſo comprehend recognition, the ſub-vaſſal's fee would fall to the King, and belong to his donatar, without any real right or burden contracted by the forfeited perſon, except ſuch as were confirmed by the King, either by a ſpecial confirmation, or by that general conſent of the King, inviting all his ſubjects to ſet their wardlands feu, by the act of *Parl.* 1457, *cap.* 71, (which would preſerve ſuch feus, being conſtitute before the act of *Parl.* 1633, *cap.* 16. reſcinding that act as to the

[gg] *Craig*, III. 6. 15. [h] *ibid.* § 17. [hh] See above, § 25. *h. t.*

the vaſſals of the King and Prince,) as was found, *Feb.* 12. 1674, M. of *Huntley*. *Nov.* 16. 1681, *Campbel*. And therefore, if recognition were implied in forfeiture, in that caſe (*of a ſub-vaſſal*) it behoved to infer a general rule, that recognition might be incurred by all atrocious deeds againſt gratitude and fidelity, committed not only by the immediate vaſſal, but by all ſubaltern-vaſſals, and would not only be competent to the King, upon deeds of treaſon committed againſt him by his ſub-vaſſals, but, by all deeds of atrocity done againſt any other ſuperior by his ſub-vaſſals; as if his ſub-vaſſal ſhould kill, wound or betray his ſuperior; ſo that the queſtion behoved to return, whether there were any feudal contract or obligation of fidelity betwixt the ſuperior and his ſub-vaſſals; for if that were, then vaſſals might fall in recognition by ſuch deeds, not only againſt their immediate ſuperiors, but againſt all their mediate ſuperiors, tho' never ſo many. For tho' the caſe in queſtion be moſt odious and unfavourable, being rebellion; yet it hath its proper puniſhment introduced by law and ſtatute; whereby the rebel loſeth his life, lands and goods to the King, to whom all his ſubjects owe fidelity, as ſubjects, tho' all do not owe the feudal fidelity as vaſſals; and therefore, as in liferent-eſcheat, the fee returneth to the King, or any other ſuperior, with all its hail burdens, it ſeems ſo to return in the forfeiture of ſub-vaſſals: yet if recognition take place as to the King, it muſt likewiſe fall to all other ſuperiors, whatever way the land be held, whether ward, feu, blench or mortification (*and muſt cut off all real burdens upon the land*,) if they have not a confirmation or conſent of the ſuperior, anterior to the deeds inferring recognition. We ſhall not therefore anticipate the public determination of this queſtion[hh]; if cuſtom hath determined it, that will take place: for all feudal rights are local, but there hath not yet appeared any caſe, by which a donatar by his gift and preſentation, being infeft in the fee of the King's ſub-vaſſal forfeited, has excluded thoſe who had real rights from the forfeited perſon before the treaſonable fact, tho' much hath been diſputed upon the act of *Parl.* 1584, *cap.* 2. Concerning the quinquennial poſſeſſion of forfeited perſons, eſpecially from the laſt clauſe thereof, bearing, that no perſon preſented by the King to feu-lands forfeited, nor any vaſſal, of any feuer forfeited, ſhall be compelled to produce the acquittances of their feu-mail, or annualrents of their forfeited lands of any year preceeding the forfeiture; which doth clearly acknowledge, that when the feuer's right is forfeited, his ſub-vaſſal's right is not forfeited *.

* The queſtion treated of in this ſection is, whether the *forfeiture* of the King's ſub-vaſſals is to be conſidered as a *recognition* of their feus, or ſimply as a puniſhment introduced by law which affects ſub-vaſſals as *ſubjects* in general, and not as *feudal-ſubjects*. It is allowed, that the forfeiture of the King's immediate vaſſals is to be conſidered in the ſame light as recognition, and the forfeiture is not burdened with ſubaltern rights granted by the vaſſal unleſs confirmed; but the learned Author here argues that the forfeiture of ſub-vaſſals ought to be conſidered in a different light, and ought to be ſubjected to all real burdens impoſed by the ſub-vaſſal. He gives his opinion more expreſsly upon this point, below, III. 3. 31. In the deciſion here quoted, *Feb.* 12. 1674, *M. of Huntley*, this doctrine is expreſſed in the following words, "*Forfeiture* of the King's immediate "vaſſal being upon the breach of his fidelity, is in effect recognition, whereby the fee returns without the "burden of any deed of the forfeited vaſſal except ſuch as are preſerved by the Statute 1457. *c.* 71. But for-"feiture of thoſe who are not the King's immediate vaſſals, confiſcates their ward-holdings as a *penal ſtatute*; "but with the burden of all ſubaltern rights and deeds of the forfeited perſon." By act 33. *Parl.* 1690. forfeiture in all caſes is declared not to hurt vaſſals or creditors, and by act 7. *Ann. c.* 20. the *Engliſh* law of treaſon is appointed to take place in *Scotland*.

[hh] See below, III. 3. 31.

TITLE XII.

Preſcription, where, of Uſucapion, long and ſhort preſcriptions, *&c.*

I. *Preſcription diſtinguiſhed and deſcribed.*
II. *Uſucapion.*
III. *The ſeveral times required to Uſucapion or preſcription, by the* Roman *law.*
IV. *Requiſites to preſcription.*
V. Bona fides *requiſite to preſcription.*
VI. *Whether he who doubteth of his author's right, be in* bona, *or* mala fide.
VII. *Evidences of* mala fides.
VIII. *The title requiſite to preſcription.*
IX. *The motives inductive of preſcription.*
X. *Exception, where the preſcription took no place by the civil law.*
XI. *The common rule of preſcription with us.*
XII. *The beginning of preſcription of perſonal rights, with the extenſions thereof.*
XIII. *Preſcription of moveables.*
XIV. *Preſcription is reckoned* de momento in momentum per tempus continuum.
XV. *Preſcription of heritable rights.*
XVI. *Preſcription is not extended againſt the right of ſuperiority.*
XVII. *Preſcription runs not for tenants againſt their maſters.*
XVIII. *Preſcription runs not againſt minors.*
XIX. *In our long preſcription* bona fides *is not required.*
XX. *The titles requiſite in preſcriptions of heritable rights.*
XXI. *Long preſcription ſecures wadſets, infeftments for ſecurity, teinds and long tacks.*
XXII. *How far teinds can preſcribe.*
XXIII. *Preſcription extends to patronage and offices.*
XXIV. *And to thirlage and all ſervitudes.*
XXV. *Preſcription excludes all actions of reduction and declarator, and is effectual againſt the King.*
XXVI. *The ſeveral ways of interruption of preſcription.*
XXVII. *The way of interruption by the King, as to the rights of the Crown.* Contra non valentem agere non currit praeſcriptio.
XXVIII. *Annual preſcription of the privilege of apparent heirs.*
XXIX. *Triennial preſcription againſt the creditors of defuncts, for the creditors of the heir.*
XXX. *Triennial preſcription of ſpuilzie, ejection, intruſion and ſucceeding in the vice, merchants-compts, houſe-mails and removings.*
XXXI. *Quadrennial preſcription of the privilege of minors, to reduce* intra quadriennium utile.
XXXII. *Quinquennial preſcription of arreſtments, miniſters ſtipends, multures, rents of tenants removed, and legal reverſion of ſpecial adjudications.*
XXXIII. *Septennial preſcription of old appriſings and ſummonſes for interruption.*
XXXIV. *Decennial preſcription of appriſings and general adjudications.*
XXXV. *Preſcription of twenty years of holograph bonds, miſſives, and ſubſcriptions in compt-books without witneſſes.*

PReſcription is the common extinction and aboliſhing of all rights, and therefore is reſerved here to the laſt place; the name and nature whereof we have from the civil law, wherein preſcription is ſometimes largely taken for any exception,

exception, but hath been appropriated to the moſt common exception in all caſes, whereby all actions and cautes are excluded, by courſe of time; and ſo preſcription had no further effect, than to maintain the poſſeſſor in poſſeſſion by exception, but not to recover poſſeſſion, being loſt, and could not conſtitute the right of property.

II. *And* in this, Preſcription did chiefly differ from uſucapion, by the ancient *Roman* law, that uſucapion did conſtitute property, and therefore is defined by *Modeſtinus*, *l.* 3. *ff. de uſucapione*; *adjectio, vel acquiſitio dominii per continuationem poſſeſſionis temporis lege definiti.* To which deſcription the name doth agree; for, *uſucapere eſt capere ex uſu aut poſſeſſione*, to take or acquire by uſe or poſſeſſion; but every poſſeſſion was not ſufficient, unleſs it were a poſſeſſion as proprietar, or for the poſſeſſor's own uſe only: ſo detention of any thing in the name, and for the uſe of another, and for the poſſeſſor only in ſecurity, as a pledge or wadſet, cannot conſtitute property.

III. As to the time appointed for uſucapion, moveables are acquired by continual poſſeſſion for one year, *Inſt. de uſucapion. in principio.* And immoveables being in *Italy* by the ſpace of two years: other immoveables by the ſpace of ten years, againſt thoſe in the ſame province; and twenty years againſt thoſe out of the ſame province, *Auth. malæ fidei*, *C. de praeſcript. longi temporis.* From which common rule, ſome caſes of greateſt moment were excepted; as firſt, public rights belonging to emperors and kings, which as all do agree cannot be acquired by uſucapion or preſcription in leſs than thirty or forty years, and many think by no leſs than an hundred years, or immemorial poſſeſſion. Secondly, Things belonging to cities, which in ſome caſes could not be preſcribed without an hundred years poſſeſſion, at leaſt without thirty or forty years. Thirdly, Things belonging to the church, againſt which no other can acquire by preſcription in leſs than forty years; and againſt the church of Rome by ſpecial privilege, by the ſpace of an hundred years only. The recent Roman law hath taken off all differences betwixt uſucapion and preſcription, *tit. C. de uſucap. tranſ.* whereby in either caſe property is acquired: yet in the ordinary acceptation, preſcription, which is ſhort in moveables, is commonly called uſucapion; but we make only uſe of the name of preſcription for both.

IV. In preſcription or uſucapion amongſt the Romans, were required three things, continuation of poſſeſſion uninterrupted, *bona fides*, and a title, beſides the kind of poſſeſſion, and time before mentioned. As to the Firſt, preſcription is unqueſtionably interrupted by real interruption or diſcontinuation of poſſeſſion; it is alſo interrupted civilly, by *litis-conteſtation*, proceſs, *&c.*

V. As to *bona fides*, or innocent poſſeſſion required in preſcription, it is commonly agreed, that it is requiſite at the beginning of the poſſeſſion in ſhorter preſcriptions, but that it is preſumed in the longeſt preſcription. The civil and canon law differ in this, that the civil law requireth only *bonam fidem* at the beginning, ſo that if any perſon acquire any thing from him, whom he believeth to be the owner thereof, and ſo believing beginneth to poſſeſs, tho' thereafter he underſtand that his author was not the true owner, yet preſcription doth proceed; but by the canon law it proceeds not: but if at any time before preſcription ended, he knoweth the thing belonged to another, preſcription is impeded; yea, tho' preſcription were ended, if the right of another appear, moſt of the canoniſts hold, that *in foro conſcientiæ*, the poſſeſſor is obliged to reſtore, unleſs the knowledge and forbearance of the owner, doth infer or preſume a dereliction of the thing, or conſent, which takes no place in the caſe of the ignorance, or error of the owner.

VI. In either caſe it is contraverted, whether he who doubteth of his or his author's right be *bonæ fidei*, or *malæ fidei poſſeſſor.* The common ground in which all agree, is that the poſſeſſor's credulity and belief of his own and his author's right makes *bonam fidem*, and his knowledge of the right of another, *malam*, which ſeemeth to infer, that he who doubteth, muſt be *in mala fide*, becauſe he believeth

believeth not his author to have had right; doubt and belief being contraries: and upon the other part, he who only doubteth, cannot be ſaid to know the right of another. The moſt rational conciliation is by this diſtinction, that doubting being like the dubious balance, when it inclineth more to the belief of the poſſeſſors, and authors right, than of the right of the other; the denomination and effect is taken from the ſtronger, and he is ſaid to believe his own right, and can no ways be ſaid to believe the right of another, whoſe doubtful opinion doth rather incline to his own right than the others; and contrarywiſe, when his opinion inclineth more to believe another's right than his own.

VII. Theſe things being hidden acts of the mind, it is very difficult to know who is in *bona fide* or *mala fide*; but *bona fides* is preſumed, unleſs a contrary probation, or vehement preſumption be for *mala fides*, of which *Menochius*, *lib.* 2. *de arbitrar. Jud. quæſt. caſ.* 225. relateth many, whereof theſe are *the* chief; Firſt, He who poſſeſſeth without a title is ever preſumed *malæ fidei* poſſeſſor. Secondly, Common fame in the neighbourhood, that the thing acquired belongs to another. Thirdly, If it be intimated or declared to the acquirer, before he acquired it that it was another's. Fourthly, The extrajudicial confeſſion of the acquirer, or of witneſſes that the thing belonged to another. Fifthly, If the acquiſition be not with obſervation of the ordinary ſolemnities. Sixthly, If the acquiſition be from a procurator, and the acquirer did not ſee his warrant, albeit he had one. Seventhly, If the acquiſition be from a prodigal perſon. Eighthly, If the acquirer take unaccuſtomed ways of ſecurity. And laſtly, By whatſoever the acquirer is obliged to know by law, *nam ſcire & ſcire debere æquiparantur in jure.*

VIII. As to the title requiſite in preſcription, thereby is not meaned a ſufficient valid title, which needeth not the help of preſcription; but a colourable title is ſufficient; as that which is acquired by emption; the emption is title enough for preſcription, tho' the ſeller had no right; or that which deſcendeth from any other by ſucceſſion, legacy, donation, *&c.* And generally, whatſoever way property uſeth to paſs, is ſufficient for preſcription, tho' it be not ſufficient alone to conſtitute the property, to which there is requiſite the author's right, and the tranſmiſſion thereof; but to preſcription, the manner of tranſmiſſion is enough; for *bona fides* and continuation of poſſeſſion ſupplieth the reſt.

IX. Preſcription altho' it be by poſitive law, founded upon utility more than upon equity, the introduction whereof, the Romans aſcribed to themſelves; yet hath it been ſince received by moſt nations; but not ſo as to be counted amongſt the laws of nations; becauſe it is not the ſame, but different in diverſe nations, as to the matter, manner and time of it; and therefore, nations under no common authority, do not properly preſcribe againſt each other, albeit by long patience and not contradiction, their conſent may be inferred, even by the law of nations. The grounds and reaſons of preſcription, are firſt, public utility, *ne dominia rerum ſint incerta, neve lites ſint perpetuæ L.* 1. *ff. h. t.:* And alſo becauſe the law accounteth it as a dereliction of the owner's right, if he own it not, neither purſue it within ſuch a time.

X. In the civil law tho' preſcription reacheth all kinds of things, moveable and immoveable, yet with theſe exceptions. Firſt, Thoſe things that are not in commerce, as they are not capable of expreſs alienation, ſo neither of preſcription. Secondly, Things ſtollen, whereunto, for utility's ſake, to repreſs that frequent vice, the law hath ſtated an inherent and real vitioſity, that paſſeth with the thing ſtollen to all ſingular ſucceſſors; and therefore tho' ſuch things be acquired by a juſt title, tho' for a cauſe onerous, and an equivalent price, and by continuation of poſſeſſion *bona fide*; yet preſcription taketh no effect becauſe of the inherent vitioſity. The like is to be underſtood of rapine or violent poſſeſſion: yet the fruits and profits of ſuch things belong to the *bona fide* poſſeſſor, rather by that right that followeth poſſeſſion, *bona fide*, of which formerly in the title, *real rights*, than by preſcription. Thirdly, It runneth not againſt pupils by the civil law, tho' ſome think that *that* is not to be underſtood of their moveables: yet it runneth againſt other

other minors, but they may be reſtored if they purſue for reſtitution in the time and manner preſcribed in law.

XI. To come now cloſs to our law concerning preſcription, our common rule of preſcription is by the courſe of forty years, both in moveables and immoveables, obligations, actions, acts, decreets, and generally all rights, as well againſt thoſe abſent as preſent; we have not thoſe differences which we have ſhown were in the civil law; and becauſe our preſcription is ſo long, there is little queſtion with us, *de bona fide*. But there muſt be continual poſſeſſion free from interruption, and in lands and other fees, a title, of which hereafter.

XII. By our antient cuſtom, there was no place for preſcription in any caſe, which hath been corrected by our ſtatutes, *both* as to long and ſhort preſcription. Firſt, As to perſonal rights, in *Parl.* 1469, *cap.* 28. and *Parl.* 1474, *cap.* 54. it is ſtatute, That as to all obligations that ſhould be purſued thereafter, and that were not then depending in law, before the making of that act; "that if the creditor "did not follow, or purſue the obligation within the ſpace of forty years, and "take document thereupon, the ſame ſhall be preſcribed and of no avail:" which ſtatute, becauſe it mentions only obligations, (that is to ſay, ſimple obligations) was not extended to others, as contracts of marriage, *Feb.* 26. 1622, *Hamilton:* but afterward it hath been ordinarily extended even to contracts of marriage, whereupon marriage followed, *Nov.* 27. 1630, *Lauder*; *Dec.* 23. 1630, *Ogilvie*. It was alſo extended to teſtaments, *June* 19. 1627, *Lindſays*. And was alſo extended to purſuits for tutor-compts; *Hope*, preſcription. It was alſo extended to all decreets, tho' *in foro contradictorio*, and this ordained to ſtand as a conſtant practick, *July* 26. 1637, *L. Lawers*.

XIII. Preſcription of forty years was found ſufficient to conſtitute the right to a bell in a kirk-ſteeple againſt another kirk, purſuing therefore, without inſtructing a title whereby they had the bell, which is not neceſſary to be inſtructed, but is preſumed from poſſeſſion in moveables, *Dec.* 7. 1633, miniſter and kirk-ſeſſion of *Aberchirdo*.

XIV. Preſcription being odious, the forty years are accounted *de momento in momentum:* ſo that it is not the running, but the compleating of the forty years that makes preſcription; and therefore, a writ blank in the month and day, expreſſing the year, was reckoned from the laſt of *December* that year; and becauſe there was three quarters *of a year* wanting of forty years *at* inſiſting upon the purſuit thereupon, it was ſuſtained as not preſcribed, *Dec.* 23. 1630, *Ogilvie*. But in regard of the length of this preſcription, it is accounted *ex tempore continuo, et non utili*, and ſo no abatement for the time of troubles, or ſurceaſe of juſtice, even in the caſe of mortification to bead-men, *June* 30. 1671, bead-men of *Magdalen-chapel*.

XV. Long after this ſtatute there was no preſcription of heritable and real rights; and therefore not of a decreet of poinding the ground, *Hope*, preſcription, *Currier contra L. Louriſtoun* *. Only it was declared, that no perſon ſhould be compelled to produce procuratories, or inſtruments of reſignation, precepts of *clare conſtat*, or other precepts of ſeiſin of lands or annualrents, whereof the heritors and their authors, or liferenters, having liferents reſerved in their infeftments, were in poſſeſſion forty years together, their charters making mention of *the reſignations, and the ſeiſins making mention of* the precepts, the wanting whereof ſhall make no reduction, the charters and ſeiſins being extant, *Parl.* 1594, *cap.* 218. *The royal prerogative and hatred of treaſon did alſo introduce a kind of preſcription in favour of the King, of lands come in his hands by forfeiture, the perſons forfeited having been in poſſeſſion, and holden and reputed heritable poſſeſſors for the ſpace of* five *years*, Parl. 1584, cap. 2.

* The deciſion, as marked by *Hope*, is in the following words, "The Lords found that a decreet obtained *in* "*anno* 1615, fell not under preſcription, *July* 3. 1618, *Geo. Currier contra L. of Louriſtoun.*" There muſt be a miſtake in *Hope* as to the date of the decreet pleaded on, but it is not ſaid to have been a decreet of poinding the ground. In an after-caſe, *July* 26. 1637, *Lawers contra Dumbar*, the above deciſion of *Hope* is referred to, as relating to decreets in general.

But preſcription of forty years is introduced of all heritable and other rights, *Parl.* 1617, *cap.* 12. where the heritors, their predeceſſors and authors, poſſeſſed land, annualrent, or other heritage by themſelves, their tenants, or others having their rights, (as by liferenters, wadſetters, tenants) for the ſpace of forty years together, following the dates of their infeftments, without lawful interruption, that ſuch ſhall not be troubled, purſued, or unquieted by his Majeſty, and other ſuperiors and authors, their heirs and ſucceſſors, upon any ground whatſomever, except upon falſhood, providing ſuch heritors ſhew a charter to them or their authors, preceeding the ſaid forty years poſſeſſion, with the inſtrument of ſeiſin following thereupon: or otherwiſe, *where there is no charter extant, that they ſhew* inſtruments of ſeiſin, one or more, continued and ſtanding together for the ſaid ſpace of forty years, either proceeding upon retours, or precepts of *clare conſtat*; where, by ſtanding together, it is not meaned unreduced, but that either the vaſſal lived and brooked by one ſeiſin forty years: or if he died, that the ſeiſin was renewed to his heirs; and ſo continued not only the poſſeſſion, but the ſeiſin forty years; in which the continuation of ſeiſins cannot be reckoned *de die in diem*; becauſe there muſt neceſſarily be an interval betwixt the death of the perſon firſt ſeiſed, and the ſervice of the heir to whom the law gives *annum deliberandi*, to conſider whether the heritage will be beneficial or hurtful, and accordingly whether he will enter or not, *Feb.* 15. 1671, E. *Argyle*. And alſo all actions upon heritable bonds, reverſions, contracts or others whatſomever, (*preſcribe in forty years*) except reverſions incorporate within the body of infeftments, uſed by the heritors for their title, or regiſtrate in the regiſter of reverſions: which general clauſe was found to extend to actions of reduction of retours, tho' if no other heir had been retoured, the right of blood preſcribes not, but any perſon may enter heir to his predeceſſor who died hundreds of years before; yet if any other were entered, he cannot after forty years, quarrel or reduce the ſame by the general act of preſcription, *Nov.* 28. 1665, *Younger*, this retour was anterior to the ſpecial act of preſcription of retours, *Parl.* 1617, *cap.* 13 *and was not included in that act*, whereby *only* retours thereafter *to be expede* are irreducible, if not quarrelled within twenty years. In the former ſtatute it is declared, that actions of warrandice ſhall not preſcribe from the date of the bond, or infeftment whereupon warrandice is ſought, but only from the date of the diſtreſs.

XVI. But this preſcription is not to be extended againſt ſuperiors, upon their vaſſals poſſeſſion forty years, tho' no feu, blench, or other duty or caſuality be demanded by the ſuperior; becauſe the vaſſal's right acknowledgeth the ſuperior's right, and his poſſeſſion is alſo the ſuperior's poſſeſſion: yet all duties and caſualities *due* thereupon, not purſued within forty years, preſcribe, without prejudice to theſe due within forty years of the purſuit, *Dec.* 15. 1638, *Stuart of Gairntullie*.

XVII. Which holdeth in tack-duties, which preſcribe as to the years preceeding forty, before the purſuit, but no other, *March* 10. 1627, betwixt two *Glaſgow* men, *Spotiſ.* preſcription, *Stuart contra Fleming*. Yet preſcription by poſſeſſing forty years, as part and pertinent, by an infeftment, was not elided; becauſe, before theſe forty years the poſſeſſor's author had a tack of the lands in queſtion, *Feb.* 20. 1675, *Counteſs of Murray*, tho' in this caſe the land in queſtion *had been ſeparatum tenementum* by a diſtinct infeftment, but became part and pertinent by being ſo brooked forty years. By this ſtatute preſcription of heritable rights, doth not only exclude other infeftments in property, but alſo annualrents, penſions, and all other rights; *if the* heritor poſſeſſed forty years free thereof, *July* 22. 1634, *Forreſter*, where the office of forreſter and the fees thereof were found preſcribed.

XVIII. From this preſcription there are excepted the rights of pupils and minors, againſt whom preſcription runs not during their minority, ſo that they need not ſeek reſtitution *in integrum*, as in the civil law; which exception is particularly

larly expreſſed in the foreſaid ſtatute, and is extended to all other preſcriptions of perſonal rights or others, *Spotiſ.* preſcription, *D. Lennox contra the executors of Alexander Beatoun.* But there is no exception of rights mortified to pious uſes, as bead-men, *June* 30. 1671, *bead-men of Magdalane-chapel.* Yet *Heriot*'s hoſpital being founded to orphans and minors, and ſo in the caſe of the foreſaid ſtatute, the Lords found that preſcription could not run againſt them, *Dec.* 29. 1691, *Thomas Fiſher treaſurer of Heriot's Hoſpital* *.

XIX. In neither of the ſtatutes introducing long preſcription by forty years, is there any mention or proviſion, concerning the manner of the entry in poſſeſſion, whether it was *bona fide* peaceable or lawful, but only that it have a title, and be continued with interruption.

XX. The title in heritable rights, being ground-rights of lands or annualrents, is very well diſtinguiſhed by the laſt ſtatute, betwixt conqueſt and heritage; for heritage which hath deſcended by ſucceſſion from a predeceſſor, is content with a more ſlender title, *viz.* ſeiſins without the warrants or adminicles, but only bearing, that they proceed upon retours, or precepts of *clare conſtat*, providing that the poſſeſſion hath been by virtue of theſe ſeiſins; ſo that not only there muſt be poſſeſſion for forty years together, but ſeiſins conſecutive, proper to the ſeveral poſſeſſors during that time: but purchaſers muſt not only have for their title a ſeiſin preceeding the forty years preſcription, but if they found upon their proper right, they muſt alſo produce a charter preceeding the forty years. And therefore, tho' a purchaſer ſhould poſſeſs forty years, and ſhow his ſeiſin anterior thereto; yet would it not be a title for preſcription, unleſs he produce a charter before that time, where, by charter muſt not be underſtood a ſolemn charter as it is diſtinguiſhed from a diſpoſition or precept, but as it comprehends theſe; for many valid infeftments have no charter, but ſeiſin proceeds upon the precept of ſeiſin contained in the diſpoſition. And tho' a precept of ſeiſin were only ſhown as the warrant of the ſeiſin, the ſame with forty years poſſeſſion by virtue thereof, would perfect preſcription; for the ſeiſins of themſelves, without warrant or adminicle, are but the aſſertions of nottars, and not probative; yet they are ſufficiently probative, not only by the immediate warrant or precept whereupon they proceed, but upon the mediate warrant; as if a ſeiſin be produced with a bond or obligement to grant an infeftment conform to that ſeiſin [a], but purchaſers may well conjoin their own title and their authors; ſo that if he can ſhow in his authors perſons conſecutive ſeiſins for forty years, upon retours or precepts of *clare conſtat*, and poſſeſſion conform, it will be ſufficient: or if they cannot ſhow ſuch ſeiſins and poſſeſſion in their authors for the whole forty years, yet if they ſhow the accompliſhment of forty years by their own ſeiſins and warrants thereof, and poſſeſſion conform, theſe may compleat the preſcription.

XXI. This ſtatute doth not only ſecure rights (*to*) lands and annualrents, by forty years peaceable poſſeſſion *cum titulo*, but alſo other heritable rights, ſuch as wadſets; for regiſtrate or incorporate reverſions being expreſſed as exceptions, wadſets muſt be comprehended in the rule, and all infeftments for ſecurity or relief, which do imply a reverſion incorporate. It will alſo extend to infeftments of teinds; for, tho' teinds be *ſeparatum tenementum* from the ſtock, yet both are ground-rights of the land; *yea*, infeftments of liferent, if poſſeſſed and unquarrelled for forty years, ſhowing their ſeiſin and the warrant or adminicle thereof, the ſame would make the liferent right irreducible, or might perfect preſcription, being joined to the author's rights; yea, this ſtatute hath been extended to long tacks of lands, teinds or others [b], not to make them perpetual, but unquarrellable during their time, *July* 14. 1657, *college of Aberdeen.*

XXII.

* This judgment was not final —The court afterwards altered the interlocutor, and found, that the minority to which the exception in the ſtatute applies, is that only which ends at the minor's attaining twenty one years; and that in this the ſtatute was to be ſtrictly interpreted.

[a] See above, II. 3. 19. 1. [b] Below, § 23. *h. t.*

XXII. A right to teinds may be preſcribed, as well as other rights, by forty years poſſeſſion; but a right to bygone teinds, being founded in public law, preſcribes not, except as to the bygones before forty years; and the poſſeſſor cannot preſcribe an abſolute immunity and freedom from payment within the forty years, and in time coming, ſeeing all lands in Scotland by law are liable in teind, except ſuch as never paid any, being *cum decimis inclusis*, or belonging to the *Cyſtertian* order, templers and hoſpitallers, or gleibs, *Feb.* 7. 1666, E. *Panmure.*

XXIII. This ſtatute is alſo extended unto rights of patronage, or offices which are heritable-rights, tho' they be not always conſtitute or continued by infeftment; yet forty years poſſeſſion by the original right in the firſt acquirer, or by the continuation in their ſucceſſors, doth eſtabliſh their rights againſt all quarrelling by reduction or declarator. Yea, this ſtatute is extended to long tacks, which if cled with forty years peaceable poſſeſſion, either in the tackſman, or his aſſignies, or their heirs who need no ſervice, cannot be quarrelled, but ſtand valid, not only for theſe forty years, but for all ſubſequent years unexpired: as was found in a tack of teinds, tho' ſet without conſent of the patron, and the bolls liquidate to ten ſhillings, *July* 7. 1677, Parſon of *Preſtonhaugh*. *July* 14. 1675, *College of Aberdeen.*

XXIV. It is alſo extended to thirlage and multures, with any antecedent adminicle, as by inrolment of court [c]; and generally to all ſervitudes, tho' there be no more antecedent title, but part and pertinent of the dominant tenement, either expreſt or implied; as was found in the caſe of a paſturage and ſheilling, albeit there was produced an old tack, bearing, to be granted to the poſſeſſor, or his predeceſſor, *Nov.* 27. 1677, *Grant* of *Ballindalloch*. Whereupon it was alledged that a tenant poſſeſſing by tack from his maſter could not preſcribe againſt him, which was not reſpected in this caſe, nor in that of the Counteſs of *Murray*, *Feb.* 20. 1675. But all annual preſtations preceeding forty years preſcribe, tho' conſtantly paid for thirty nine years, every year being a ſeveral obligement, tho' in one writ, *and* preſcribes ſeverally, *Jan.* 19. 1669, E. *Athol*. It holds alſo in annualrents, *July* 22. 1671, and *Feb.* 7. 1672, *Blair* of *Bethaick*. But it cannot be extended to preſcribe againſt a ſuperior, for not payment of the *reddendo* [d], becauſe a right of property cannot conſiſt without ſuperiority, unleſs there be a right taken from another ſuperior.

XXV. Preſcription doth not only exclude the preference of other better rights, which if inſiſted upon within preſcription, would have been preferred as anterior, and the poſterior right thereby reduced as *à non habente poteſtatem*; but all ground of reduction by the King, or other ſuperiors or authors, is excluded; ſo that the neglect of the King's officers cannot be obtruded by the act of Parliament declaring that their neglects ſhall not prejudge the King; neither any nullity in the titles of preſcription, except it be in the eſſentials thereof: ſo, preſcription cannot ſuſtain a perpetual tack without iſh, which is eſſential thereto; nor a ſeiſin without a ſymbol, generally or particularly, or not given upon the gound of the land. But all requiſites in rights introduced by cuſtom or ſtatute, and not eſſential thereto, are cut off by preſcription.

XXVI. The main exception or reply againſt preſcription, is interruption, not only by the diſcontinuing the poſſeſſion of the whole, but alſo of a part, which was found ſufficient to interrupt the preſcription as to the whole; as an infeftment of thirlage and poſſeſſion of corns growing upon the lands, was found ſufficient to exclude the preſcription of the multures of all grain, *June* 26. 1635, L. *Wauchtoun* *. So likewiſe, payment of annualrents within forty years, interrupts preſcription of bonds, and that not only as to the party paying, but payment made by the

* In this caſe a thirlage of *omnia grana creſcentia* was conſtituted by writ. Preſcription of exemption was pleaded, as to ſuch corns, as were not grinded by the defenders, becauſe for forty years they had been in uſe of ſelling ungrinded corns multure free. The defence was repelled, and it was found ſufficient to ſupport the total aſtriction that the defenders had always grinded apart of the corns growing on the lands.

[c] See above II. 7. 16. *med.* [d] Above § 16. *h. t.*

the principal debtor was found to interrupt preſcription as to the cautioner, who never paid, nor was purſued during the ſpace of forty years, *Dec.* 18. 1667, *Nicolſon.* And an annualrent conſtitute out of two tenements, was found unpreſcribed as to both, by uplifting the annualrent out of either, tho' the one was now forty years in the hands of a ſingular ſucceſſor, *June* 22. 1671, Lo. *Balmerino.*

Preſcription is ordinarily interrupted and excluded, by the dependence of any action, whereupon the right might have been taken away or impeded, *Hope*, patronage *L. Glenurchie contra Campbel*; * *Idem*, tacks and tenants, *Carnouſie contra Keith*, even though there was only the firſt ſummons without continuation, or ſecond ſummons, *Feb.* 17. 1665, *Butter*; yea, though the purſuer paſt from the ſummons *pro loco & tempore*, *Hope*, removing, *Douglas contra Lo. Herreis*; or by a transference, though reducible, becauſe not proceeding upon the right title; ſeeing the right title was alſo in the purſuer's perſon, *July* 26. 1637, *L. Lawers.* The like though the purſuit might have been excluded for want of ſolemnity, *in the executions of the ſummons, in re antiqua*, where the cuſtom *of executions* was not clear, *Nov.* 25. 1665, *White.* Yea, *Preſcription againſt* an annualrent was found interrupted by a poinding of the ground, though therein the heritor was not called, *June* 15. 1666, *Sinclair.*

Preſcription was alſo found validly interrupted, by a charge of horning upon the bond in queſtion, albeit proceeding only upon ſummary regiſtration by the clauſe in the bond, and by no citation, *July* 21. 1629, *Moris.* But warning, whereupon nothing followed, was not found a ſufficient interruption of an old tack-duty, *Hope*, poſſeſſion, *Bruce contra Bruce*; *Idem*, *March contra Keir.* Neither was it found ſufficient, to interrupt preſcription of the firſt part of a mutual contract, that action was uſed upon the ſecond, which ſaved the ſecond from preſcription; ſeeing the party concerned in the firſt, neither uſed action or charge thereupon, nor founded exception upon it, when purſued by the other party, *Nov.* 27. 1630, *Lawder.* Interruption was alſo ſuſtained upon a citation, at the inſtance of a party not then entered heir, being entered thereafter within the years of preſcription, 24th *July* 1672, *Edingtoun.* The like upon a ſummons of reduction upon minority, though it was not filled up within forty years, being inſinuate in the title of the ſummons, that minors have intereſt to reduce deeds to their leſion, *July* 14. 1669, E. *Mariſhal.*

But interruption *in the caſe of an inhibition*, was not ſuſtained from the citation in a ſummons of reduction, but from filling up of the reaſon which was *ex capite inhibitionis*, *Feb.* 11. 1681, *Kennuay.* And it was ſuſtained upon citation upon the ſecond ſummons, being only a day before the year was complete, albeit the firſt ſummons ſhould be found null, and *it was alſo ſuſtained upon the firſt ſummons*, though the citation was at the market-croſs upon a privileged warrant, purchaſed upon pretence that *non fuit tutus acceſſus*, paſt of courſe among the common bills, and the reaſon of the privilege was neither true nor inſtructed, and though the execution bore not a copy left at the croſs, the party adding that, and abiding thereby as truly done by the executor of the ſummons, *July* 6. 1671, *MacCrae.* Interruption was alſo ſuſtained upon a citation in a reduction in *anno* 1630, albeit the Executions bore not the name of the purſuer, but "the *purſuer* within mentioned:" And were not written upon the back of the ſummons, but upon a looſe ſchedule: and the citation was in the laſt of the thirteen years excepted from preſcription, againſt a party of great quality, againſt whom, many interruptions were like then to have been uſed, *ſo that theſe executions might have belonged to a different ſummons:* the uſer of the interruption deponing that he received the ſame from his father, or amongſt his evidents, and knew not that they were the executions of *any* other ſummons, *Feb.* 11. 1673, *Muir.* But interruption was not ſuſtained upon ſummary regiſtration, without citation or charge, *Jan.* 12. 1672, *Johnſtoun.* And interruption by warn-

* This deciſion not found.

ing and citation thereupon to remove from a ſalmond-fiſhing, was not found effectual in a competition betwixt two parties, both being then *in acquirenda poſſeſſione*, by preſcription, and neither having a ſufficient right conſtitute before, unleſs the party warned and cited, had diſcontinued his poſſeſſion for a year at leaſt, *Jan.* 13. 1680, *Brown.*

XXVII. Preſcription as to the King, was found ſufficiently interrupted by the King's letters, publiſhed at the croſs of the head-burgh of the ſhire, where the lands in queſtion lie, without citation or charge, *March* 29. 1630, E. *Monteith.* There was then an act of ſederunt made penult of *March* 1630; upon a letter from the King to the Lords of Seſſion, bearing, "that in reſpect by the act of "preſcription, 1617, All heritable rights cled with forty years poſſeſſion, are "declared irreducible, unleſs they had been quarrelled within the ſpace of forty "years preceeding that act and liberty granted, to intent actions within the ſpace "of thirteen years after the date of the ſaid act, to interrupt preſcriptions, albeit "there had been no interruption for forty years before the ſaid act; and his Ma"jeſty reſolving to uſe interruption within the ſpace of thirteen years, of deeds "done to the prejudice of the Crown, for preſervation of his Majeſty's right and "actions competent to him and his ſucceſſors, for that effect, ſeeing a multi"tude that may be concerned therein, cannot commodiouſly be ſummoned per"ſonally, or at their dwelling-places, within the ſaid thirteen years, which were "to expire in *June* 1630. And it being neceſſary that ſome ſolemn act ſhould "be done, to teſtify the King's will and reſolution, to proſecute actions, in his "own time, which could not be more properly and conveniently done, nor by "inſerting and publiſhing as follows; therefore his Majeſty appointed his de"claration for proſecuting his rights, to be inſert in the books of ſederunt, and "letters thereupon directed, to be publiſhed at the market-croſs of *Edinburgh*, "and other places needful: and deſired the Lords to declare the ſame, to have "the force of a legal and lawful interruption." Which the Lords enacted to be done accordingly, as to the particulars therein contained; and iſſued letters of publication at the market-croſs of *Edinburgh*, and other market-croſſes of the kingdom, where the lands and baronies lie, or where the perſons intereſted therein reſide, and at the ſaid market-croſs of *Edinburgh* and pier of *Leith*, for theſe without the kingdom: which act of ſederunt was ratified, *Parl.* 1633, *cap.* 12. Which letter and acts, extended to his Majeſty's annexed and non-annexed property, whereof the farms, duties, and feu-farms were compted for in exchequer, ſince the month of *Auguſt* 1455, and to the principality, and to the erection of benefices, ſpirituality or temporality, patronage of kirks pertaining to his Majeſty and his predeceſſors; regalities and heritable offices, any of the ſaid particulars being unlawfully diſponed againſt the laws and acts of Parliament; and likewiſe againſt changing of ward in blench or taxt-ward, granted by the King or his predeceſſors in their minority, and not ratified by any King or Prince in their majority; and but prejudice to any perſon of their lawful defences in actions to be intented by his Majeſty thereupon.

In preſcription this is a general exception, *contra non valentem agere non currit præſcriptio, becauſe the reaſon of preſcription, which is particularly expreſſed in the act of parliament, is,* "*the not following the right*;" *and therefore not to be accounted, till it could be followed; as in obligations of warrandice, the preſcription is accounted from the diſtreſs or eviction.* And therefore bonds preſcribe not from their dates, but from the term of payment, *Feb.* 17. 1665, *Butter. June* 23. 1675, *Bruce.* And inhibition preſcribes from the date of the laſt execution, and not from the regiſtration, *Feb.* 19. 1680, *Lutefoot* *. So *preſcription of* an obligement by a cautioner in a contract of marriage, obliging to employ a ſum for a wife's uſe, found only to run from her huſband's death, *July* 5. 1665, *Mackie.* And likewiſe preſcription was not found to run againſt a party to take away his infeftment

* Preſcription againſt an inhibition runs, from the time the deed contrary to the inhibition, became public by appriſing, infeſtment, &c. *Falconer, Nov.* 22. 1682, *Moultray.*

infeftment, ſeeing he had given a liferent-right, which would have excluded him from any action that could have attained poſſeſſion, and that he was not obliged to uſe declarator or reduction in this caſe, more than in the preſcription of bonds from their dates, *Feb.* 28. 1666, E. *Lauderdale*. The like, *Jan.* 17. 1672, *Young*. *Feb.* 5. 1680, *Brown*. Yea, Preſcription was found not to run againſt a party forfeited, and ſequeſtrated by the uſurper, who poſſeſt his right in queſtion for eight years, which years therefore were deduced, *Jan.* 25. 1678, D. *Lauderdale*. But where a party was not forfeited, but durſt not appear during the uſurpation, he was not found *non valens agere*, ſeeing he might purſue by a procurator or aſſigny, *July* 24. 1678, Colonel *Whitefoord*. Yea, Preſcription was not extended to the liferent of a wife, in a ſum payable to her, and her huſband, the longeſt liver, *and to the huſband's heirs*, tho' the ſtock was preſcribed againſt the huſband, who neither inſiſted, nor got annual for forty years; but not againſt the wife's intereſt for the annualrent, *during her life*, though the ſum bore no annualrent, yet the wife was found to have right to uplift the ſum, and to reimploy it for her liferent uſe, *June* 22. 1675, *Gaw*.

XXVIII. Our ſtatutes have introduced ſeveral ſhort preſcriptions, as the rights to which they relate do require, which we ſhall ſhortly repreſent, not according to the time they were introduced, but according to the time of their endurance, moſt of them occurring to be conſidered in their proper places, with the rights whereto they relate. And *firſt*, our law hath introduced the *annus deliberandi* in favour of heirs, becauſe if once they enter or immix themſelves in their predeceſſors heritage, they become liable for their whole debts, though far exceeding the worth of their heritage; and therefore the heir apparent hath a year to deliberate whether the heritage will be profitable, during which, he may not only inquire, but may purſue actions of exhibition *ad deliberandum* [f], and if *for that time* they forbear, they are free of all actions againſt them or the heritage during that year; and therefore, that privilege preſcribes in a year and a day, after the defunct's death.

XXIX. *Secondly*, By the act of *Parl.* 1661, *cap.* 24. There is a preference granted to the creditors of defuncts, preferring them to the creditors of the heir or apparent heir *; ſo that all diligences by the creditors of the defuncts, againſt *the defunct's* eſtate, ſhall be preferred to the diligences, for debts contracted by apparent heirs, providing the ſaid diligences of the defunct's creditors, be compleat within three years after the defunct's death. Albeit the being compleat be not expreſſed in the ſtatute; yet by the deſign thereof, it muſt be ſo underſtood: for if diligences inchoated in theſe three years, tho' perfected thereafter, would be ſufficient, the preference would not be for three years, but might come to be for forty years. Complete diligences are appriſings, or adjudications with infeftment, or a charge againſt the ſuperior to infeft, poinding, and decreets for making arreſted ſums or goods forth-coming. And by the ſaid ſtatute, diſpoſitions by heirs or apparent heirs of the defunct's eſtates, are declared not to be valid againſt their predeceſſors creditors, unleſs made a full year after the defunct's death **; therefore this preference of the defunct's creditors preſcribes in three years, or rather in two years, becauſe within the year of deliberation they cannot purſue, unleſs the

* A privilege ſimilar to this was given to the creditors of defuncts by the civil law, *L.* 1. § 1. *ff. de ſeparationibus*, which expired in five years, *L.* 1. § 13. *eod.*

** 1ſt edition adds, "ſo that after that year the heirs diſpoſitions are not limited, tho' they ſhould prefer their "own creditors to the defunct's, and therefore the defunct's creditors had need to uſe inhibition, or inchoat their "diligence by charge to enter heir, which may be done within the year of deliberation; they may alſo arreſt, "tho' they cannot inſiſt in purſuits upon any of theſe or other grounds, till the year paſs; for this act doth "not prefer the diligences of the creditors of the defunct, to the voluntary diſpoſitions granted by the heir "to his own creditors; but only to the legal diligences of his own creditors." But diſpoſitions by the heir to his own creditors within the three years were not found good, *Hercus* N° 144. and 773. Gratuitous diſpoſitions are rieducble tho' granted after a year, *Harcarſe*, N° 134.

[f] Below III. 5. 1.

the heir enter or immix; and therefore this privilege preſcribes in two years after the year of deliberation [ff].

XXX. *Thirdly*, There is a triennial preſcription of ſpuilzies, ejections, intruſions, which comprehends ſucceeding in the vice of parties removed, *Parl.* 1579, *cap.* 81. This preſcription by the ſtatute, runs not againſt minors. And this preſcription doth not take away the right, but only the privileges of *the action* as proceeding upon a ſhort citation, and the oath *in litem*, allowed to the party injured, to declare his loſs, and the violent profits; but hinders not the reſtitution, or recovery of the thing, with the ordinary profits. There is alſo a triennial preſcription of merchant compts, houſe-mails, *ſervants fees*, and the like, which is only as to the manner of probation, that if theſe be not purſued within three years from the time they are due, witneſſes ſhall not be admitted to prove the ſame, but only writ or oath of party: But in this preſcription, minority is not excepted, *Parl.* 1579, *cap.* 83. which is not extended to rents of lands in the country, *Jan.* 20. 1627, *Roſs.* In both theſe preſcriptions (if actions be intended within the preſcription of three years) cuſtom did not limit theſe actions to three years; but they continued for forty years, which might have much more conveniently been cut off by three years; for thereby the action which is acceſſory, was more privileged, than the principal right, to which it is acceſſory, which is amended in part by poſterior ſtatutes, as to ſubſequent caſes; for by the 9. act *Parl.* 1669, all ſhort preſcriptions wherein there was action intented *debito tempore*, the ſaid action ſhall preſcribe in ten years, except it be wakened every fifth year, minority being excluded: the like is extended to caſes preceeding the ſaid act, if not renewed, as is therein preſcribed, *Parl.* 1685, *cap.* 14 *. There is another triennial preſcription in removings, that if they be not purſued within three years, they can never be purſued thereafter upon the ſame warning, wherein minority is not excepted, *Parl.* 1579, *cap.* 82. This preſcription was not reckoned from the date of the warning, as being uncertain, but from the term, to which the warning was made, *Feb.* 6. 1629, *La. Borthwick.*

XXXI. There is a quadriennial preſcription againſt minors not *purſuing* [g], to reduce deeds done by them in their minority to their enorm leſion, from their age of twenty one complete, to their age of twenty five complete, but theſe actions being intented within that *quadriennium utile*, did laſt for forty years, till the ſaid late act of Parliament anent preſcription and interruption **.

XXXII. There are ſeveral quinquennial preſcriptions; as firſt, all arreſtments upon decreets preſcribe five years after the dates thereof; and arreſtments upon dependences preſcribe in five years after ſentence, upon the dependence, if the ſaid arreſtments be not purſued or inſiſted upon, during that time; by the ſaid act, *Parl.* 1669, *cap.* 9. Secondly, By this ſtatute miniſters ſtipends and multures not purſued for within five years after they are due, and likewiſe mails and duties of tenants, not being purſued within five years after the tenant's removal, preſcribe, unleſs the ſaid ſtipends, multures, mails and duties, be proved reſting by oath, or ſpecial writ, acknowledging what is reſting; and that all bargains concerning moveables, or ſums of money, probable by witneſſes, ſhall only be probable by writ or oath of party, if the ſamin be not purſued within five years after the making of the bargain, and all *ſuch* purſuits, and grounds thereof preſcribe, unleſs they be wakened every fifth year ***. There is alſo a quinquennial preſcription of the legal reverſions of ſpecial adjudications, whereby lands are

* By this ſtatute, actions upon ſuch grounds of debt as preſcribe in three or in five years muſt be wakened every five years; by which the obſcurity of the former ſtatute *Parl.* 1669, *cap.* 9. was removed.

** The acts of Parliament for preſcription of interruptions do not ſeem to relate to actions brought within the *quadriennium utile.*

*** None of theſe preſcriptions introduced by P. 1669, c. 9. run againſt minors.

[ff] Below, III. 5. 13. [g] F. Poſſeſſing.

* Sir

are adjudged only equivalent to the ſums by the act of Parliament 1672, *cap.* 19.

XXXIII. There was a ſeven years preſcription of the legal reverſions of apprifings; and there is a ſeptennial preſcription of *citations uſed for interruptions, either in real or perſonal rights*, which, if they be not renewed every ſeven years, preſcribed by the act of Parliament 1669, *cap.* 10.

XXXIV. There is likewiſe a decennial preſcription of reverſions of apprifings to which they were prorogued by the act of debtor and creditor 1661, *cap.* 62. and of general adjudications, when the adjudger cannot get a ſpecial one, by the ſaid act *Parl.* 1672, *cap.* 19.

XXXV. And by the ſaid act, *Parl.* 1669, *cap.* 9. there is introduced a preſcription of twenty years of holograph-bonds, and holograph-miſſives, and ſubſcriptions in compt-books without witneſſes, unleſs the verity of the ſaid ſubſcriptions be proved by the defender's oath; by which manner of probation, there is action competent, till the long preſcription of forty years *.

The End of the Second Book.

* Sir *Geo. M'Kenzie*, in his obſervations, tells us, that the Parliament refuſed to include bills of exchange under this 20 years preſcription; ſo it was adjudged *Feb.* 4. 1692, *Balquhan.*

By act 57. *Ja.* IV. ſummons of error againſt inqueſts on retours, preſcribe in three years, excepting the years of minority.

By act 6. P. 1701, actions of wrongous impriſonment preſcribe, if not raiſed within three years, and when raiſed, they preſcribe, if not inſiſted in yearly.

By act 5. P. 1695, cautionary obligations preſcribe in ſeven years.

By act 9. P. 1696, actions on tutory and curatory accompts, at the inſtance of minors, and the contrary actions at the inſtance of tutors and curators, preſcribe in ten years after majority; but this preſcription does not run againſt minors.

Actions for reducing retours preſcribe in twenty years, P. 1617. c. 13.

I

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Assign

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XX.

THE INSTITUTIONS OF THE LAW of SCOTLAND.

BOOK III. TIT. I.

Assignations, where, of Arrestments, and Actions for making forth-coming.

I. *The several conveyances of rights.*
II. *What rights are not transmissible.*
III. *The rise of assignations.*
IV. *The tenor of assignations.*
V. *The conveyance of blank-bonds,* &c.
VI. *The rise and effect of intimations.*
VII. *The several ways of intimation.*
VIII. *What assignations are perfected by possession, without other intimation.*
IX. *Other supplies of intimation.*
X. *Intimations to* correi debendi.
XI. *Intimation is not necessary to rights registrate for publication, as assignations of reversions,* &c.
XII. *Nor to orders of merchants.*
XIII. *Nor to judicial assignation, by appriſing,* &c.
XIV. *Nor to the legal assignation,* jure mariti, *by marriage. Nor to retrocessions of assignations not intimated.*
XV. *Nor against the cedent, his heirs or executors, even tho' creditors.*
XVI. *To what rights assignations extend.*
XVII. *Assignations of debts carry inhibitions,* &c. *tho' not expressed.*
XVIII. *In what cases the cedent's oath proves against his assignie.*
XIX. *Assignations intimated before the cedent's death, gives summary execution.*
XX. *All exceptions against cedents before intimation, are relevant against assignies.*
XXI. *The effect of back-bonds, discharges, assignations of dispositions before infeftment; of appriſings during the legal.*
XXII. *Assignies by tutors have no execution till the tutor-compts be made up.*
XXIII. *How far assignies to mutual-contracts may be debarred till performance of their cedents part.*
XXIV. *Arrestment granted by judges superior or inferior, how far effectual.*
XXV. *The effect of arrestments made in the debtor's own hand.*
XXVI. *Arrestment is personal.*
XXVII. *Arrestment is not effectual for, or against heritable sums by infeftment, except made moveable.*
XXVIII. *Rents or annualrents are always arrestable.*
XXIX. *The effect of arrestment of rents, annualrents, or other sums laid on before the term of payment.*
XXX. *The effect of arrestment laid on in the hands of factors.*
XXXI. *Arrestment extends only to the debts due by him in whose hands it was laid on.*
XXXII. *Arrestment makes the subject litigious.*

XXXIII. *The*

XXXIII. *The order and tenor of looſing arreſtments.*
XXXIV. *In what caſes arreſtments laid on for ſums due by decreets, are looſable or not.*
XXXV. *The effect of looſing arreſtment.*
XXXVI. *The order of actions for making forth-coming.*
XXXVII. *Exceptions in the actions for making forth-coming.*
XXXVIII. *The effect of arreſtments for making moveable goods forth-coming.*
XXXIX. *The effect of arreſtment of ſums.*
XL. *He to whom payment is made after arreſtment is liable to reſtore.*
XLI. *The oath of parties in whoſe hand arreſtment is made muſt be ſpecial.*
XLII. *The decreet for making forth-coming, only, doth transfer the right.*
XLIII. *But aſſignations do transfer the right, when intimated, without further diligence.*
XLIV. *If the arreſtment be prior to the intimation, how far preferable.*
XLV. *How aſſignations are compleated by intimation, citation, charge, poſſeſſion, or corroboration.*
XLVI. *The preference of arreſtment in competitions.*

HAVING now gone through all the ſeveral kinds of private rights, perſonal and real, both as to their nature and conſtitution, and as to their extinction and deſtitution; we are now come to the ſecond part of our deſign propoſed, which is the conveyance and tranſmiſſion of theſe rights, which ſtand in force, and become not extinct; for the extinction of a right is no conveyance of it, ſeeing thereby it ceaſeth to exiſt.

I. Rights are conveyed, or derived, either amongſt the living, or from the dead; and in both, the conveyance is different, in perſonal and real rights, and in moveable and heritable rights: the conveyance amongſt the living, of perſonal rights, is by aſſignation, of real rights by diſpoſition, and promiſcuouſly of both by confiſcation; conveyance of right from the dead, is by ſucceſſion; in moveables by executry, in heritable rights, by the ſucceſſion of heirs and other like ſucceſſors; of which in order.

II. Perſonal rights or obligations, are ſometimes incommunicable, and not aſſignable, or tranſmiſſible; either by reaſon of the matter, ſuch as moſt *of the* conjugal and parental obligations are, or where there is a ſingular conſideration of the perſon, as in commiſſions, truſts, *&c.* Moſt of theſe are intranſmiſſible, even by the conſent, both of debtor and creditor: yea, generally, all obligations are intranſmiſſible, upon either part directly without the conſent of the other party, which is clear upon the part of the debtor, who cannot, without conſent of the creditor, liberate himſelf, and tranſmit his obligation upon another, though with the creditors conſent he may, by delegation: neither can a creditor force his debtor to become debtor to another, without his own conſent, as when he takes him obliged to pay to him or his aſſignies [z].

III. Yet, that obligations may become the more uſeful and effectual, cuſtom hath introduced an indirect manner of tranſmiſſion thereof, without the debtors conſent, whereby the aſſigny is conſtituted procurator; and ſo as mandatar for the creditor, he hath power to exact and diſcharge, but it is to his own behoof, and ſo he is alſo denominated donatar, and this is the ordinary conception of aſſignations. The like is done amongſt merchants, by orders, whereby their debtors *are* ordered to pay ſuch a perſon their debt, which indeed is a mandate; but if it be to his own behoof, it is properly an aſſignation. And in favour of creditors, law hath introduced judicial aſſignations upon arreſtment, and by appriſing and adjudication. Aſſignations are more frequent with us than any where; there is ſcarce mention thereof in the civil law. Aſſignation is alſo called, *ceſſio*, which both

[z] See below, § 16. *h. t.*

both there and with us, is moſt applied to *ceſſio bonorum & actionum*; whereby not only obligations, but property of things, and generally, all rights are ceded from the debtor to his creditor; from this term the aſſigny is called ceſſioner, as the aſſigner is alſo called cedent. Under aſſignations are comprehended tranſlations, being tranſmiſſions from a prior aſſigny to a poſterior; or retroceſſions, which are the returning back of the right aſſigned from the aſſigny to the cedent, which are alſo called repoſitions.

IV. For clearing the matter of aſſignations; *firſt*, Conſider the requiſites to make them perfect and valid conveyances. *Secondly*, What are the effects and extent thereof. For the firſt, an aſſignation doth neceſſarily require the clear expreſſing of the cedent, aſſigny, and thing aſſigned; and though the ordinary ſtile of it be known, yet any terms that may expreſs the tranſmiſſion of the right aſſigned from the cedent to the aſſigny, will be ſufficient; as if the cedent aſſign, transfer and diſpone, make over, ſet over, gift, or grant the thing aſſigned to the aſſigny, or nominate or conſtitute him his ceſſioner, aſſigny, donatar, or procurator to his own behoof; and therefore, an aſſignation to a bond, was found valid, both againſt principal and cautioners, both being in the diſpoſitive clauſe, though the cautioners were omitted in the clauſe, "with power, *&c.*" which was not thought a neceſſary clauſe, *Had. Dec.* 12. 1622, *Johnſtoun contra Jack and others.*

V. The conveyance of bonds or other writs, wherein the name of the creditor or acquirer is left blank, have become of late very frequent, and have occaſioned many debates, as to the conveyance of ſuch rights, and the effects thereof: as firſt, whether the leaving the name of the creditor or acquirer blank be warrantable, or a fraudulent conveyance, to conceal and keep in the dark, to whom the right belongeth, that creditors may not know to affect it by legal diligence: the reaſon ordinarily given for taking writs in that way, is to ſhun the trouble of aſſignations, tranſlations, or intimations thereof, as they paſs from hand to hand, according to that tenor of obligation, frequent in other places, whereby the debtor obligeth him to pay and perform ſuch things, *lateri præſentium*; by which he is obliged to pay to none, but to him from whom he may get up the bond, and may ſafely pay to any that hath it.

There is another reaſon of taking blank-bonds, to ſhun compenſation upon any debt due by the cedent; for the law alloweth compenſation againſt the aſſigny, upon any debt due *to* the debtor *by* the cedent [a], before the aſſignation was intimated; but when the debtor gives a bond blank in the creditor's name, he is thereby underſtood to paſs from compenſation, which hath been ſuſtained [b], for it is a juſt perſonal objection againſt him who granted the blank bond, not to ſtop the effect or execution thereof, upon any other debt due *to* him *by* that party, to whom he granted the bond. And albeit ſuch blank-bonds may paſs amongſt merchants, where intimations are not neceſſary upon bills of exchange, which are tranſmitted by the orders of merchants thereupon without intimation: and though ſuch bonds may paſs amongſt perſons of intire credit, yet ſuch conveyances, if they ſhould be encouraged, and paſs currently without intimation, would be of dangerous conſequence, and give occaſion to much fraud; for thereby creditors ſhould not know in whoſe perſon ſuch rights ſtood, and how to affect them for juſt debts: and although the granter of ſuch blank-bonds, or the haver, who ſo tranſmits them, may be excluded from compenſation; yet others who may have intereſt to propone compenſation in the ſame way, as they may found upon a diſcharge granted by the receiver of the blank bond to the debtor therein, cannot be excluded from alledging compenſation, there being no perſonal objection againſt them. And likewiſe, conveyances without a cauſe onerous, in prejudice of anterior creditors, by perſons inſolvent *are* [c] fraudulent; ſo that, if either the firſt receiver of ſuch blank ſecurities, or the poſterior receiver thereof be inſolvent,

[a] F. due by the debtor to the cedent. [b] See above, I. 18. 6. 2. [c] F. And.

and without an equivalent cauſe onerous, do tranſmit ſuch blank ſecurities, only by delivering the ſame, the intermediate havers can hardly ever be known, whoſe creditors might affect the right while in their hands.

Upon which conſideration, the firſt occaſion that occurred to the Lords, being a blank bond, granted by *Marjory Sandilands*, and delivered to *Samuel Veatch*, he did deliver the ſame to *Marion Geddes*, who filled up her name in the blank left for the creditor, and regiſtrated the bond againſt *Sandilands* the debtor; yet *Tailziefer* who was *Veatch's* creditor, having arreſted all ſums in *Sandilands* hands, due to *Veatch*, in the competition betwixt *Tailziefer* the arreſter and *Geddes*, whoſe name was filled up in the blank, and the bond regiſtrated in her name before the arreſtment, the ſum remaining yet unpaid in *Sandilands* hands, the arreſter was preferred, in reſpect that albeit *Geddes*'s name was filled up in the blank bond, and it ſo regiſtrated before the arreſtment; yet the delivery of the blank bond by *Veatch* to *Geddes*, being in effect an aſſignation, was found to require intimation; and therefore, *Tailziefer* the arreſter was preferred, *Nov.* 11. 1665, *Tailziefer:* In this caſe *Veatch*, who was firſt creditor, was inſolvent. And albeit the Lords in the competition betwixt *David Henriſon* and *Thomas George*, decided *Jan.* 18. 1668, preferred *Henriſon*, whoſe name was in the bond as creditor, and who offered his oath for clearing, whether the bond was blank, *ab initio*, and when filled up, yet the Lords did not leave it to his oath, but took witneſſes, *ex officio*, who proved that they ſaw the bond filled up with *Henriſon*'s name, before the arreſtment laid on by *Thomas George* in the hands of the debtor, as due to *Short* his creditor before the arreſtment; yet there was nothing adduced to prove that ever the bond had been blank or delivered to *Short*. And likewiſe, a bond blank in the creditor's name, being delivered by the receiver of the bond to a creditor of his, in ſatisfaction of his debt, the ſame was found relevant to be proved that the blank bond was delivered (before the declarator of eſcheat of the party, to whom it was firſt delivered) in ſatisfaction of a debt due by him before he was denounced, *Dec.* 19. 1676, and *Jan.* 17. 1677, L. *Bamff*.

There hath been nothing done ſince to take off the neceſſity of a formal intimation to the debtor, of the filling up of the creditor's name, *by* production of the bond itſelf, ſhewing that name to be filled up; and therefore, any arreſtment upon the debt of the perſon to whom the bond was firſt delivered as creditor, or to his own behoof, or for the debt of any other perſon, in whoſe poſſeſſion it came for his own behoof, before the ſaid intimation, will prefer the arreſter. As to the manner of probation, that the bond was blank *ab initio* in the creditor's name, it is a ſtrong evidence that it is written with a hand different from the body of the bond; for though blank draughts of bonds be frequently drawn up by writers and nottars, leaving the ſums, the names of the debtor and creditor blank, which are filled up by any that makes uſe of the draught, yet at the ſubſcription, the filler up of the ſum, the debtor and creditor's name ſhould be expreſt; for theſe are more ſubſtantial than all the reſt of the bond, ſo that if the creditor's name be not filled up with the hand that wrote the bond, or of him who inſert the date and witneſſes; it will be preſumed to have been blank [a]; in which caſe, the debtor's oath may be taken, to whom he did deliver it for his own uſe, and that perſon's oath to whom he did deliver the ſame, whereby the progreſs of it, till it come to him whoſe name was inſert, will be found out; and upon this ground a diſpoſition of lands bearing to be, "to two perſons for themſelves and other creditors of the diſponers after-ſpecified," after which, there were ſeveral lines written with another hand, inſerting particular creditors and ſums, without mentioning of the filling up thereof at the date of the writ; therefore an inhibition by a creditor of the diſponers, was ſuſtained to reduce the right of theſe creditors filled up in the blank, as preſumed to be filled up after the inhibition; although the date of the diſpoſition was before the inhibition; unleſs it were proved

[a] See below, IV. 42. 19. 4.

proved by witneſſes inſert in the diſpoſition or others above exception, that the blank was ſo filled up before the inhibition, *Jan.* 15. 1670, La. *Lu. Hamilton.* This ground is much cleared by *Act* 5. *Parl.* 1681, requiring the name of the filler up to be expreſt, which if wanting will annul the writ.

Theſe blank bonds are ſo little favoured, that when the debtor depones, that he is only debtor by a bond blank in the creditor's name, which he did deliver to ſuch a party for his own uſe, but knows not now who hath the bond, and conſequently to whom he is debtor, it will not liberate him from the debt of that party to whom he did deliver it; tho' it may make him liable to double payment to that party, and to him who hath the bond, it being his own deed in delivering the bond blank in the creditor's name, which infers that hazard: yea, if the debtor ſhould depone that the bond was blank, *ab initio*, and delivered to ſuch a party, but afterwards it was ſhown to the debtor, filled up in the name of ſuch another party, before the arreſtment, whereby he became debtor to that party, and not to the firſt; it is not like that quality will be reſpected, unleſs he depone, that he had paid before the arreſtment; for in *Veatch*'s caſe, *Nov.* 11. 1665, the filling up of *Geddes*'s name was unqueſtionably offered to be proved, that the bond was regiſtrated in *Gedaes*'s name, before the arreſtment, which is a much ſtronger probation than the oath of the debtor. And therefore in ſuch caſes, the debtor ſhould get an inſtrument of intimation of the name filled up, or elſe ſuſpend on double poinding. A blank bond being loſt, and referred to the debtor's oath, who confeſſed the ſame, and both parties agreeing upon the date, ſum and witneſſes, the debtor was decerned to pay the ſum to the purſuer, to whom he had delivered the blank bond upon caution, to re-found, in caſe he were diſtreſſed upon a bond, containing the ſame ſum, date and witneſſes, *June* 27. 1676, *Gibſon*. The like was done at the inſtance of the executors of the perſon to whom the blank bond was delivered, *Jan.* 4. 1678, *Peebles* *.

VI. The aſſignation itſelf is not a compleat valid right, till it be orderly intimated to the debtor, which tho' at firſt (it is like) hath been only uſed to put the debtor *in mala fide*, to pay to the cedent, or any other aſſigny: yet now it is a ſolemnity requiſite to aſſignations, ſo that tho' the debt remain due, if there be diverſe aſſignations, the firſt intimation is preferable, tho' of the laſt aſſignation, and that not as a legal diligence, which can be prevented and excluded by another diligence, but as a full accompliſhment of the aſſignation, *Jan.* 13. 1629, *Finlayſon*; *Jan.* 18. 1628, *L. Halkertoun, where poſſeſſion of rents aſſigned, or uſe of payment, was found as valid as an intimation.* But where both aſſignations were gratuitous, implying warrandice from fact and deed, the laſt aſſignation, tho' firſt intimated, was not preferred, becauſe the cedent was debtor to the firſt aſſigny, by the implied warrandice againſt future facts and deeds, *July* 15. 1675, *Alexander*. This behoved to be, becauſe the laſt aſſignation was reducible, being gratuitous, on the implied warrandice of the firſt aſſignation.

VII. Intimation may be by any legal diligence, as by arreſtment, by a charge or proceſs upon the aſſignation: yea, tho' the proceſs be not ſuſtained, becauſe all parties having intereſt were not called, it will ſtand as an intimation; but it is moſt ordinarily by way of inſtrument, either by the aſſigny himſelf, ſhowing the aſſignation, or by his procurator, ſhowing the ſame with his procuratory, wherein the like ſolemnities will be requiſite, as are in inſtruments of premonition and requiſition: of which, *title, wadſets* [b]. So an intimation was found null by exception, becauſe one perſon was both procurator and nottar, *July* 3. 1628, *Scot*. Neither was an intimation found ſufficient by an inhibition, uſed by the aſſigny againſt the cedent upon the aſſignation, *March* 14. 1626, *L. Weſtraw*; where payment made thereafter to the cedent, was found valid. In this caſe it was alſo found, that

* By act 25. P. 1696, no bond, aſſignation, diſpoſition, or other deed, ſubſcribed and delivered blank in the creditor's name, is valid. The indorſations of bills of exchange, and the notes of any trading company are excepted.

[b] See above, II. 10. 17. & 22.

that intimation will not be ſupplied by a party's knowledge of the aſſignation. The like, *June* 15. 1624, *Adamſon*. Neither by the debtor's knowledge, tho' by a purſuit againſt him upon the writ, containing the aſſignation, but in relation to another matter therein, *and the offer of his tack-duty to the cedent was ſuſtained to ſave* the incurring a clauſe irritant *in the tack*, *Nov.* 30. 1622, *Murray*.

VIII. But aſſignations to annual preſtations, as to mails and duties, teinds, or annualrents or aſſignations to rights, requiring poſſeſſion to compleat them, as tacks are perfected by uſe of payment or poſſeſſion, and need no other intimation; as was found in the caſe of the annualrent of an heritable bond, where getting payment of ſome years, preferred the aſſigny to a *poſterior* arreſter, tho' there was no inſtrument of intimation, *Jan.* 18. 1628, *L. Halkertoun*.

IX. And any writ under the debtor's hand, acknowledging the production of the aſſignation, will be ſufficient intimation, as if he gave a bond of corroboration to the aſſigny, or *pay*, *and take* [d] diſcharges of the annualrent, or any part of the principal ſum [e].

X. Where there are many *correi debendi*, principal or cautioners, intimation made to any will be ſufficient as to all; yet this will not exclude payment made by another of the debtors, *bona fide*, to whom no intimation was made, *Had. Feb.* 23. 1610, *Lyon contra Law*; to ſecure which it is ſafeſt for aſſignies to intimate to all the *correi debendi*.

XI. Aſſignations to reverſions or bonds for granting reverſions, renunciations of wadſets, or grants of redemption, being regiſtrate in the regiſter of reverſions, conform to act of *Parl.* 1617, *cap.* 16. require no intimation, that regiſter being deſigned, not ſo much for conſervation of theſe rights, where the principals are not detained, but for publication thereof to all parties having intereſt, which is a ſufficient intimation; as was found in the caſe of an aſſignation to a right of reverſion, *Dec.* 5. 1665, *Beg*.

XII. Intimation being by our proper cuſtom ſo neceſſary a ſolemnity, it holds not in the orders which ſtand for aſſignations amongſt merchants, ſtrangers eſpecially, *qui utuntur communi jure gentium*; and therefore the firſt order by merchants, direct to their debtor here, to pay the debt to the obtainer of the order, was preferred to arreſters and aſſignies, uſing diligence before them, tho' there was neither intimation of the order, nor acceptance by the debtor [f], *July* 8. 1658, *Cuthbertſon contra Wallace*, &c.

XIII. Neither is intimation neceſſary to judicial aſſignations by appriſings or adjudications, *March* 25. 1635, *Lo. Yeſter contra L. Innerweek*, *Hope*, aſſignations; *idem*, appriſings, *Bruce contra Buckie*: ſo that if the debt remain due, the firſt appriſing or adjudication, without intimation, will be preferred; but ſeeing there is nothing to put the debtor in *mala fide*, payment made *bona fide*, will liberate the debtor; but will give repetition againſt the obtainer of payment, nor will his *bona fides* ſecure him, becauſe it is no neceſſary act, as the debtor's is [g].

XIV. Marriage alſo is a legal aſſignation, requiring no intimation; for thereby all the moveable rights of the wife are ſtated in the huſband, *jure mariti*, without other intimation than the marriage [h]: yea, intimation was not found neceſſary to a repoſition of the aſſigny to the cedent ſeeing the aſſignation was, *of a bond bearing annualrent*, by a wife in her contract of marriage, *upon which* no intimation *had followed*; and therefore the huſband's repoſition to her needed no intimation, *Dec.* 2. 1674, *Craig*.

XV. Though in the caſes aforeſaid, intimation be a neceſſary ſolemnity to aſſignations, yet the aſſignation alone will be ſufficient againſt the cedent, if he ſhould quarrel it, becauſe he is author thereof, and can do no deed contrary thereto: yea, it was preferred to an executor creditor of the cedent's, even as to his own debt, *July* 27. 1669, Executors of *Ridpeth* *.

XVI.

* In this caſe the aſſigny had got payment of a part of the debt aſſigned before the executor-creditor was confirmed. See *Gosford*, *July* 27. 1669, *Home*.

[d] F. gave. [e] See below, § 45 *h. t.* [f] See above, I. 11. 7. 5. [g] See below, § 4. 40. *h. t.* Above, I. 18. 3. [h] See above, I. 4. 10. *fin.*

XVI. As to the extent and effect of aſſignations, *firſt*, the ſame extends to all perſonal rights, whether moveable or heritable, as to bonds, liferents, tacks, reverſions, mails and duties, annualrents, and to diſpoſitions of lands and others, till infeftment follow; but it is no valid conveyance of any right completed by infeftment, (except liferents, which can have no ſubaltern infeftment) as to the ground-right itſelf, tho' it may *extend* to the profits thereof, as to mails and duties of property, and to theſe no longer than the right by infeftment ſtands in the cedent's perſon; whence there ariſeth to him and to his aſſigny, a perſonal obligement upon the poſſeſſors, which faileth as to all terms after the proprietar *is denuded*, *Dec.* 13. 1628, *Huntley contra Home*: and an aſſignation to ſuch a ſum yearly out of teinds, was found excluded by an appriſing of, or aſſignation to, the tack of theſe teinds, *Feb.* 6. 1666, *Watſon*. But liferenters can be no other way denuded but by aſſignation, voluntary or legal, and ſo (*an aſſigny*) can never be excluded by any other, being poſſeſſor.

Secondly, Aſſignations are effectual, not only of ſuch rights as are granted to heirs and aſſignies, but generally to all rights, tho' not mentioning aſſignies, which by their nature are tranſmiſſible; and therefore, an annualrent by a father to his daughter, wherein his brother and ſiſters were ſubſtitute, failing the heirs of her body, without mentioning her aſſignies, and wherein the annualrent was redeemable, by payment of a principal ſum, which ſhe had no power to require, unleſs ſhe were married; the annualrent was found to belong to her aſſigny after her death, being principally conſtitute, and not acceſſory to the principal ſum, *the power of requiring whereof, was at an end by her death unmarried*, *June* 24. 1669, *Stuart*: and albeit ſuperiors be not obliged to receive ſingular ſucceſſors without appriſing or adjudication; yet before infeftment, aſſignies to the diſpoſition, granted by the ſuperior, may compel him to receive the aſſigny, which was ſo found, tho' the ſuperior alledged that the aſſigny was not in good terms with him, *Dec.* 24. 1673, *Ogilvie* [k]. But reverſions and tacks are in moſt caſes unaſſignable, unleſs they be granted to aſſignies [l]; for albeit the aſſignation being a procuratory, may give them intereſt to act *procuratorio nomine*, for the cedent; yet they cannot act *proprio nomine*, as procurators, *in rem ſuam*; therefore the oath of the cedent will always be competent againſt them, and they cannot obtain declarator of redemption, in their own name, or decreet for denuding of the wadſetter, in their favour: neither can aſſigny's to tacks enter in poſſeſſion, by virtue thereof: yea, liferent-rights by infeftment or tack, are ſo peculiar to the liferenter, that no aſſignation can ſtate them in the aſſigny's perſon, but only the profits thence ariſing [m]: ſo that in the aſſigny's perſon they are not liferents; and therefore the liferents of wives, which belonged to their huſbands, *jure mariti*, as a legal aſſignation, fall not under the huſband's liferent-eſcheat, nor (*continue*) longer than during the marriage; as they would fall under the liferent of the wife unmarried, but under the huſband's ſingle-eſcheat only [n]. Upon which ground, *Hope*, upon *horning*, obſerves, that aſſignations to liferent-tacks, make them fall under the aſſignies ſingle-eſcheat, in the caſe of *Ker contra Ker*.

XVII. *Thirdly*, An aſſignation to a ſum, carries with it the inhibition raiſed thereupon *tho' not expreſsly aſſigned*, *Hope* aſſignation, *Hay contra Ker* *. The like, where only "all actions competent thereupon" were expreſſed generally, *Had.* *June* 28. 1610, *Blair contra Gray*. And an aſſignation to a bond, was found to carry a bond of corroboration of the foreſaid bond, tho' not mentioned therein, albeit the aſſignation bore not that ordinary clauſe, "with all that has followed, "or may follow thereupon," which is but an explicatory clauſe of ſtile of that which *ineſt de jure*, *Feb.* 3. 1676, *Cullie*. *Here the bond of corroboration was produced by the aſſigny*.

* The deciſion is thus marked by *Hope*, "Found that an improbation pertains to the aſſigny, albeit it be not "aſſigned *per expreſſum*, *Jan.* 17. 1622. *Walter Hay contra Mark Ker*."

[k] See above, II. 4. 32. [l] See above, II. 9. 26. II. 10. 7. [m] See above, II. 6. 7. [n] See below III. 3. 15. 2.

XVIII. *Fourthly*, The effect of aſſignations is, that the oath of the cedent cannot prove againſt the aſſigny, unleſs the matter *hath* been litigious before the aſſignation or intimation, as in the caſe that arreſtment *has* been laid on; and therefore a debtor having purſued the cedent to annul a bond, upon a reaſon to be verified by the cedent's oath, before the aſſigny had intimated, the cedent's oath was ſuſtained, *Feb.* 15. 1662, L. *Pitfoddels*. And an aſſigny purſuing in the cedent's name, and not in his own, albeit he produced his aſſignation in the proceſs; yet there being no other intimation thereof, the cedent's oath was admitted againſt him, *Feb.* 12. 1678, *Frazer*. (*The like,*) *July* 26. 1628, *Rule*. Or if the aſſignation be gratuitous without a cauſe onerous, the cedent's oath will be competent in all caſes againſt the aſſigny, *June* 16. 1665, *Wright*: *June* 13. 1666, *Jack*: but the oath of the cedent will prove againſt the aſſigny in England, as to aſſignations made by reſidenters there, *June* 28. 1666, *M'morland*, and uſes ſo to be ſuſtained againſt Engliſhmen, becauſe the law there is ſuch.

XIX. *Fifthly*, Aſſignations being intimated during the cedent's life, *they have* ſummary execution; *and* the aſſigny got proteſtation againſt a ſuſpenſion raiſed againſt the cedent, after the cedent's death, without wakening or transference, and thereupon all execution did proceed ſummarily by horning, poinding, appriſing, even after his death, *Hope*, aſſignation, *Stevenſon contra L. Craigmiller*: otherwiſe it would yield but an ordinary action, *Jan.* 23. 1624, *inter eoſdem*. The ſame was found, and that there needed no confirmation, *July* 27. 1664, *Muirhead*. Yea, tho' it was an aſſignation by a father to his ſon, of all his goods and debts; yet action was ſuſtained thereupon without confirmation, *June* 25. 1663, *Halyburton*. But where there was no delivery, the aſſignation of all the goods was not found to give action without confirmation, *June* 23. 1665, Procurator fiſcal of *Edinburgh*. Or where there was a reſervation to the diſponer, to diſpone otherwiſe during his life, *July* 4. 1665, Commiſſar of St. *Andrews*. But ſince the reſtitution of Biſhops, and reviving of the quots; actions are ſuſtained upon aſſignations, not intimated in the cedent's life, if they be ſpecial, the purſuer always confirming before the decreet be extracted *.

XX. Except in the matter of probation, all exceptions competent againſt the cedent before the aſſignation or intimation, are relevant againſt the aſſigny, as payment, compenſation, *&c.* which was found, even as to aſſignies to tacks, that the ſetter's back-bond was ſufficient againſt his ſingular ſucceſſor by aſſignation, *Dec.* 18. 1668, *Swintoun* °.

XXI. Aſſignations to incomplete real rights, as appriſings, diſpoſitions of lands before infeftment are affected with the *cedent's* back-bond, if the competition come in before infeftment, (*or if*) inhibition be uſed, or legal diligence that makes the matter litigious; and therefore, the back-bond of an aſſigny to an appriſing, was found effectual againſt his ſucceſſors by tranſlation, *July* 6. 1676, *Gordon*. But *an infeftment of annualrent granted by one having* a diſpoſition of lands, not drawn in queſtion till the *diſponee's* ſingular ſucceſſor was infeft upon his *aſſignation*, was not found effectual againſt that ſingular ſucceſſor, *June* 20. 1676, *Brown*: for if aſſignations, back-bonds, or even diſcharges or renunciations (*unregiſtrated*) of redeemable diſpoſitions of lands, were effectual againſt ſingular ſucceſſors in theſe lands, after the rights were perfected in their own perſons, or their authors by infeftment, it might in a great part diſappoint the deſign of thoſe excellent ſtatutes for regiſtration of land-rights; therefore, unleſs inhibition were uſed, or the matter made litigious upon theſe perſonal rights before infeftment, they are not habile to affect a real right, or a ſingular ſucceſſor therein; but becauſe appriſings within the legal, may be taken away in the ſame manner as perſonal rights; therefore aſſignations,

* By P. 1690. c. 26. it is declared that ſpecial aſſignations or diſpoſitions, tho' not intimated or made public during the life time of the granter, ſhall be valid and effectual rights without neceſſity of confirmation.

And by P. 1693. c. 15. actions of transference active are declared unneceſſary, and that an aſſigny by ſpecial aſſignation not intimated, may carry on the action raiſed by the defunct.

° See above, I. 18. 6. 6.

aſſignations, diſcharges and back-bonds, by thoſe who have right to the appriſing, being made within the legal, are effectual, *and* if thereupon the matter be made litigious before the expiring of the legal reverſion, or inhibition uſed thereupon, they will be effectual againſt the ſingular ſucceſſors, even after the legal is expired [p]; but after expiring of the legal, infeftments upon appriſings, are in the ſame caſe as infeftments upon irredeemable diſpoſitions; for they are the foundation of the rights of moſt lands in the kingdom, and if perſonal rights ſhould make them inſecure after the expiring of the legal, it would be of great inconvenience.

XXII. Aſſignies by tutors to their pupils bonds, will have no execution till the tutors compts be made by the cedent, *Dec.* 2. 1679, *Cleiland.*

XXIII. It is more dubious, and hath been diverſly decided when the exceptions are perſonal againſt the cedent, as in mutual contracts, the contracter himſelf can have no action unleſs he fulfil his part; but whether his aſſigny will be in the like caſe is the queſtion; which is at large cleared, *Lib.* I. *tit.* 10. § 16. and therefore ſhall not be here repeated.

XXIV. Judicial aſſignations are of two ſorts, according to the matter conveyed thereby, which, if it be moveable, is conveyed from the debtor to his creditor by arreſtment and decreet for making the arreſted ſums and goods forthcoming, and if it be heritable, by appriſing or adjudication. As to the *firſt*, That the progreſs upon arreſtment may be clearly taken up; we ſhall firſt conſider the arreſtment itſelf. *Secondly*, The looſing of it. *Thirdly*, The action for making forthcoming. Arreſtment is a precept or command of a judge, ordaining the thing arreſted to remain in the ſame caſe it is when arreſted, till ſuch things be done as are preſcribed in the letters of arreſtment: it is ſometimes extended to any preparatory precept *of a* judge, antecedent unto any further proceſs; ſo the firſt citation, or ſecuring of perſons till trial were made, or ſurety found, is called an arreſtment or attachment, as appears in the form of the crowners arreſtments of delinquents, *Parl.* 1487, *cap.* 99. *Parl.* 1528, *cap.* 5. But arreſtment proceeds moſt ordinarily upon an interlocutory ſentence, as when parties are contending for peats, turfs, or corn, upon debateable land; theſe uſe to be arreſted till the matter be decided, whereby the thing arreſted becomes litigious, and any thing done to the contrary hath the effect of breach of arreſtment, and is of the nature of *innovata lite dependente*, which therefore muſt be ſummarily reſtored and put *in ſtatu quo*, and brings no advantage but loſs to the actor.

But arreſtment which we are now about, is a precept by letters of arreſtment, arreſting debts or goods in the hands of any party haver thereof, at the inſtance of the creditor of him to whom the debts or goods belong, to remain under arreſtment, until the debt whereupon the arreſtment proceeds, be ſecured or ſatisfied; therefore arreſtments may be granted by all judges ordinary, ſuperior or inferior; but the arreſtment of an inferior judge was only found effectual in proceſs before himſelf, and before no other inferior judge, *March* 8. 1634, *Smith.* But upon occaſion of this debate, moſt of the Lords thought an inferior judge might proceed upon the Lords arreſtment, paſſing in the King's name; and there is not wanting ground to think that an inferior judge may proceed upon the arreſtment of another, ſeeing all of them proceed alone upon the King's authority; as if the defender change his domicile, an arreſtment made by the inferior judge, where he dwelt before, ought not to be ineffectual, nor the *creditor arreſter* neceſſitate to purſue before the Lords; for the Lords ſuſtain proceſs on arreſtments by inferior courts, as was found in an arreſtment before the Admiral, *March* 22. 1637, *Finnie.* Yet an arreſtment upon the precept of an inferior judge, was found null, becauſe executed without the juriſdiction of that judge, although the party in whoſe hands it was made, dwelt within the juriſdiction, *Dec.* 5. 1671, *Miller.* The reaſon hereof was, no execution is valid *extra territorium judicis*, which

[p] See below, III. 2. 39. above, II. 3. 22. 1. II. 5. 15.

which doth not conclude againſt the arreſtment of an inferior judge, made within his own juriſdiction; but that it would be ſuſtained againſt that party in any proceſs before the Lords, or any ſuperior having cumulative juriſdiction, or even before a co-ordinate or inferior juriſdiction, in which, if any queſtion were made, the Lords, by letters of ſupplement, would readily authoriſe the ſame. Arreſtment requires no other ſolemnity but the execution thereof, by him to whom the letters are directed, which requires the like requiſites as other executions do: of which hereafter.

XXV. There hath been an extraordinary form of arreſtment, ſometime uſed and ſuſtained, whereby creditors did arreſt the goods of their debtors in the debtors own hand, and thereupon did purſue ſuch as bought from them, whereof there is an inſtance obſerved by *Dury*, *Jan.* 10. 1624, betwixt the L. *Innerweek*, *John Wilkie*, and the La. *Bothwel*; wherein *Innerweek* having arreſted a parcel of wool in the La. *Bothwel*'s hand, upon a debt owing by her to him, and ſhe having thereafter ſold the wool to *Wilkie*, who paid the price, he was decerned to make forthcoming the true worth of the wool to *Innerweek*, although nothing appears inſtructed, that there was any colluſion betwixt the La. *Bothwel* and *Wilkie*, but what may be conjectured from the Lords allowing the price of the wool *. This kind of arreſtment hath not been drawn in example, for I have found no inſtance of it obſerved by any ſince that time **; and as the inſtance obſerved, is but the arreſtment of one particular; if it were to be allowed, it might be extended to more particulars, even to all the moveable goods and means of the debtor, and certainly it would be ordinarily ſo uſed, as ſtraitning the debtor more, that he could diſpoſe of nothing, but to the uſe of the arreſting creditor; and ſo it would become an inhibition in moveables, yet much more inconvenient, becauſe inhibition muſt be publiſhed at the market-croſs, and regiſtrate; whereas arreſtment may be done moſt privately before two witneſſes: and though inhibitions at firſt were deſigned to diſable debtors, not only to diſpone or dilapidate their lands or heritage, but their moveable goods, as the ſtile of inhibition doth ſtill expreſs; yet experience did early ſhow, that there was a neceſſity for current courſe of moveables, and that it could not conſiſt with traffick and commerce, that no man could ſecurely buy moveables without inſpection of regiſters; and therefore, inhibitions have now no effect as to moveables; much leſs ſhould arreſtment of the debtor's moveables in his own hand, which could with no reaſon affect the moveables, when diſponed for a juſt cauſe to third parties, much leſs could it infer breach of arreſtment againſt the buyers after arreſtment; and all the effect it could have, were only to ſuperadd upon the debtor the penalty of breach of arreſtment, thereby to confiſcate all his moveables; whereas there are ordinarily liquidate penalties agreed upon, of conſent of debtor and creditor. Such an arreſtment might be ſuſtained for the rents due to maſters of the ground upon their hypothecation, or for *invecta & illata* for houſe-mails; for the buyer might call for the maſter's diſcharge, and if he prejudged the hypotheck, it were on his own peril; or, in the caſe of competition, the ſubject thereof might be arreſted in the haver's hand, but only to make him liable not to ſell or put it away, but not to make the buyer liable.

XXVI. Arreſtment being a perſonal prohibition, uſed againſt him in whoſe hands the arreſtment was made, if he die, it is not extended to his ſucceſſors, but they may diſpoſe of the goods or ſums arreſted, unleſs it be renewed in their hands, in the ſame manner as an inhibition, which is alſo a legal prohibition, extending to heritable rights, as arreſtment doth to moveables; but though the debtor, whoſe goods or ſums were arreſted die, the arreſtment ceaſeth not; but the debt being eſtabliſhed againſt his ſucceſſors, proceſs may proceed upon the arreſtment, *Feb.* 19. 1667, *Glen.* *Jan.* 20. 1681, *Riddel.*

XXVII. As

* *Wilkie* in this caſe had not paid the price to Lady *Bothwel*, ſo far as appears by the deciſion, but he was found liable for the wool itſelf, or the higheſt value, without reſpect to the price he agreed to pay.

** See another deciſion of the ſame kind, *Nov.* 10. 1685, *Falconer*, No. 100.

XXVII. As to the effect and extent of arreſtments, they can only be laid on, and affect moveable goods or moveable debts, and can only be made uſe of for ſatisfying of moveable debts (what rights are moveable, and what heritable, hath been ſhown in the title, Real Rights) wherein by heritable, not only theſe are underſtood, which are properly ſo by infeftment, but alſo ſuch ſums and *debts*, as are by deſtination ſuch, as bearing obligement for infeftment or annualrent, even though the bond did bear no clauſe of requiſition, yet, if it did bear annualrent, arreſtment or appriſing had been found null thereupon, unleſs it had been made moveable by a charge, becauſe the bond bore the ſum payable at any time, upon a ſingle charge of ſix days, *July* 20. 1622, *Cranſtoun*. The like, *Hope*, obligations, *Mowat contra creditors of Richardſon*; *Cranſtoun contra L. Lugtoun*. Yet the contrary hath alſo been found in bonds, bearing annualrent, without a clauſe of requiſition, that poinding, arreſtment and appriſing might proceed without a charge, ſeeing it bore not to be paid with a charge, *July* 10. 1629, *L. Clackmannan*; *Jan.* 25. 1642, *Johnſtoun* [q]: but the matter is now cleared by the act of *Parl.* 1644, *cap.* 41. renewed *Parl.* 1661, *cap.* 51. declaring that all bonds and ſums, though bearing annualrent, are arreſtable at the inſtance of any creditor of that perſon, if infeftment hath not paſt actually thereupon; yet a ſum whereupon appriſing had followed, was found not to be arreſtable by the appriſer's creditor; and therefore an appriſer, from that prior appriſer, though poſterior to the arreſter, was preferred, *Feb.* 22. 1666, *Lockhart*. And though they do not ſo clearly determine upon what bonds arreſtment may proceed, as againſt what bonds or ſums it may proceed: yet *the act* bears *generally* for ſatisfying of any debt, which though it cannot be extended to an heritable debt, upon which actual infeftment is, till they be made moveable, yet ought to be extended to all other debts, upon which infeftment hath not followed, that *à pari*, as ſuch debts are arreſtable without a charge, ſo they may be arreſted for ſatisfying the like debt, without a charge upon the debt to be ſatisfied, more than upon the debt arreſted for ſatisfying thereof [s].

XXVIII. Though no heritable right, upon which infeftment hath paſt, can be arreſted till it be made moveable: yet the rents and profits thereof, are arreſtable and moveable, *Dec.* 15. 1630, *Ogilvie*. And ſo are the bygones of an annualrent, conſtitute by infeftment [ss], for theſe bygones are as to all effects moveable, though the right itſelf is heritable, as fruits falling from a tree are moveable, though the tree be not; yet they give a real action, by poinding of the ground, as well as perſonal againſt intromittors with the rents.

XXIX. Yea, arreſtment of annualrents, or mails and duties, is effectual, tho' laid on before the term, if the debtor to whom they belong were not denuded thereof before the term, the term being current when it was laid on, *March* 23. 1624, *Brown*; but it will not extend beyond the ſubſequent term, where the rent is paid termly, as in ſilver-rents, *March* 23. 1624, *Brown*: otherwiſe it will extend to the whole year in which it was laid on, as in farms, which are paid together, *Hope*, arreſtments, *Thomſon contra Wiſhart* *. Yea, an arreſtment of rent laid on before the term, was preferred to a poſterior appriſing, not having infeftment before that term, *July* 2. 1667, *Litſter*. And an arreſtment laid on *currente termino*, was preferred to a poſterior aſſignation to that term, *July* 27. 1673, *creditors of Scot competing*. Arreſtment is alſo valid, being laid on upon ſums before the term of payment, *Feb.* 21. 1624, *Brown*; *eodem die*, *Rentoun*. But in all theſe, the execution was ſuperſeded till the terms of payment of the arreſted ſums were *paſt*, *July* 3. 1628, *Scot*. Yet arreſtments ought not to be laid on for ſatisfying of debts, whereof the term of payment is not come; therefore ſuch an arreſtment was excluded by an arreſtment poſterior, which was laid on for ſatisfying a ſum, whereof the term of payment was come, when it was laid on, *July* 17. 1678, *Lo. Pitmedden* [t]. The like *Charters contra Neilſon*, *July* 29. 1670. Yea, it was extend-

* This deciſion does not prove the author's doctrine.

[q] See below III. 2. 15.

[s] See below, § 37. *med. h. t.*

[ss] See above II. 1. 4. 2.

[t] See below, § 34. & § *ult. h. t.*

ed to *affect* the price of lands, tho' laid on before writ, but after agreement, *Hope*, arreſtment, *Lo. Dalhouſie contra*

XXX. Neither was arreſtment effectual, being only laid on in the hands of the debtor's factor, and not their own hands, for making the ſame forthcoming for payment of his debt to whom it was due; becauſe factors are not debtors, but their conſtituents, *Hope*, arreſtment, *Muirhead and M'Michael contra Wallace.*

XXXI. Arreſtments have never been extended to future debts or goods; for arreſtments, both by their name and nature, do only ſtop the debtor's goods or debts arreſted, to remain in the ſame condition they were in when arreſted, till caution be found, or ſentence be obtained for making forthcoming. But inhibitions do prohibite the party inhibited, and whole lieges to buy from the perſon inhibited till the debt be ſatisfied, which is abſolute, and extends againſt all buying or blocking with the inhibited, whether *pro acquiſitis*, or *acquirendis.*

XXXII. Arreſtment orderly laid on, renders the thing litigious, ſo that an aſſignation made thereto, tho' to a creditor thereafter, hinders not the arreſter to prove by the cedent's oath, *Dec.* 10. 1623, *Douglas.*

XXXIII. As to the ſecond point propoſed, concerning the louſing of arreſtments, it hath been ſaid before, that the intent of arreſtment is the ſatisfaction of the arreſter's debts, (*either*) by the action for making forthcoming, which is a judicial aſſignation to him, of that which is arreſted; or otherways by ſecurity, when he whoſe goods or ſums are arreſted, findeth caution, and thereby louſeth the arreſtment, which is done by ſupplication to the Lords, and their deliverance, which of old gave warrant to the meſſenger to receive caution, and louſe the arreſtment; but is well amended by the act of *Parl.* 1617, *cap.* 17. annulling that way of louſing arreſtments, and ordaining caution to be found in the books of Seſſion, before giving out of the letters, which are not effectual, when the arreſtment proceeds upon a decreet; and therefore the letters expreſs the arreſtment to be louſed, unleſs it proceed upon a decreet. The ſame is to be extended to louſing of arreſtments of inferior judges, by caution found in their books.

XXXIV. Arreſtment is ſometimes granted upon production of principal writs, but if the arreſtment proceed upon production of the principal bond unregiſtrated, there being then no decreet of regiſtration, it may be louſed, *Feb.* 7. 1665, *Graham:* or if the decreet be turned into a libel, *June* 30. 1675, *Murray:* or if the arreſtment was laid on after the decreet was ſuſpended: or if the term of payment of the ſum for which it was laid on, was to come [r], *Nov.* 4. 1675, *Moſman* ſupplicant: or upon conſignation of the ſum arreſted for, *June* 18. 1675, *Hamilton* ſupplicant. But when the arreſtment was upon a dependence, tho' the decreet proceeded upon the dependence before the louſing of the arreſtment; yet it was found, the arreſtment might be louſed upon caution, *June* 9. 1677, *Sibbald of Rankilor.* But in louſing arreſtments, no juratory caution was admitted, *July* 16. 1661, college of *St. Andrews* ſupplicant.

XXXV. Arreſtment being louſed, the party in whoſe hands it was made, may ſafely pay the ſum, or deliver the goods arreſted to the louſer of the arreſtment, *June* 21. 1626, *Lo. Balmerino*; *Hope*, arreſtment, *Gordon contra Brody.* But if the ſum remain unpaid, the arreſter may proceed againſt the perſon in whoſe hands he arreſted, *Feb.* 7. 1665, *Graham.* In this caſe the debtor who louſed the arreſtment, had granted aſſignation to the debt arreſted; yet the arreſter was preferred to the aſſigny, in reſpect the caution is inſufficient ordinarily, which comes in the place of arreſtments *.

XXXVI.

* See *July* 4. 1661, *Raith*, where an aſſignation was preferred to a prior arreſtment louſed, altho' the ſum arreſted was ſtill unpaid. But the arreſtment proceeded upon a dependence, and decreet was not obtained at the time of the competition.

[r] See above, § 29. *h. t.*

XXXVI. Upon arreſtment there ariſeth two actions to the arreſter, the one is againſt the cautioner, found in louſing the arreſtment, the other againſt the perſon in whoſe hands the arreſtment was made. This action for making ſums or goods arreſted forthcoming, is ordinary; and for underſtanding the requiſites of it, it would be adverted, that arreſtment may be raiſed (firſt) upon production of the principal bond, without decreet or dependence, *March* 5. 1628, *Binnie*; *Feb.* 7. 1665, *Graham*; *Hope*, arreſtment, *Thomſon contra M'Moran*. Secondly, It may be raiſed upon an action depending. Thirdly, Upon a decreet obtained againſt the debtor, whoſe ſums are arreſted: but there is no proceſs for making forthcoming, till the debt be liquidated and eſtabliſhed by a decreet at the arreſter's inſtance, againſt him whoſe goods or ſums are arreſted, or againſt ſome repreſenting him, which was ſo done, though the *executor of the defunct debtor* compeared and conſented, *March* 13. 1628, *Somervel*; *Hope*, transferring, *L. Lamingtoun contra Durham*. And if that party die before the decreet for making forthcoming, the decreet muſt be transferred againſt thoſe repreſenting him: but if none will enter to be heir, or executor to him, but renounce; yet the party that might ſucceed, muſt be called *cognitionis cauſa*; *Nicolſon, de hæreditariis actionibus*, *Murray contra Dalgleiſh*; and therefore, when the arreſtment is upon a principal bond, or upon a dependence, the bond muſt be regiſtrated, or decreet obtained thereupon, or upon the dependence, before the party in whoſe hands the arreſtment was made, be obliged to anſwer. The party whoſe ſums and goods are arreſted, muſt not only be called *in initio litis*, but to all the diets of the proceſs, *March* 17. 1637, *Stuart*. In this proceſs the arreſtment was not found inſtructed by extracting the horning, containing arreſtment and the executions, but that the principals of both muſt be produced, *Spotiſ.* arreſtment, *Boid contra Wilſon*. For the act of Parliament for regiſtration of hornings, *&c.* makes extracts probative, but that will not extend to the execution of the arreſtment, tho' by the ſame letters, for that execution needs not be regiſtrated *.

XXXVII. As to the exceptions competent in this action; *Firſt*, It is not competent to the party in whoſe hands the arreſtment was made, to alledge payment made by the party whoſe goods or ſums are arreſted, that being *jus tertii*, competent only to that party himſelf, who muſt be called, *Dec.* 21. 1721, *Hamilton*. Neither will it be relevant to either party to alledge the debt, whereupon the arreſtment is raiſed, is ſuſpended; but the reaſon of ſuſpenſion muſt be repeated by way of defence, *Jan.* 25. 1642, *Stirling*. But it will be relevant to alledge that the arreſtment is null, as being executed upon the Sabbath-day, *Feb.* 3. 1663, *Oliphant*: or that the arreſtment not being upon a decreet, was louſed, and that the ſums are paid: it is alſo relevant, that the goods arreſted were lawfully poinded by another creditor of the party to whom they belonged, becauſe arreſtment is but a begun incompleat diligence, and doth not tranſmit the right, till decreet be obtained thereupon: but others uſing more compleat diligence, will carry the ſame, *Had. June* 5. 1611, *Wright contra Thomſon and Archibald*, *Feb.* 12. 1636, *Leſlie contra Hume*, which was ſuſtained, albeit the arreſtment was laid on for exciſe, *Dec.* 4. 1679, *Forreſter*. Yea, though the party in whoſe hands arreſtment was made, ſuffered the poinder to enter his cellars, and poind the goods arreſted, *March* 11. 1635, *Dick*. In this caſe the haver voluntarily opened his cellar by paction with the poinder, which was not reſpected, ſeeing he refuſed not entry to the arreſter, if he had demanded it. But this exception was elided by this reply, that the party in whoſe hands the arreſtment was made, colluded with the poinder, and voluntarily exhibited the goods arreſted to be poinded, not being paſſive therein, but active to prefer the poinder, as was formerly *found* relevant, *Hope* arreſtment, *Kinloch contra Halyburton*; *White contra Blackater*; *Jan.* 20. *and Feb.* 2. 1672, *Bell contra Fleming and Williamſon*. It is alſo a relevant exception, that the ground of the arreſtment, or the ſum arreſted

* In this caſe the principal executions were produced, and only the letters of arreſtment were loſt, an extract whereof was not found ſufficient.

arreſted was heritable [rr], before the act of *Parl.* 1644; or ſince, that infeftment hath paſſed upon either, unleſs it be made moveable; and therefore arreſtment being laid on upon ſums conſigned, for a redemption, was not found effectual till declarator of redemption paſs, which only makes the ſums moveable; and, during the dependence of redemption, theſe ſums cannot be arreſted, as belonging to the uſer of the order; becauſe they come in place of the lands redeemed, and can belong only to the wadſetter or appriſer, or any having right from them to the lands wadſet; but after redemption, the ſum conſigned may be arreſted and made forthcoming for payment of the wadſetter's debt, *Spotiſ.* arreſtment, *Hepburn contra Hay.* It is alſo a competent exception, that the thing arreſted is a proper aliment, expreſsly conſtitute, and not exceeding the meaſure of aliment; *Had. Nov.* 29. 1622, *Adamſon contra Kirkaldie and Barclay* *. And the fee of a ſervant was not found arreſtable, in ſo far as it was neceſſary for the ſervice he was in, but only for the ſuperplus, more than was neceſſary for his aliment in ſuch a ſervice, *July* 9. 1668, *Beg* **. The like holds in the King's penſions and fees of his public miniſters, Lords of Seſſion, and others, which are not arreſtable in the treaſurer's hands by act of ſederunt, *June* 11. 1613 [u], and was ſo found in the caſe of Sir *Robert Murray* juſtice-clerk, a part of whoſe ſalary was arreſted ***.

XXXVIII. When purſuits are for making arreſted goods forthcoming, which are not liquid, the party in whoſe hands arreſtment was made, will not be decerned for making forthcoming a liquid ſum for the price: but if he offer the goods *ipſa corpora*, the decreet will contain a warrant to the magiſtrates of the place, to roup the goods arreſted, that the price thereof may be delivered to the arreſter, *Nov.* 12. 1680, *Stevinſon.*

XXXIX. Appriſing and adjudication of heritable ſums, whereupon infeftment hath not followed, being little in uſe (though competent) ſince the act of Parliament 1644, which hath been continued by *Act* 51. *P.* 1661, though that Parliament be reſcinded, we ſhall ſay no more of it in this place; but, as we have conſidered theſe ſeveral ways of tranſmiſſion of perſonal rights ſeverally, we ſhall now conſider them jointly as they fall in competition, for preference amongſt themſelves, and each with others. In theſe competitions it muſt be conſidered that arreſtment doth conſtitute no right in the arreſter, but is only a legal prohibition to alter the condition of the thing arreſted, nor to pay or deliver the ſame to the arreſter's debtor; but that it may remain in his hand for ſatisfaction of the debt arreſted for: and it is only general, arreſting all ſums of money, or goods, in the hands of the party in whoſe hands it is laid on, due or belonging to the arreſter's debtor, for ſatisfying of the debt whereupon the arreſtment proceeded; and therefore cannot be of more effect, than a denunciation of lands to be appriſed, or a citation on a ſummons of adjudication; and therefore doth conſtitute or transfer no right, but is a legal diligence, rendering the ſubject matter arreſted litigious, ſo that the party in whoſe hands the arreſtment is made, cannot alter any ſums or debts belonging to that debtor in prejudice of the debt arreſted for, until the arreſtment be louſed, and caution found for the debt or decreet abſolvitor or declarator be obtained, excluding the arreſtment: and if he do any thing on the contrary, it infers breach of arreſtment, confiſcating his moveables, and he is liable, as if the ſums or goods remained in his hand, *pro poſſeſſore habetur qui dolo deſiit poſſidere:* and though the arreſtment have no intimation to the arreſter's debtor, or any of his creditors; yet if any of them recover the ſums or goods arreſted by the colluſion or neglect of the party, in whoſe hands arreſtment is made, he will ſtill remain liable; as if by colluſion and gratification, he or his procurator

* See to the ſame purpoſe, *March* 27. 1627, *Weſtniſbet.*

** In this caſe the debtor had made a *ceſſio bonorum*, and afterwards was engaged as a ſervant: the queſtion was, whether this was ſuch an acquiſition as could be affected by his former creditors? the Lords found it was not.

*** This deciſion not found. The act of ſederunt is preſerved by *Spotiſwood*, *voce* penſion.

[rr] See above, § 27. *h. t.* [u] See above, II. 5. 18.

procurator (whoſe deed will be preſumed his) oppoſe the arreſter, and procure delay, to compear and depone; and acknowledge the debt, or be holden as confeſt to another arreſter; neither will he be liberated by offering his oath, that he gave no ſuch warrant; for the employing a procurator is a ſufficient warrant for all the common courſe of proceſs, and requires no ſpecial mandate; yea, if he pay or deliver to any other arreſter, or even if by his colluſion goods be pointed upon a decreet, he will not be liberated, ſeeing he ought to have raiſed a proceſs of multiple-poinding, calling the debtor and all the arreſters or aſſignies to diſpute their ſeveral rights, that once payment to the party, found to have beſt right, might liberate him; yet if he have paid, he does thereby without a direct aſſignation, come in the place of the party to whom he hath paid; and if he can ſhow that that parties right is preferable to the arreſter inſiſting, he will be heard thereupon.

XL. And unleſs it be found that he proceeded warrantably, not only will he be decerned to make forthcoming, though it infer double payment; but he to whom he paid unwarrantably, will be compelled to reſtore and ſatisfy the arreſter, the ſubject having been litigious by his arreſtment, before the other party recovered the ſame, albeit he have recovered payment *bona fide*, without any fault in him, but by the litigiouſneſs of the ſubject; for payment made *bona fide*, (*in competition*) with a preferable right, relieveth only the payer, who was or might have been compelled to pay, being conſcious of no other right: for it is not relevant for the party obtaining payment *bona fide*, nor will that ground of law ſecure him, *quod, qui ſuum recipit, licet a non debitore, non tenetur reſtituere*, which holds only in voluntary payments, *à non debitore*, and where the ſubject is not litigious [x]. Upon the ſame ground, albeit the party in whoſe hands arreſtment is made, collude not, but be equally paſſive, or equally oppoſe the competitors: yet if the debtor collude and propone defences againſt ſome of the competitors, and not equally againſt all, and thereby procure delay, and terms to prove; if he ſuccumb, tho' another purſuing in a ſeveral proceſs, before the ſame or different judges, obtain decreet and payment thereupon, yet he will be neceſſitated to refound, if he had not a preferable right to whom he paid.

XLI. If the party in whoſe hands arreſtment was made, appear and offer to depone, if the purſuer ſuffer him to depone generally, that at the time of the arreſtment, he had neither goods nor ſums belonging to the debtor in his hands, the arreſter will not *ex intervallo*, obtain him to be more particularly interrogated, *ad vitandum perjuriam*; but if before, or at his oath given in general, there be ſpecial interrogatories offered by the party or the judge, whether at any time there were in his hands ſums or goods belonging to the arreſter's debtor, and how, and when he ſatisfied or delivered the ſame, he will be holden as confeſt, unleſs he depone particularly; that he be not his own judge, as to the time when he was due, or when he ceaſed to be due; for he may pretend or imagine, that the time of the arreſtment, he was not debtor, becauſe he had paid to an aſſigny, whoſe aſſignation was prior to the arreſtment, albeit intimation was not prior, though he had promiſed payment before intimation, yet he could not thereupon have been compelled to pay, if before payment an arreſtment had interveened; becauſe his promiſe could be but underſtood to be according to the party's right, to whom he promiſed, which he could not quarrel; but if another did exclude that party, he could not be liable to double payment, albeit he had given a bond of corroboration *, unleſs the aſſigny had offered to intimate, and he had hindered the ſame, as unneceſſary, and promiſed payment; for then through his own fraud or fault, he would be liable to pay both parties; and therefore, the promiſe of payment was only found relevant to exclude an arreſtment after the promiſe, to be proved by the oath or writ of the arreſter, *(that it was known to him)* and not of the promiſer, or party to whom he promiſed; yet if the promiſe were not ſo proved,

* See, § 9, and § 45. *h. t.* where it is ſaid, that a bond of corroboration granted to the aſſigny, ſupplies the place of a formal intimation.

[x] See above, § 13. *h. t.*

and thereby the arreſter were preferred, the party promiſer, in whoſe hands the arreſtment was made, was declared free of the promiſe, unleſs there had been a tranſaction, or that the promiſer had undertaken the hazard; *Dec.* 11. 1674, *Elphingſtoun.*

XLII. That which transferreth the right, is neither the arreſtment, the citation, nor any thing in the proceſs, but only the decreet for making forth-coming, which is in the ſame condition, as to ſubjects arreſtable, as appriſings, or adjudications are to others, which do not import full ſatisfaction of the debt, and do not fully liberate the debtor, but that other diligences may be uſed for the ſame debt, unleſs he poſſeſs till the legal expire: and in the ſame way after decreet, for making forth-comnig, the arreſter may uſe other diligences; but in competition with other creditors uſing diligence, he may not exclude them, and keep up his own diligences, but hath his option thereof. But ſeeing the arreſtment maketh the ſubject arreſted litigious, it hath the common effect neceſſarily introduced by law *in re litigioſa*, that inchoat diligence cannot be excluded, either by the voluntary deed of the debtor, or by any legal diligence poſterior, unleſs the uſer of the firſt inchoat diligence become negligent, *nam vigilantibus, non dormientibus jura ſubveniunt.*

XLIII. The application of theſe grounds will eaſily clear the preference in the competition of arreſtments with aſſignations, or of arreſtments with arreſtments. And as to the competition betwixt aſſignations and arreſtments, an aſſignation duly intimated, is a full and complete tranſmiſſion of the right aſſigned, if by its nature it be aſſignable, and thereby the right of the cedent ceaſeth, and the aſſigny becomes creditor, and hath no neceſſity of any further diligence to complete the right: therefore no poſterior arreſtment will be preferred to an aſſigny, if the intimation be before the arreſtment, which is accounted, not only by days, but by hours: but if the intimation and execution of the arreſtment be both in one day, and expreſs no hour, if the arreſter be not negligent, they will come in *pari paſſu*, becauſe no priority doth appear, *Spotiſ.* debtor and creditor, *Ingles contra Edward*, which will hold in the competition of diverſe arreſtments, or diverſe aſſignations, where no priority doth appear; for we have little reſpect to the anteriority of debts in competition, but to the anteriority of diligence, as is evident in appriſings and adjudications; ſo if the hour be expreſt in the arreſtment, and not in the aſſignation, or contrarywiſe, that which wants the hour, will prove no more but once that day, and the other will be preferred *.

XLIV. But if the arreſtment be prior to the intimation, the arreſtment is preferable, if it fail not in diligence; and therefore an arreſtment was preferred to an aſſignation intimate the ſame day, but two hours thereafter, *Jan.* 30. 1629, *Davidſon.* This diſtance was too narrow, for the executor and witneſſes may miſtake the preſent hours, ſo that three hours were a fitter diſtance to prefer: yea, an arreſtment upon a dependence, was preferred to a poſterior aſſignation, tho' intimate half a year before ſentence, upon that dependence, *Hope*, aſſignation: but it muſt be in the diſcretion of the judge to determine, when arreſters fail in diligence.

XLV. As to intimations, they are unqueſtionable, if done by inſtrument, or by charge of horning, at the inſtance of the aſſigny upon the aſſignation; becauſe the letters bear, that the aſſignation was produced to the judge, paſſer of the bill: and there is little doubt that aſſignations attaining effect by poſſeſſion, will be in the ſame caſe, as if intimated by inſtrument: or if a bond of corroboration be obtained upon the aſſignation, or diſcharges inſtructing payment of a part of the debt aſſigned: or if in proceſs the aſſignation be judicially produced [w]; but the caſe is not alike, nor have I obſerved it decided, if a citation before the aſſignation be judicially produced, will exclude an arreſter, *medio tempore*, wherein the negative is more juſt and convenient; for a formal inſtrument of intimation, will not inſtruct, if it bear not the production of the aſſignation.

XLVI. As

* The contrary was found *July* 1687, *Edie*, obſerved by Mr. *Patrick Home*, N°. 949, where both competitors were brought in *pari paſſu.*

[w] See above, § 7. *et* 8. *et* 9. *h. t.*

XLVI. As to the competition of arreſters, the firſt arreſtment, not failing in diligence, is preferable; and therefore the firſt arreſter was preferred, tho' prior but by one day, tho' both obtained decreet upon the ſame day, and both uſed full diligence, *Feb.* 1. 1666, *Cunninghame*. And likewiſe, an arreſtment by letters from the Lords of Seſſion, and firſt citation thereupon, being inſiſted in without negligence, was preferred to a poſterior arreſtment, tho' obtaining the firſt decreet before a ſheriff; in reſpect that decreets before the Lords, cannot be ſo ſummarily obtained, eſpecially, ſeeing they muſt abide the courſe of the roll, *Nov.* 23. 1667, *Montgomery*. And a poſterior arreſtment was preferred to a prior, in reſpect the term of payment of the ſum, for ſatisfying of which the firſt arreſtment was laid on, was not come at the time of the firſt arreſtment; but before the ſecond arreſtment was laid on, the term of payment of the ſum, for which it was laid on, was paſt; albeit the terms of both ſums were paſt before the competition came before the Lords by advocation, *July* 29. 1670, *Charters*: *July* 17. 1678, Lo. *Pitmedden*. And for the ſame cauſe, arreſtment upon a decreet may be preferred to a prior arreſtment upon a dependence; becauſe the ground of the former hath *paratam executionem*, and not the ground of the latter: yet an arreſtment upon a dependence, was preferred to a poſterior arreſtment, obtained upon production of a regiſtrable bond, before it was regiſtrate, and ſo was not raiſed upon a decreet, *Hope, arreſtment, Thomſon contra M'morran*. And arreſtment laid on after the term of payment of the debt arreſted, was preferred to a prior arreſtment, laid on before the term of payment upon the debt arreſted, *Jan.* 23. 1673, *Mader**. And an arreſtment laid on by a towns-officer *whoſe execution bore no witneſſes* was excluded by a poſterior arreſtment, having an execution before witneſſes, albeit the *firſt* execution was the cuſtom of the place, *July* 19. 1678, *Warrock*. And a firſt arreſter was not excluded for want of diligence, but was preferred to a poſterior arreſter, who had brought his cauſe to be concluded at which time the prior arreſter compeared, and produced an aſſignation, after his arreſtment from the common debtor, whereby he needed no further diligence, *July* 5. and 19. 1673, *Birnie*: this aſſignation was found no voluntary gratification, ſeeing it preferred the firſt legal diligence: and upon the ſame ground, an aſſigny by a bankrupt, was preferred to a poſterior arreſter, in reſpect the aſſigny had uſed the firſt diligence by horning, before the arreſtment, *Nov.* 20. 1677, Biſhop of *Glaſgow*.

TITLE II.

Diſpoſitions, where, of Reſignations *in favorem*, Appriſings and Adjudications of real Rights, *&c.*

I. *Diſpoſitions of property carry virtually all leſſer and ſuperveni-ent rights.*
II. *How ſuperveening rights belong to ſingular ſucceſſors.*
III. *Diſpoſitions deſcribed.*
IV. *How diſpoſitions are accompliſhed in equity.*
V. *How by the law of the* Romans, *and other civil nations.*
VI. *Poſſeſſion accompliſheth real rights.*
VII. *Property of moveables is preſumed from poſſeſſion.*
VIII. *Reſignation* in favorem, *and* ad remanentiam.
IX. *Diſpoſitions or aſſignations with conſent of theſe who have right, how far effectual.*
X. *Procuratories or inſtruments of reſignation after forty years, needs not be produced.*
XI. *Infeftment on reſignation carries any leſſer right in the diſponer.*
XII. *The effect of reſignations, before infeftment follow thereon.*

XIII.

* The contrary was found *Jan.* 2. 1628, *Watkins*. *Forbes* MSS *Jan.* 26. 1714, *King*.

XIII. *Superiors are not obliged to receive ſingular ſucceſſors.*
XIV. *The original and extent of appriſings.*
XV. *Appriſings can only proceed on liquid ſums.*
XVI. *Appriſings reach all heritable rights, though not provided to aſſignies.*
XVII. *Appriſings carry all perſonal rights, without intimation.*
XVIII. *The riſe of infeftments upon poſterior appriſings.*
XIX. *Infeftments obtained ſummarily upon appriſings after the debtor's death.*
XX. *The effect of appriſings as to non-entry, ward, and life-rent-eſcheat.*
XXI. *The denunciation of appriſing, renders the matter litigious.*
XXII. *Competition of appriſings.*
XXIII. *The effect of appriſings at the inſtance of ſuperiors againſt their vaſſals.*
XXIV. *The effect of appriſings, as to removings, mails and duties,* &c.
XXV. *Allowance of appriſings.*
XXVI. *Whether ſuperiors muſt receive appriſers not inſtructing their author's right.*
XXVII. *The quantity of the year's rent due to ſuperiors, for entering appriſers.*
XXVIII. *What courſe is competent againſt contumacious ſuperiors.*
XXIX. *The legal reverſion of appriſings.*
XXX. *Appriſers may uſe other diligence for their payment, though the appriſings were expired.*
XXXI. *Nullities of appriſings.*
XXXII. *Modifications of exorbitant penalties in appriſings.*
XXXIII. *Appriſing ſuſtained without a charge for the ſum.*
XXXIV. *Appriſing ſuſtained, though the letters and executions were blank as to the lands.*
XXXV. *An appriſing ſuſtained without producing the letters of appriſing.*
XXXVI. *An appriſing ſuſtained, tho' by diſpenſation at a private place, and the court of appriſing adjourned.*
XXXVII. *An appriſing of rights generally, preferred to a poſterior ſpecial.*
XXXVIII. *Appriſings become extinct by payment, or intromiſſion.*
XXXIX. *In what caſes appriſers muſt poſſeſs, and how they are countable.*
XL. *What alterations in appriſings are introduced by act of Parliament* 1661, cap. 62.
XLI. *How appriſings coming in the perſon of the debtor's apparent heir, are ſatisfiable.*
XLII. *How appriſings againſt parties charged to enter heir, are redeemable.*
XLIII. *Legals run not againſt minors.*
XLIV. *Appriſers continuing to poſſeſs after the legal, can uſe no other diligence.*
XLV. *The riſe of adjudications.*
XLVI. *The form of adjudications or renunciations to be heir.*
XLVII. *Why adjudications paſs at random, and may now be put to inſtruct ſome intereſt in the debtor.*
XLVIII. *What rights are affected with adjudications.*
XLIX. *Superiors muſt receive adjudgers, paying a year's rent.*
L. *How adjudications are redeemable.*
LI. *Adjudications may be for the apparent heirs own debt.*
LII. *How adjudications become extinct.*
LIII. *The form and effect of adjudications, to perfect diſpoſitions.*
LIV. *The form and effect of the partial and total adjudications introduced by act of* Parl. Sept. 6. 1672.
LV. *The order of the ſale, adjudication, and diviſion of bankrupts eſtates.*

A DISPOSITION may, and ſometimes doth ſignify the alienation of any right, whether real or perſonal; ſo the ſtile *of* tranſlations ordinarily bears, the aſſigny to transfer and diſpone: as aſſignation is ſometimes extended to the

the diſpoſal of real rights, which are frequently provided, not only to heirs, but to aſſignies; yet theſe terms are ſo appropriated and diſtinguiſhed, that diſpoſition is applied to the alienation of real rights, and aſſignation *to the alienation* of perſonal rights.

I. In both diſpoſitions and aſſignations, the diſponer or cedent is called author, and the acquirer is called the ſingular ſucceſſor, and in both, this common brocard takes place, *jus ſuperveniens authori accreſcit ſucceſſori*, that is, whatever right befalleth to the author after his diſpoſition or aſſignation, it accreſceth to his ſucceſſor, to whom he had before diſponed, as if it had been in his perſon when he diſponed, and as if it had been expreſsly diſponed by him: whence ariſeth the diſtinction, betwixt diſpoſitions and aſſignations, expreſs and implicite, or tacit when the right is not expreſsly diſponed, but tacitly or virtually; as he who diſpones the property, *hoc ipſo*, doth tacitly and virtually diſpone any leſſer right, as a reverſion, ſervitude, liferent, though no particular mention be of theſe, according to another rule of law *majori ineſt minus*; ſo any perſon infeft in property, and his ſeiſin regiſtrated, will have right to a reverſion, if no more was in the diſponer's perſon; albeit aſſignations to reverſions require ſpecial ſolemnities, as to be regiſtrated in the regiſter of reverſions; yet the regiſtration of this ſeiſin will be equivalent: ſo a liferent-right, granted by him, who had only right of tack, was found to carry the right of that tack, during the liferenter's life, *Hope*, liferents, *L. Roſyth contra his tenants*. The like of a back-tack, *ibid. La. Boyd contra her tenants*, *Stuart contra Fleming*. The like found of a liferent, which carried the right of a reverſion *quoad* the liferenter's life, *Dec.* 5. 1665, *Beg.*

II. There is no queſtion of this accretion, when the diſponer diſponeth for all right he hath, had, or ſhall acquire, which is a general aſſignation or diſpoſition, of any right ſuperveening, if the debate fall betwixt the diſponer and his ſucceſſor; there is alſo little queſtion, if the right diſponed have expreſt or implied abſolute warrandice, as being for a cauſe onerous; in which caſe, if the queſtion be betwixt the diſponer and ſucceſſor, he who diſponed for an equivalent cauſe, importing his acknowledgment of having an abſolute right, cannot clothe himſelf with any poſterior right, which would infer warrandice againſt him, if it were in another's perſon; and therefore, that perſonal objection excludes him, it being in his own perſon: neither is it queſtionable, that if the diſpoſition or aſſignation be limited, as being only to a particular title, or generally, for any right the diſponer hath, or bearing warrandice from his own fact and deed, then if he acquire a poſterior right, he may make uſe thereof againſt that perſon to whom he diſponed, much more may any ſingular ſucceſſor of his; and therefore, in the caſe decided, *July* 19. 1664, betwixt Dame *Eliſabeth Douglas and Sir Robert Sinclair her ſpouſe*, *contra L. Weddderburn*, anent the tiends of *Kello* and *Kimmergem*, whereof the Earl of *Home*, common author, gave a tack to *Wedderburn*'s predeceſſor, with warrandice from his own deed; and any right the Earl then had, being reduced, he did thereafter acquire a new *annualrent*-right from *Coldingham*, and thereupon granted a right to *William Douglas* of *Evla*, to whom the ſaid Dame *Eliſabeth Douglas* is heir, which ſuperveening right was found not to accreſce to *Wedderburn*, to defend his tack, ſeeing he had not abſolute warrandice, but from his author's deed only. But the main queſtion is, when the controverſy is not betwixt the author and the party to whom he diſpones, but betwixt the ſingular ſucceſſor of that author, and that party to whom he had diſponed before, in which caſe the perſonal objection upon the warrandice hath no place; and oft-times the right ſuperveening, requireth ſpecial ſolemnities, and cannot be tranſmitted without theſe; as reſignation, confirmation, ſeiſin; yet even in theſe caſes, reaſon, and the Lords deciſions, extended the rule ſo that the ſuperveening right *ipſo facto* accreſces without any new ſolemnities; but if the neceſſary ſolemnities have preceeded when there was no right, whenſoever the right ſuperveens, it is drawn back, as if it had been in the time of the former ſolemnities, *fictione juris* [w]; and

[w] See *L.* 72. *ff. de rei vindicat.*

and ſo, if a ſuperior acquire the right of forfeitry of his ſuperior, the ſame *ipſo facto* accreſceth to the ſub-vaſſals, and cannot be made uſe of againſt them, *Spotiſ.* conjunct fees, *Crawford contra L. Murdiſtoun.* The like was found, *Feb.* 15. 1665, *Boid of Pinkel contra vaſſals of Carſluth:* in which caſe the vaſſals were ordained to pay their ſhare of the compoſition of a ward [a]: but where the ſuperveening right befel to the author's apparent heir, and was by him diſponed to another, before he was entred heir; in that caſe, the author's apparent heir, obtaining a gift of the liferent-eſcheat of lands diſponed to vaſſals, the ſaid liferent was not found to accreſce to the vaſſals, becauſe the apparent heir was denuded thereof in favour of another, before he was heir, *Had. July* 5. 1611, *Skeen contra vaſſals of Athol* *. This rule was ſo far extended, that a ſupervenient right, by decreet of reduction and improbation acquired by L. *Swintoun*, having right to the lands of *Brimſtoun, by gift of E. Lauderdale's forfeiture*, was found to accreſce to the Earl of *Lauderdale*, being reſtored, *July* 13. 1644, *E. Lauderdale.* But this is not the accreſcing of a new right, but declaring an old; yet, where a perſon having a diſpoſition of lands, did infeft another in *an annualrent*, himſelf never being infeft, *and afterwards* did aſſign the diſpoſition to a third party, who was thereupon infeft, that *infeftment* was not found to accreſce to the annualrenter, becauſe his author was never infeft, *June* 20. 1676, *Brown.*

It is the common opinion, that if a party grant infeftment, before he be infeft himſelf, and be thereafter infeft, it accreſceth to that party whom he infeft before, if the queſtion be betwixt them; but I have not obſerved it directly decided, *quid juris*, in theſe caſes, if a perſon not infeft, do give right to two parties, and thereafter be infeft, to which of the two his ſuperveening infeftment will accreſce: or if he infeft one, when he is not infeft, and thereafter another, when he is infeft, *which of* theſe will have right: *but it ſeems the firſt infeftment in both caſes will be preferred, becauſe the common author's right accreſceth* ipſo facto; yet if the common author's infeftment proceed upon the diligence of any party, the ſame will only accreſce to him, who is the procurer of it; if the preference be upon diligences, and not upon aſſignations; in the caſe *of aſſignations* it was found to accreſce to the firſt right, with abſolute warrandice, *June* 21. 1671, *Neilſon.*

III. But now to return to what is ſpecial in diſpoſitions. A diſpoſition is the tranſmiſſion, or conveyance of real rights from the diſponer to his ſingular ſucceſſor, not in contemplation of the diſponer's death, for ſuch are comprehended among ſucceſſions, from the dead, as legacies, donations *mortis cauſa*, &c. A diſpoſition is ſaid to be a conveyance, and ſo it is taken, not for the diſpoſitive act of the will only, but whatſoever elſe is requiſite to complete the conveyance, as tradition, reſignation, poſſeſſion, tho' a diſpoſition is oft-times taken as diſtinct from theſe. For the more clear uptaking of conveyances of real-rights; conſider firſt, what is requiſite to tranſmit them by the law of nature, without any poſitive law or cuſtom: and next, what by theſe is requiſite to tranſmit the ſeveral rights. As to the firſt, it hath been ſhown in the title Real Rights how far dominion and property is competent by the law of rational nature, and it cannot be doubted, but that tho' there were no poſitive law nor cuſtom, that the rational creature is naturally inſtructed how to diſpone and alienate his own, the power of diſpoſal being the characteriſtick of dominion, which is natural to man, being created lord of the creatures. The queſtion then is, by what act men may naturally exerciſe the power of diſpoſal, which can be no act of the underſtanding, that being only contemplative, and nothing active or operative for conſtituting or tranſmitting of rights; but it muſt needs be an act of the will, for by it, rights are both acquired, relinquiſhed, and alienated; there may be three acts of the will about the diſpoſal of

[a] See above, II. 4. 15.

* The caſe here was, that the liferent of certain lands was provided to the Counteſs of *Athol*, which lands were afterwards feued out by the Earl. His apparent heir acquired right to the Counteſs's liferent; but before he was ſerved heir to his father, his eſcheat fell, by which he was denuded of the Lady's liferent in favour of the King, by whom it was gifted ſoon after to a donatar. In a competition between the vaſſals and the donatar, it was found, that the right to the Lady's liferent had not in this caſe accreſced to the vaſſals.

of rights; a reſolution to diſpone, a paction, contract or obligation to diſpone, and a preſent will or conſent that that which is the diſponer's be the acquirer's. Reſolution terminates within the reſolver, and may be diſſolved by a contrary reſolution, and ſo tranſmits no right: paction does only conſtitute or tranſmit a perſonal right or obligation, whereby the perſon obliged may be compelled to tranſmit the real right. It muſt needs then be the preſent diſpoſitive will of the owner, which conveyeth the right to any other, which is expreſſed by ſuch words *de praeſenti*, "*Titius* diſponeth, alienateth, or annalzieth, gifteth, granteth, ſelleth, *&c*;" which cannot properly import an obligation, having its effect in the future, tho' there may be obligations conſequent as to delivery, warrandice, *&c.* but theſe terms do expreſs ſomething preſently done, and not engaged to be done, and ſo can be nothing elſe but the alienation or tranſmiſſion of the right itſelf.

IV. That the diſpoſitive will of the owner alone, without any further, is ſufficient to alienate his right, without delivery or poſſeſſion, is evident in perſonal rights, wherein the diſpoſitive clauſe of aſſignations or tranſlations is ſufficient; intimation or poſſeſſion being introduced for expediency in ſome caſes, by our cuſtom. That the diſpoſitive will is alſo ſufficient to tranſmit real-rights, it appeareth, becauſe the will alone is ſufficient to retain, not only rights, but even poſſeſſion itſelf, tho' there be no corporeal act exerciſed therein; and therefore, the act of the will alone, as it retaineth, ſo may it relinquiſh that right or poſſeſſion, whereby it ceaſeth to be the former owner's; and therefore, if the will be, not ſimply to relinquiſh but to remit or tranſmit the right to any other, *hoc ipſo* that other doth become *dominus*; dominion being the power of diſpoſal, which is a faculty, and no corporeal thing, it may be fitly conſtitute in the acquirer, by the will of the diſponer, unleſs the acquirer reject it: for the diſponer, before having the only power of diſpoſal, and remitting that power to the acquirer, the thing cannot be ſaid to be *nullius*, as *not* being relinquiſhed: and therefore, the dominion or *power of* diſpoſal of it, muſt either be in the diſponer or the acquirer; not in the diſponer, becauſe by his will, which is ſufficient to relinquiſh or quit it, he hath remitted it; and therefore that power muſt be in the purchaſer, unleſs he reject it. This is the more evident, that poſitive law and cuſtom, which requireth delivery or poſſeſſion, reſteth in ſymbolical or imaginary poſſeſſion, as by delivery of earth and ſtone for land, of a penny for annualrent, and in ſome caſes requireth no poſſeſſion; ſo the fiſk acquireth real right without poſſeſſion; and the right of ſpecial legacies, and others from the dead, are tranſmitted without poſſeſſion alſo.

V. But, for utility's ſake, not only the Romans, but almoſt all nations require ſome kind of poſſeſſion, to accompliſh real rights, that thereby the will of the owner may ſenſibly touch the thing diſponed, and thereby be more manifeſt and ſure; ſo the law ſaith, *Traditionibus et uſucapionibus, non nudis pactis dominia rerum transferuntur*, with which our cuſtom accordeth. It uſeth here to be debated, whether poſſeſſion itſelf be ſufficient to accompliſh diſpoſitions; or if there muſt be tradition, or delivery of that poſſeſſion, by the diſponer to the acquirer; the forecited law ſeems to require tradition, or at leaſt uſucapion, or preſcription, which doubtleſs are the moſt proper ways to accompliſh diſpoſitions; yet *utiliter* and *equivalenter*, poſſeſſion lawfully attained by virtue of the diſpoſition, altho' not delivered by the diſponer, will be ſufficient, as if the diſponer were not in poſſeſſion himſelf, and ſo cannot deliver it; yet the acquirer may recover it from the detainer, or the acquirer might have been in poſſeſſion before, by any other title, as by cuſtody, conduction, *&c.* In which caſe none require delivery: yea, it is more queſtionable, whether the poſſeſſion would not conſummate the diſpoſition, tho' unlawfully attained; as if the diſponer not being in poſſeſſion, the acquirer attained the poſſeſſion from a third party, *vi aut clam*, tho' he might be obliged to reſtore that poſſeſſion to the third party; yet whether it would not exclude a poſterior diſpoſition *attaining a poſterior*, tho' more legal poſſeſſion; it is a queſtion as probable in the affirmative, as in the negative, unleſs another having a diſpoſition, were endeavouring to get poſſeſſion, and were prevented

prevented by an irregular poſſeſſion, albeit his endeavour were not by a legal diligence, but by requiring it.

VI. It remaineth then that poſſeſſion is the accompliſhment of the diſpoſition of real rights, ſo that not the firſt diſpoſition, but the firſt poſſeſſion, by virtue thereof, preferreth. This poſſeſſion is not alike in all caſes, for in ſome real, in others ſymbolical poſſeſſion is requiſite, which cannot be ſupplied by real poſſeſſion itſelf, as in property of lands or annualrents by infeftment, wherein the diſpoſition and natural poſſeſſion make no real right without ſeiſin, *July* 12. 1628, *Bennet*; *Nov.* 25. 1628, *Hall*; *Dec.* 16. 1629, *Hunter*. Poſſeſſion is requiſite, not only to the conveyance of the property of moveable goods, but alſo of liferent-rights, tacks and rentals, ſervitudes, pledges, *&c.* which tacks, tho' they be truly perſonal rights of location, and conſtitute only as real rights by ſtatute, yet intimation will not tranſmit them; but there is a neceſſity of poſſeſſion: and tho' liferents be more properly real rights, becauſe conſtitute by infeftment, yet ſeeing a liferenter cannot infeft another as a fiar can, aſſignation or diſpoſition is ſufficient, but it muſt be cled with poſſeſſion: but reverſions, tho' they be accounted as real rights by ſtatute, require no poſſeſſion for tranſmitting them, but an aſſignation duly regiſtrated, according to the act of *Parl.* 1617, *cap.* 16. is ſufficient as a public intimation.

VII. In moveables poſſeſſion is of ſuch efficacy, that it doth not only conſummate the diſpoſition thereof, but thereupon the diſpoſition is preſumed without any neceſſity to prove the ſame, which was found ſufficient to inſtruct the property of a ſhip from poſſeſſion, without vendition in writ, *July* 26. 1673, *Captain Hamilton*. And the property of money was inferred, from having the key of the cheſt in which the money was found ſealed, unleſs a contrary probation were adduced, *June* 18. 1675, *Tailor*. And ſo a creditor having pointed goods from his debtor, was preferred thereunto, to a third party, who offered to prove theſe goods to be his own proper goods, bred upon his own ground, and ſet a graſſing to that debtor, the poinder inſtructing that the goods were milked, wrought, and the offſpring thereof enjoyed by the debtor for two years, without any poſſeſſion by the other party, during that ſpace, which ſo far preſumed his right, that the Lords admitted not the contrary probation, *Nov.* 24. 1624, *Turnbul of Symontoun*. The like upon two years poſſeſſion, *June* 17. 1625, *Brown*. But reſtitution of a horſe was not excluded, becauſe the poſſeſſor offered to prove he bought him from one who then had him in poſſeſſion, in reſpect the purſuer then offered to prove, that immediately before he had ſet the horſe in hire for a journey to that perſon who ſold him, *Nov.* 18. 1680, *Forſyth*: ſo that it will not be ſufficient to any claiming right to moveable goods, againſt the lawful poſſeſſor, to alledge he had a good title to theſe goods, and poſſeſſion of them, but he muſt condeſcend, *quomodo deſiit poſſidere*, as by ſpuilzie, ſtealth, *&c.* or that he gave them only in graſſing and cuſtody, and continued to uſe acts of property; the reaſon whereof is, becauſe in the commerce of moveables, writ uſeth not to be adhibited, and it would be an inſuperable labour, if the acquirers thereof behoved to inſtruct all the preceeding acquirers, as if one ſhould inſtruct that he bought or bred ſuch goods ſome years ago, the preſent poſſeſſor behoved either to inſtruct a progreſs of them, through all the hands they paſſed from the firſt owner, or loſe them, which being deſtructive to commerce, cuſtom hath introduced this way, that poſſeſſion being preſent and lawful, preſumeth property without further probation, unleſs the purſuer condeſcend upon *a* clear *and probable* way of the goods paſſing from him, not by alienation; as if they were ſpuilzied, ſtollen, ſtrayed, *&c.* *Feb.* 3. 1672, *Scot of Gorrenberry*. In which caſe, *as the purſuer did not condeſcend quomodo deſiit poſſidere*, the libel was *only* found relevant to be proved by the defender's oath, that he had not bought or acquired the goods *bona fide*; or *condeſcend* that the goods were in a defunct's poſſeſſion the time of his death, which is probable *prout de jure*, *Feb.* 24. 1672, *Semple*; in which caſe a defunct's goods were reſtored, albeit they were long poſſeſſed after by

by his wife, and impignorated by her, and her ſecond huſband, without confirmation, *and* the children of the defunct huſband recovered the ſame from the acquirer, *upon offering ſuch a proof.*

The paſſing moveables from the proprietar muſt be ſo evidently inſtructed, that there may no probability remain of their *having been* recovered, and thereafter alienated; upon this ground it was, that Sir *John Scot* purſuing Sir *John Fletcher*, for a book delivered to him, the Lords found the libel not relevant, unleſs it were condeſcended on *quo modo* the purſuer delivered the ſame, *viz.* by loan, and would not put the defender to prove gifted, but preſumed his title, unleſs the contrary were proved by oath or witneſſes, *Jan.* 27. 1665. And in a proceſs for jewels, *Dec.* 12. 1665, at the inſtance of *Ramſay contra Wilſon*, who had them from Mr. *Robert Byres*, the Lords found, that the preſumptive title of the defender and his author, was elided, upon the contrary preſumption, that jewels of ſuch value could not be bought *bona fide*, ſeeing the ſeller was neither merchant nor jeweller, nor the jewels fit for his proper uſe; and becauſe it was offered to be proved, he took them at his own hand out of the purſuer's poſſeſſion, to whom they were impignorated by writ by the proprietar, who immediately went out of the kingdom [a].

VIII. The moſt ordinary and important conveyances are of lands and annualrents, which paſs by infeftment, for perfecting whereof, there muſt not only be a diſpoſition, but alſo a reſignation in the hands of the ſuperior, and new infeftment granted by him to the acquirer thereupon, or by confirmation, or for obedience upon appriſing or adjudication: for diſpoſitions of lands to be holden of the granter, do not tranſmit the granter's right, becauſe he continues ſuperior in the direct dominion; but it becomes an original right, conſtituting a new ſubaltern infeftment. Reſignation is either in favour of the ſuperior himſelf, for conſolidating of the property with the ſuperiority; and therefore is called reſignation, *ad perpetuam remanentiam:* or it is a reſignation in the ſuperior's hands, in favour of the reſigner himſelf; or in favour of an acquirer; and therefore is called reſignation *in favorem.* The firſt of theſe is no tranſmiſſion, but an extinction of the fee, and hath been ſpoken to in that title. The ſecond is not properly a tranſmiſſion, becauſe it paſſeth not from, but returneth to the reſigner; yet ordinarily under diverſe conſiderations; as when he reſigns from himſelf and ſuch heirs, in favour of himſelf and other heirs, or when he reſigns a ward-holding, that it may be returned blench or feu, *in ſo far it is a tranſmiſſion, and partakes of the third, which is moſt properly a tranſmiſſion.* For the right underſtanding of reſignations *in favorem*, conſider the ſolemnities requiſite thereto, and the effects which flow from the ſeveral ſteps thereof.

For the firſt, a reſignation muſt proceed upon a diſpoſition, or procuratory of reſignation, having in it the effects of a diſpoſition, which muſt be in writ; for the inſtrument of reſignation being but the aſſertion of a nottar, will not be ſufficient alone, without an adminicle in writ: and tho' a reſignation *propriis manibus* can have no procuratory, yet the diſpoſition whereupon it proceeds, muſt be ſhown as the warrant of the inſtrument of reſignation. The ſecond ſtep in reſignation, is the act of reſignation itſelf, which neceſſarily muſt be by way of inſtrument of a nottar, expreſſing the warrant of it, *viz.* the diſpoſition, if it be done by the reſigner *propriis manibus*, or the procuratory if it be done by a procurator, and that conform thereto, the reſigner or procurator compeared perſonally before the ſuperior or his commiſſioner, having ſpecial warrant to receive reſignations, and that the reſignation was made in the hands of the ſuperior by ſtaff and baſtoun, delivered by the reſigner or his procurator to the ſuperior, as the token or ſymbol of the thing reſigned, and that the ſame was accepted and received by the ſuperior, or his commiſſioners, by taking the ſaid ſymbol in their hands, for new infeftment, to be given to the acquirer: and tho' the reſignation uſeth to be made by the vaſſal, or his procurator on their knees, and ſo is expreſſed

[a] See above, II. 1. 42.

preſſed in the inſtrument, either ſpecially, or generally "with all humility," and that the ſuperior or his commiſſioner, uſe to deliver the ſtaff as the ſymbol of the fee to the acquirer, which is alſo expreſſed in the inſtrument; yet theſe are not ſo eſſential, but that without the being or expreſſing thereof the inſtrument will be valid [b]. The laſt ſtep of this tranſmiſſion by reſignation, is the ſuperior or his commiſſioners giving new infeftment to the acquirer, the nature and requiſites of which infeftment hath been expreſſed before in the title *infeftments*, *Lib.* 2. *tit.* 3.

The ſolemnities of reſignation are ſo *eſſential* and neceſſary, that the omiſſion of them annulleth the reſignation; and therefore renunciation without a formal reſignation, tho' it may be ſufficient againſt the renouncer, yet it is not ſufficient to take away *the* infeftment renounced, againſt ſingular ſucceſſors, *Nov.* 23. 1627, *Dumboig*. Nor can it conſtitute any real right in the perſon of the acquirer, unleſs he had *aliunde* another right ſtanding in his perſon, in which caſe the renunciation might exclude the renouncer, or his heirs, to quarrel that right, *Hope*, alienation, *Hamilton contra M'Adam* [c]: the reaſon thereof is, becauſe *jura eodem modo deſtituuntur quo conſtituuntur*; and therefore, as infeftments cannot be conſtitute without an inſtrument of ſeiſin, ſo they cannot be deſtitute without an inſtrument of reſignation, or at leaſt another inſtrument of ſeiſin, with the ſuperior's confirmation, or upon his charter for obedience; ſo that renunciation being perſonal, operates nothing, except in the caſe of wadſets, which are extinguiſhed by a renunciation regiſtrate by the act of Parliament 1617, *c.* 16. But even wadſets cannot be tranſmitted without reſignation in favour of the wadſetter's ſingular ſucceſſor.

IX. But where it is ſaid, that the reſignation muſt be by the vaſſal or his procurator, this queſtion ariſeth, if the reſignation be made by him who is not truly vaſſal, but with conſent of the true vaſſal, *quid juris*, *Craig*, *lib.* 3. *Deig.* 1. § 29. ſhows, "That in his time this queſtion was not clearly determined, nor is he "poſitive in it, but this far, if the reſigner had no title, no conſent could be "ſufficient: yet if he had a colourable title, the conſent of the true vaſſal might "validate it." *We have cleared this queſtion in the title, wadſets, lib.* 2. *tit.* 11. § 7. *and ſhall repeat it in a word, that* if the true vaſſal be conſenter to the procuratory of reſignation, either expreſsly bearing, that the diſponer, with conſent, *&c.* conſtitute his procurators, or if he be conſenter to the diſpoſition, by being expreſſed in the entry therof, which is holden as extenſive to the whole diſpoſition, and ſo as repeated in the *procuratory, or if otherwiſe he conſent after the diſpoſition or procuratory, apart, yet before the reſignation made, the* ſame will be as valid, as if the conſenter himſelf had granted the diſpoſition or a procuratory; for the act of the diſponer, tho' more expreſs and amplified, is no more but his conſent: and ſo the other conſenting, doth the ſame materially which he would do if he were diſponer formally; but if his conſent be adhibited after the reſignation is made, it is merely perſonal, and cannot have influence on the reſignation, which was before it; or if he but permit or give licenſe to the diſponer, or, which is alike, if he conſent that the diſponer diſpone in ſo far as may concern the diſponer's right, theſe will not be ſufficient warrant for the reſignation; but if he give warrant or conſent to the reſignation, it is ſufficient; neither is there neceſſity to diſtinguiſh whether the diſponer have a colourable title or not, ſeeing it is the conſent of the true vaſſal, and the reſignation as flowing from, and warranted by that conſent, which tranſmitteth the right. And therefore an infeftment of annualrent, granted by a perſon not infeft, was found valid, becauſe a conſenter thereto was infeft; and ſo it did exclude a valid right flowing from that conſenter to a ſingular ſucceſſor thereafter, *viz.* a tack, *Dec.* 15. 1630, *Stirling*.

X. Reſignation how neceſſary ſoever to tranſmit an infeftment, yet becauſe the procuratory and inſtrument of reſignation may be loſt, therefore the vaſſal poſſeſſing forty years, by virtue of an infeftment, mentioning ſuch a reſignation, the ſame

[b] See above, II. 11. 1. & 2.

[c] See above, II. 11. 6. 2.

ſame will be valid without the production of the procuratory, or inſtrument of reſignation; which therefore is preſumed thence *praeſumptione juris*, *Parl.* 1594, *cap.* 218 [d].

XI. As to the effect of reſignation, there is no doubt, but when the ſame is truy made, and infeftment follows conform, the reſigner is fully diveſted, and the acquirer is fully inveſted; and if there be conditions or proviſions, whether bearing expreſs clauſes irritant, that the acquirer's infeftment ſhall be null, and the diſponer's infeftment ſhall revive, or he have regreſs, how far theſe are effectual, until by reſignation or judicial proceſs, the ſame be recovered, is more fully cleared before, *Title*, *Infeftments*. *Lib.* II. *T.* 3. § 58. It is no leſs evident, that before reſignation be made, the diſpoſition or procuratory, operates nothing as to the real right, which notwithſtanding remains fully in the diſponer; though he be perſonally obliged to perfect it, albeit there be no ſuch expreſs obligement in the diſpoſition, yet, by the nature thereof, the diſponer is obliged to infeft himſelf, if he be not infeft, and to infeft the acquirer, *Hope* alienations, *Gladſtanes contra L. M'kerſtoun:* the diſpoſition of property being accompliſhed, carries all real right the diſponer had of the land, or bonds for granting real right, in favour of the diſponer, or his authors, tho' neither aſſigned nor mentioned in the diſpoſition; yea, a liferent carrieth the reverſion in the diſponer's perſon, as to the liferenter's liferent uſe, that thereupon (*the diſponee*) might redeem a wadſet: ſo likeways a diſpoſition of lands immediately before a term, not expreſſing an entry, nor aſſignation to the rent, was found to exclude the diſponer therefrom, though infeftment followed not, till after the term, *Spotiſ.* mails and duties, *Caldwal contra Stark.* And generally, it carries mails and duties, as including virtually an aſſignation thereto, *July* 17. 1629, *inter eoſdem*: and though the diſpoſition or procuratory, cannot conſtitute a real right, yet it doth ſufficiently exclude the diſponer or his heirs, from troubling the acquirer's poſſeſſion thereupon.

XII. The main queſtion then is, what is the effect of a reſignation, when done and accepted by the ſuperior, and no infeftment following thereon, where, in that caſe, the right *or fee* ſtandeth, whether in the diſponer, acquirer, or ſuperior, and whether the reſigner be fully thereby denuded, or if he may not grant a ſecond reſignation, whereupon the firſt infeftment being recovered, will be effectual: this is very learnedly debated by *Craig* in the forementioned place, (III. 1. 17. *et* 18.) where he ſheweth, that the common opinion was, that the ſecond reſignation with the firſt ſeiſin will be preferred, though the Lords had decided otherways, in the caſe of a citizen of *Perth*, making a ſecond reſignation in favour of his ſon, though after the firſt reſignation by the ſpace of twenty years; yet *Craig* approveth the old opinion conceiving the reſigner, never to be fully diveſted, till the acquirer were inveſted; this is clear, that by the reſignation, the fee falls in non-entry, and is in the ſuperior's hands, and while the reſigner reſigning in his own favour, be received, or the reſignation paſt from, or otherways, the acquirer be infeft, the ſuperior hath the non-entry-duties of the lands reſigned, if the infeftment be not delayed, through his own fault. It is alſo clear, that, by the ſuperior's acceptance of the reſignation *in favorem*, there is upon him a perſonal obligation to infeft that perſon in whoſe favour the reſignation was made; and therefore, though the *acquirer* [e] die uninfeſt, his heir by a ſingle ſervice, hath right to that as other perſonal rights, and thereupon may compel the ſuperior to infeft him; yea, as *Craig* obſerveth in the fore-cited place, (III. 1. 16.) the Lords upon ſupplication, without citation, will grant letters ſummarily upon ſight of the inſtrument of reſignation, and warrant thereof, to charge the ſuperior to infeft the party, in whoſe favour it was made, who may not receive another reſignation, or infeft another party, or elſe his obligement may make him liable to the obtainer of the firſt reſignation, *pro damno & intereſſe*; but the real right will be carried by the firſt infeftment, though upon a poſterior reſignation; and ſo

[d] See above, II. 12. 15.

[e] F. Reſigner.

ſo poſterior deciſions go along with *Craig*'s opinion, not only in the caſe of the firſt public infeftment, upon a ſecond reſignation, but which is much more, after a reſignation is made, a baſe infeftment flowing thereafter from the reſigner, and being but a ſhort time before the public infeftment, upon the reſignation, yet was preferred thereto, as *Dury* obſerves, but expreſſes not the parties, *July* 22. 1626. As to the contrary deciſion obſerved by *Craig*, it ſaith nothing, ſeeing the firſt infeftment upon the laſt reſignation, was in favour of the reſigner's ſon, and ſo *inter conjunctas perſonas*, was fraudulent, which would not hold ſo, if that ſon had been a ſtranger, acquiring *bona fide*, for a cauſe onerous. So then the reſignation *in favorem*, doth not denude the reſigner of the real right, but is incomplete till infeftment follow; and therefore a perſonal renunciation of him in whoſe favour it was, will fully evacuate the reſignation, and make the reſigner's infeftment as intire as at firſt, which could not be without a new infeftment, if the reſigner had been diveſted: as in the caſe of a reſignation *ad remanentiam*, the ſuperior's ſimple renunciation or diſcharge thereof, could not revive the vaſſal's prior infeftment, but he behoved to be infeft *de novo*; and though after the reſignation, till it be paſt from, or infeftment follow, the lands be in non-entry, it will not conclude that the reſigner is denuded, and the fee is in the ſuperior, more than other non-entries, which give not the ſuperior the property, but a caſuality of the fee *. Yet if the obtainer of the ſecond reſignation firſt infeft, knew of the firſt, if it were given him as a creditor, he were ſecure, but if it were merely voluntary buying, it might be reduced *ex capite fraudis*. And in what caſe diſpoſitions of moveables or lands, are holden to be ſimulate or fraudulent, hath been ſhown before, *Title Reparation, Lib.* I. *Tit.* 9. § 12. upon circumvention or fraud; wherein retention of poſſeſſion in moveables is a main ground for preſuming ſimulation, eſpecially in gifts of eſcheat; yet if the diſpoſition of moveables bear expreſsly to take effect after the diſponer's death, retention of poſſeſſion will not annul it, neither will it be eſteemed as a legacy, or *donatio mortis cauſa*, if death be the term, and not the conſideration of it, and it was not found prejudged by the diſponer's univerſal legacy, *March* 8. 1626, *Traquair*.

XIII. So much for conventional conveyances of real rights; judicial conveyances of real rights are competent, not by the nature of the right, which cannot be alienated without conſent of the owner, and in the caſe of infeftments, holden of the ſuperior, without his conſent, who is not obliged to receive any to be his vaſſal, but the heirs and ſucceſſors of the firſt vaſſal, provided in the firſt inveſtiture; and though the inveſtiture bear alſo, the vaſſal's heirs and aſſignies, yet the ſuperior cannot thereon be compelled directly to receive a ſingular ſucceſſor, aſſignies being only meant, ſuch aſſignies to whom the diſpoſitions ſhould be aſſigned before infeftment thereupon, as was found in the caſe of recognition, *La. Carnagy*, *Feb.* 5. 1663 [f]. But law hath introduced in favour of creditors, judicial conveyances, requiring no conſent, but the authority of law, which hath alſo its foundation in natural equity, by which, as obligations are effectual for exaction of what is thereby due: ſo if there were no poſitive law nor cuſtom, the creditor might exact, either what is due *in ſpecie*, or the equivalent; and therefore repryſals betwixt nations not governed by one common authority, are lawful: and by the cuſtom of nations, extended not only againſt the party injurer, who is obliged to repair, but againſt all the ſubjects of his ſovereign, if he do not cauſe reparation to be made. The judicial tranſmiſſion of moveables, is by poinding, which being a legal execution, we ſhall leave it to that place. Arreſtment and the action for making forthcoming, do alſo tranſmit moveables; but is rather proper to perſonal rights, and ſo is competent againſt the havers of moveables, by reaſon of that perſonal obligation of reſtitution, which is upon the haver to the owner, beſide his own *(right of)* property.

Of

* See *Nov.* 14. 1677, Sir *William Purves contra Strachan*, by which deciſion the doctrine here treated is fully explained and eſtabliſhed. See *Dirleton, voce*, Reſignation; *Hope*, Minor Pract. *Tit.* v. § 14.

[f] See above, II. 4. 32.

Of old, alienations of lands for money, were very rare in *Scotland*, or the contracting of conſiderable debts; for the nobility and gentry did then live in a plain and ſober way, contenting themſelves with that which their own eſtates did afford: and there was then known no legal executions for debt, againſt lands or heritable rights, but only againſt moveables, by the brief of diſtreſs [g] or poinding; by which, not only the moveables of the debtor were pointed for his debt, but all the moveables upon his lands belonging to his tenants, as appeareth from Act 36. *Parl.* 1469, bearing this title, "That the poor tenants ſhall pay no fur-"ther than their terms mail for their Lord's debt, by the brief of diſtreſs," which is correctory of the former cuſtom, whereby the goods and cattle of the inhabitants of the ground were diſtrenzied for their Lord's debts, though their mails extended not to the avail of the debt, and that not only for real debts affecting the ground by infeftments of annualrent, feu-duties, or caſualities of ſuperiority, or other *debita fundi*, (for which the moveables of the tenants and poſſeſſors may be yet pointed for the Lord's debt, not exceeding their terms mail, which is ordinarily in their hand, or if paid, may be allowed in the next term) but for the heritor's perſonal debt; for by the act, the debtor's moveables in that, or any other barony or ſhire, are appointed to be pointed for ſatisfying of the debt; but *debita fundi* can only reach the moveables of the barony or tenement affected therewith; and though this act, by its tenor, would yet extend to pointing of tenants moveables for their maſter's perſonal debt, (*to the extent of their terms mail*) cuſtom hath reſtricted it only to real debts, and it is intirely in deſuetude, as to perſonal debts, which cannot burden tenants, but upon arreſtment, in ſo far as they are then debtors to their maſters [h].

XIV. Before this ſtatute in the year 1469, there is no mention in our law or cuſtoms, of appriſing or adjudication *: but appriſing was thereby introduced in this manner, that where the debtor has not moveable goods, but lands, the ſheriff ſhall cauſe ſell the lands to the avail of the debt, and pay the creditor, which ſhall be redeemable by the debtor within ſeven years, and if he cannot find a buyer, he ſhall appriſe the debtor's lands by thirteen perſons of the beſt and worthieſt in the ſhire, leaſt ſuſpect to either party, and aſſign to the creditor lands to the avail of the ſum, and the ſuperior ſhall receive the creditor, or any other buyer, for a year's rent, as the land is ſet for the time, or otherways ſhall take the land to himſelf, and undergo the debt. According to this act, appriſings did proceed by ſheriffs and bailies, who for ſatisfying of debts, liquidated by decreets, iſſued precepts for denouncing ſuch lands to be appriſed upon fifteen days warning, conform to the Acts of Parliament, which denunciation was publicly read upon the ground of the land, before witneſſes, and a copy thereof left affixed thereupon, and alſo at the market-croſs of the head-burgh of the juriſdiction, where the lands lie, and to the debtor whoſe lands were to be appriſed, expreſſing the creditor, ſum, day and place of appriſing, that all parties intereſted might appear; perſons of inqueſt and witneſſes were alſo ſummoned to the ſame diet; and ordinarily the place was upon the ground of the lands, that the value and worth thereof might the more clearly appear, where, after diſcuſſing of the appriſer's claim, the hability of the perſons of inqueſt, and witneſſes, ſo much land was appriſed and adjudged as was worth the ſum, the year's rent to the ſuperior, and expences of infeftment; and if the lands were burdened with any former annualrents, whereby a proportion of land could not be appriſed, free of burden; there was appriſed an annualrent forth of the lands effeiring to the ſums, and expences foreſaid, and redeemable in the ſame manner, which was ſuſtained by the

* By ſtatute of *Alexander* II. *cap.* 24; If the debtor has no moveables, the ſheriff is appointed to ſell the debtor's land and pay the debt: the ſuperior too, is thereby directed to receive the purchaſer.—By ſtatute 1469, *cap.* 36. The legal reverſion of 7 years, in favour of the debtor, was introduced; and the ſheriff was further authoriſed, if no purchaſer offered, to appriſe and deliver to the creditor, land equal to the debt.

[g] See below, IV. 23. 1. [h] See above, II. 5. 9.

meaning and intent of the ſtatute; and tho' by the words of it, appriſing of lands was only mentioned, it was ever extended to all heritable rights.

Thus it continued until the Lords of Seſſion, upon exceptions againſt the ſheriff, upon his intereſt, relation, or enmity, or upon the lying of lands in divers juriſdictions, for preventing of expences by many appriſings, where the lands in one juriſdiction ſufficed not, did grant letters of appriſing under the ſignet, direct not to the ordinary ſheriffs, but to ſheriffs in that part, which being frequent, did come to run in courſe to meſſengers, as ſheriffs in that part, *&c.* And thereby the appriſer, in reſpect the letters had a blank for inſerting the meſſenger's name, did chuſe the meſſenger, who did denounce all lands and other heritable rights, which the appriſer pretended to belong to his debtor: and in reſpect the letters bore a diſpenſation of the place, he did appriſe at *Edinburgh*, all that the appriſer claimed, in ſatisfaction of the debt, without knowledge or conſideration of the value of the lands, or others appriſed, or proportion to the ſums appriſed for, and thereupon *the creditor* was infeft in the whole, and paid to the ſuperior for a compoſition, a year's rent of the whole, which was a conſiderable acceſſion to the debtor's debt, and behoved to be paid by him; and by the ſaid appriſings, the appriſer might, and oftentimes did enter in poſſeſſion of the whole lands, without being comptable for the rents thereof of what quantity ſoever: by this abuſe, the intent of that excellent ſtatute for appriſings, was enervated, and the ſame turned into a mere formality, until the *Parl.* 1621, *cap.* 6. which began to correct that exorbitant abuſe, and declared appriſers comptable for their intromiſſions, in ſo far as exceeded their annualrents, to be imputed in their principal ſums *pro tanto*, and that they being thereby ſatisfied of their ſums, principal and annual, compoſition to the ſuperior, and expences of appriſing and infeftments, that thereby the appriſing ſhould expire *ipſo facto*; and it is alſo declared, that if the lands appriſed be not worth of free rent, effeiring to the annualrent of the ſaid ſums, that before redemption he ſhall be ſatisfied of the ſuperplus. By which act alſo it is declared, that minors may redeem lands appriſed from them at any time within their age of twenty-five years complete; yet ſo, that after the firſt ſeven years, the appriſer ſhall have the benefit of the whole mails and duties till he be redeemed, which hath always been extended to lands appriſed from perſons being major, if a minor ſucceed, during the legal; and if a perſon being major, ſucceed to him who was minor, he hath the benefit of reverſion of ſeven years, in ſo far as was not run in the minor's life; and if leſs remain than a year at the minor's death, *or if the ſeven years were elapſed before that time*, the major hath a full year to redeem after the minor's death [i]; and by the Act 67. of the abrogated Parliament 1641, appriſers were declared comptable for the rents of appriſed lands intromitted with by them, during all the time of the legal, whether minors or others *.

Becauſe of another great abuſe, by the debording of appriſings from the firſt inſtitution, that the firſt appriſer appriſing the whole eſtate, the other creditors had no more but the legal reverſion, which did ordinarily expire, the ſubſequent creditors not being able to raiſe money to redeem the anterior appriſer, whereby the firſt appriſer carried the whole eſtate, and excluded all the reſt, and being aſhamed to take ſo great a legal advantage, and ſometimes not daring to make uſe of it, did ordinarily compone with the debtor's apparent heirs, or ſome confident to their behoof, whereby the debtor's heir recovered his whole eſtate, by ſatisfying one creditor, and excluding all the reſt; therefore the *Parl.* 1661, by their Act 62. anent debtor and creditor, declared that all appriſings deduced ſince the firſt of *January* 1652, or to be deduced in time coming, within a year after the firſt appriſing, which became effectual by infeftment or charge, ſhould come in *pari paſſu*,

* By Act 10. P. 1663, the Act 67. P. 1641, was revived, and minors declared only liable for the annualrent of the ſums in the appriſing, till their majority, even where the legal has expired before that time. See below, § 39. 2. *h. t.*

[i] See above, I. 6. 44. 10.

paſſu, as if one appriſing had been led for all the ſums, and thereby the legal was extended to ten years; and it is declared, that whenſoever the apparent heir, or any to his behoof, ſhall acquire right to any expired appriſing, that the ſame ſhall be redeemable from them within the ſpace of ten years after their acquiry, by poſterior appriſers, upon payment of what they truly paid, in ſo far as ſhall not be ſatisfied by their intromiſſion [k]. This hath been ſo far extended by the Lords, that the words of the ſtatute mentioning only poſterior appriſers, might redeem expired appriſings, coming in the perſon of the apparent heir, yet that the ſamine was to be underſtood as the chief inſtances of this article of the ſtatute; and therefore found, that any perſonal creditor had this benefit of redemption, becauſe he might appriſe, and there was no neceſſity to put him to the expence of actual appriſing, *July* 11. 1671, *Maxwell contra Maxwell*, *Jan.* 9. 1677, *Hay contra Gregory*. And likeways appriſings *(not expired)* coming in the perſon of the apparent heir, are ordinarily redeemable, for what was truly paid *(for)* them within the legal, *July* 21. 1671, *Maxwell contra Maxwell*, and the ſame is extended when the acquiſition is by the apparent heir in the defunct debtor's time. But the appriſing coming in the perſon of the apparent heir in his father's life, was not found redeemable by the father, nor by his other children, upon their bonds of proviſion, being granted after the expiring of the legal, *Harcus, contracts of marriage*, *No.* 340; *Jan.* 31. 1682, *Naſmith*. But theſe bonds being alledged granted during the legal, were found to give right to redeem, *Dec.* 3. 1680, *inter eoſdem* *. There is nothing in this ſtatute, in caſe an appriſing come in the perſon of the debtor himſelf, or to his behoof, after the expiring of the legal; nor hath deciſions cleared, whether it will be redeemable from the debtor for what he paid, but there is no leſs reaſon to extend it to that caſe than the former, unleſs the appriſer hath never taken poſſeſſion, ſeeing as he might relinquiſh the appriſing, ſo he might compone with the debtor, and ſo the appriſing would become extinct, in the ſame way as if the appriſing were diſponed to the behoof of the debtor within the legal.

But neither did this ſtatute cure the abuſe of appriſings; and therefore the act of Parliament of the 6th of *September* 1672, *c.* 19. upon conſideration of the debording of appriſings from the firſt deſign, and of the great inconveniencies ariſing thereby; for the bringing in of all appriſers within year and day, did give way to break the credit, and ruin the intereſt of the moſt conſiderable heritors in the kingdom, creditors being thereby invited, under the hazard of being excluded to appriſe within a year; and thereby one wilful, malicious, or neceſſitous creditor appriſing, all the reſt followed, and intirely broke their debtor's credit, unleſs they would pay all their debt in one day; therefore the Parliament did, in place of appriſings, ordain adjudications to proceed before the Lords of ſeſſion, for adjudging the lands and other heritable rights of debtors, effeiring to the ſums appriſed for, and a fifth more in place of the penalties and ſheriff-fee, and allowed witneſſes for either party, for clearing of the rental and rate of the lands, in the ſeveral places where they lie, and appointed the adjudger to have preſent poſſeſſion of the lands adjudged, not being accomptable for his intromiſſion during the legal, redeemable only within five years, whereby the creditor had eaſy acceſs for his ſatisfaction, without all hazard of accompt, which had been the ground of many tedious proceſſes of compt and reckoning for the intromiſſion of former appriſers, and wherein the adjudger is to have the conſent of his debtor, both as to right and poſſeſſion, and delivery of the evidents; and it is declared, that if the debtor do not inſtruct, and deliver a good right, and conſent, as ſaid is,

* As this deciſion is obſerved in Lord *Stair*'s collection, the bonds of proviſion were admitted to have been granted during the ſecond legal only; and therefore the deciſion, *Jan.* 31. 1682, obſerved by *Harcus* is directly contrary to this.

By Act 24. P. 1695, Apparent heirs are ſubjected to an univerſal paſſive title, if they enter to poſſeſs any part of their predeceſſor's eſtate, or purchaſe any right or legal diligence affecting that eſtate, by themſelves, or others to their behoof, otherways than as higheſt offerers, without colluſion, at a public roup.

[k] See below, § 41. *h. t.*

is, that the creditor might adjudge all the debtor's eſtate in the ſame manner, and to the ſame effect, as is appointed by the Act of *Parl.* 1661, betwixt debtor and creditor.

XV. We ſhall not here ſpeak of adjudications and appriſings, as they are legal executions, and of the order and ſolemnities requiſite to them, as ſuch; but only as they are conveyances of real rights, wherein we ſhall conſider; Firſt, Upon what ground appriſing proceeds. Secondly, Againſt what rights it is competent. Thirdly, What is the effect of the proceſs, or decreet of appriſing, without further diligence. Fourthly, What is the effect thereof, when further diligence is uſed. Fifthly, What is the effect thereof when infeftment is obtained. And Laſtly, In what manner it ceaſeth and becometh extinct. As to the firſt, Appriſing is an appretiation and judicial vendition of the thing appriſed, from the debtor to the creditor: and as in all venditions, there muſt be *merx* and *prætium* or the price in numerate money, for if the matter conſiſt in any thing elſe, it is not ſale but exchange; therefore the ground of appriſing muſt be numerate and current money, and if originally it be not ſo, it muſt be liquidate before appriſing can proceed; neither can it proceed but upon a decreet eſtabliſhing the debt by regiſtration or otherwiſe in the perſon of the appriſer, *activè*, and of the debtor *paſſivè*; yet an aſſigny intimating before the cedent's death, may appriſe ſummarily without action eſtabliſhing the debt in his perſon, as hath been ſhown, title *aſſignations* [l]. Neither could appriſing proceed upon heritable bonds, unleſs the ſame had been made moveable, by requiſition or charge; and therefore was found null, proceeding upon an heritable ſum, bearing a clauſe of annualrent, tho' payable without requiſition upon a ſingle charge of ſix days, ſeeing that charge was not given *July* 20. 1622, *Cranſton*. *Hope*, obligations, *Mowat contra the creditors of Richardſon, Gibſon and Cranſton contra L. Lugtoun*. But poſterior deciſions have run in the contrary, that if the ſum were payable without requiſition, appriſing might proceed thereupon without a charge, as well as poinding or arreſtment, *March* 6. 1623, *Finlayſon*; *July* 4. 1627, *Edgar and Johnſtoun*; *July* 10. 1629, *L. Clackmannan*: in which caſe the principal ſum was payable at a preciſe term, and no mention of any term or time thereafter, and yet was appriſed for after that term [m], *Jan.* 25. 1642, *Johnſtone* *. But if infeftment followed **, or requiſition be requiſite, the ſum muſt be made moveable before appriſing [n]: but other ſums, tho' by deſtination heritable, yet having ſummary execution by the parties conſent, appriſing is ſuſtained thereupon.

XVI. As to the ſecond point, againſt what rights appriſings extend; Firſt, tho' letters of appriſing contain power to poind moveables, which muſt be ſearched for; yet that which is properly called appriſing, extends to no moveables, but only to heritable rights, as lands, annualrents, liferents, tacks, reverſions, heritable bonds, *July* 25. 1623, *E. of Errol*; and therefore it extends not to the mails and duties of the appriſed lands, before the appriſing, *Feb.* 14. 1623, *L. Saltcoats* ***. The like, tho' the queſtion was againſt the debtor himſelf, and that the ſtyle of the appriſing bore all right that the debtor had to the lands to be appriſed, *March* 13. 1627, *Mackie*. And where an annualrent is appriſed, it extends not to the bygone annualrents, which are moveable; but theſe being moveable, are arreſtable, neither doth it extend to the duties after denunciation, and before appriſing, *Feb.* 16. 1633, *Harper* [o]. Appriſing is extended to all heritable rights, tho' they were

* The four deciſions here quoted do not ſeem contradictory to the doctrine eſtabliſhed by the other deciſions quoted above. If by a clauſe in the bond the creditor is only allowed to demand his money on a ſimple charge of ſix days, appriſing cannot proceed without a charge; but where the creditor has power to call for his money at any time, or the ſum is made payable at a preciſe term, in that caſe no charge is neceſſary.

** It was found, *July* 19. 1666, *Thomſon*, obſerved by *Dirleton*, that tho' infeftment had followed upon a bond, which was payable without requiſition, appriſing might proceed without a previous charge.

*** This deciſion related to the competition between an appriſer and an arreſter, as to mails and duties which fell due after the appriſing. The arreſter was preferred, becauſe the appriſer had been *in mora*. See the ſame deciſion referred to below, § 21. *h. t.*

[l] Above, III. 1. 19. [m] See above, III. 1. 27. [n] See below, § 33. *h. t.* [o] See below, § 48. *h. t.*

were not provided to aſſignies, but to the debtor and his heirs only, or failing ſuch heirs to return; and therefore publick utility and the favour of the creditor, makes it more effectual than any voluntary diſpoſition or aſſignation could be; ſo an appriſing was found to carry a right, tho' *excluding* aſſignies, *Hope*, appriſing, *Bruce contra Buckie*. And a huſband granting right to his wife, but with proviſion that ſhe ſhould renounce it, if he required it in his own life allenarly, a creditor of his, appriſing that land, and requiring the wife, *during the huſband's life*, to renounce, was found to have right thereto, *Spotiſ.* appriſing, *La. Huttonhall contra Cranſtoun*. An appriſing of the ground-right and property of lands, and all other rights, *&c.* carrieth not only the property, but all other real right, or obligements for granting thereof; and tho' no infeftment follow, the appriſing ſo conceived will carry any right, which requireth not infeftment, as if it had been ſpecially denounced and appriſed, *June* 19. 1635, *Rule*.

XVII. To come now to the third point concerning the efficacy of the proceſs and decreet of appriſing, withut further diligence; and firſt, it hath the effect of an aſſignation, without neceſſity of intimation, and carries all rights which require not infeftments to tranſmit them, as liferents, reverſions, tacks: and ſo an appriſing was found to carry the legal of an anterior appriſing, tho' the denunciation whereupon it proceeded, was anterior to the denunciation whereupon the firſt appriſing proceeded, and thereby at the time of the denunciation of the ſecond appriſing; neither was the firſt appriſing in being, neither the denunciation thereof, and ſo could not be denounced or appriſed; yet the denunciation of the ground-right, and all right competent, or that might be competent to the debtor, was found to carry the reverſion of the ſaid firſt appriſing, *Nov.* 18. 1624, *Kincaid*.

XVIII. Tho' ſecond appriſings carry the legal reverſions of anterior appriſings without infeftment; yet infeftment is frequently taken thereupon, that the poſterior appriſer may have intereſt thereby, to reduce or quarrel the anterior appriſings, and to purſue for mails and duties, or removing, if the anterior appriſer ſhould forbear.

XIX. The ſecond effect of appriſing is, that the debtor is thereby ſo far diveſted, that after his death, infeftment may be taken by the appriſer, without tranſferring or infefting the debtor's heir, *Nov.* 20. 1624, *L. Lag*, and the caſes there related. So likewiſe the heir of the appriſer dying before allowance or infeftment, upon ſupplication obtained allowance from the Lords, and letters to charge the ſuperior to receive him, *Spotiſ. hic*, *Frazer ſupplicant*. The like was granted *to* the appriſer's aſſigny, *March* 22. 1626, *Collace* *. Yea, an appriſer did obtain allowance and warrant to charge the heir of the ſuperior contained in the firſt allowance, *Dec.* 5. 1628, *L. Corſbie*. From this ground it is, that an appriſing excludes prior aſſignations, granted by the debtor, to the mails and duties of the lands appriſed, as to terms after the appriſing, *Hope*, aſſignations, *Meldrum contra L. Anſtruther* **.

XX. And when an appriſing was led before an huſband's death, it excluded his wife from a terce, *Hope*, appriſings, *Crichton contra relict of Comiſton* [p]: where he doth alſo obſerve it to exclude a ſubſequent ward, in reſpect the ſuperior gave a charter upon the appriſing, in his vaſſal's life, tho' no ſeiſin followed thereupon [pp], *ib. Hamilton contra tenants of Newburgh*. And albeit *Dury* obſerves, that in the caſe betwixt the L. *Covingtoun* and the Ld. *Balmerino*, *March* 7. 1633, it was not decided, but ſuperſeded in hopes of agreement, whether a ſuperior could be compelled to receiver the appriſer, *appriſing from a minor holding ward*, ſeeing he was not obliged to receive a minor himſelf till his majority; it ſeems the ſuperior ought to receive the appriſer upon his legal diligence, but prejudice of the ward, during the minority of his former vaſſal, tho' he would not receive the

* The aſſigny in this caſe brought an action againſt the ſuperior for obtaining infeftment, which was ſuſtained.
** In this caſe the aſſignation was not intimated, till after denunciation on the appriſing.
[p] See above, II. 6. 17. [pp] II. 4. 36. 2.

minor, *as* he would be neceſſitated to receive the appriſer and his heirs whatſomever, tho' the lands were tailzied, and were to return to the ſuperior himſelf.

XXI. The third effect of appriſing is, that being a legal diligence, it renders the thing appriſed litigious, not only from the date of the appriſing, but from the date of the denunciation: ſo that no voluntary deed of the debtor, after the denunciation, can prejudge the appriſer, if he be not *in mora*. Thus a tack ſet by the debtor after denunciation, was found null, *Feb.* 17. 1629, *Blackburn*. Yet where the appriſer was negligent, and obtained not infeftment, nor did diligence therefor for ſome years, a tack ſet by a debtor before the appriſing, but having its entry after the appriſing, *but before ſeiſin thereon*, was preferred thereto, *July* 11. 1627, *Wallace*. Yea, no infeftment or diligence being uſed upon an appriſing for many years, an arreſtment thereafter was preferred to the mails and duties of the lands appriſed, *Feb.* 14. 1623, *L. Saltcoats*. But cuſtom ſince hath always preferred appriſings to arreſtments, altho' there were no infeftment or diligence upon the appriſing, becauſe it is a legal aſſignation, and needs no intimation unleſs the appriſer had relinquiſhed his right; and therefore, tho' that caſe of *Saltcoats* was adduced, an appriſer of an annualrent was preferred to an arreſtment, tho' the appriſer neither was infeft nor uſed diligence, for nine years before the arreſtment, *Feb.* 23. 1671, *Lord Juſtice-clerk* [q]. It is ſaid, no voluntary diſpoſition, or deed of the debtor after the denunciation, will prejudge the appriſing, becauſe if the deed done thereafter be neceſſary, and that thereunto the debtor was ſpecially obliged before, and might have been directly compelled, ſuch even after denunciation may be preferred; as an annualrent proceeding upon a bond, prior to the denunciation, containing an obligement to infeft in that annualrent, the infeftment thereupon tho' after denunciation was preferred, *Hope*, appriſing, *Henderſon contra M'Adam*. The like of an infeftment, whereof the charter was before denunciation, and the ſeiſin before the ſeiſin upon the appriſing, *ibid. George Hamilton contra tenants of Newburgh*. The like of an infeftment upon reſignation, which reſignation preceded the denunciation; and tho' the reſignation was at firſt refuſed by the ſuperior, being accepted thereafter, it was preferred, *ibid. Hope contra Anderſon*. And ſo an infeftment upon a diſpoſition for a cauſe onerous, which diſpoſition was of the ſame date with the denunciation, and whereupon infeftment followed, before the appriſing, was preferred to the appriſing, *Spotiſ.* compriſing, *Hamilton contra Brown*. Yea, an infeftment upon a diſpoſition, poſterior to an appriſing, was preferred thereto, ſeeing the appriſer did no diligence for ſix years, *ibid. Hamilton contra M'Culloch*. And generally voluntary rights are excluded, being granted after the denunciation of lands to be appriſed, *tho' before* [qq] infeftment be obtained, or a charge againſt the ſuperior; all which is, the creditor being *in curſu diligentiæ*; but if he be ſupinely negligent, he will loſe that privilege; after a competent time for obtaining infeftment, or charging the ſuperior from the decreet of appriſing, any poſterior voluntary right, is preferable to the appriſing, as was found in the competition of the creditors of *Cockburn* and *Langtoun*, *Jan.* and *Feb.* 1692 *, *vide infra*, *Lib.* 4. *tit.* 35. competition of real rights.

XXII. In the competition of appriſings, being both legal diligences, the firſt appriſer doing ſufficient diligence, is preferred **; as the firſt appriſer, laſt infeft, but having firſt charged, was preferred, tho' the ſuperior did voluntarily infeft a poſterior appriſer, *Jan.* laſt, 1632, *Fergu ſon*. Yea, a poſterior appriſing was preferred to a prior, where the debtor by colluſion ſuſpended the letters, and the denunciation of the one and not of the other, whereby the other appriſed firſt, *Nov.* 28. 1628, *Borthwick*. The like where the *poſterior appriſing* proceeded upon a citation of the party upon ſixty days, as being out of the country, and the debtor

* This deciſion not found.

** By act 62. P. 1661, it is declared, That all appriſings within year and day of the appriſing, firſt made effectual by infeftment, or exact diligence for obtaining infeftment, ſhall come in *pari paſſu*.

[q] See above, § 17. *h. t.* [qq] F. until.

debtor was brought to the country of purpoſe, that a poſterior denunciation upon fifteen days by another appriſer, might give him the firſt appriſing, and yet the other was preferred, *Nicol. tenants of Cockburnſpeth contra Wardlaw*. And upon the competition betwixt the *L. Clerkintoun* purſuing a reduction of *L. Corſbie*'s appriſing, as colluſive, in ſo far as after *Clerkintoun*'s author Sir *William Dick*, had charged the ſuperior with the firſt upon the letters of four forms, they gave infeftment to *Corſbie* before the days of the firſt charge expired; the Lords reduced the infeftment, but aſſoilzied *Corſbie* from bygones, as poſſeſſing *bona fide*; and ſeeing the purſuer ſuffered *Corſbie* to poſſeſs without purſuit, till the legal *of Clerkintoun's appriſing* was expired, they found that *Corſbie*, as now the ſecond appriſer, might redeem him, *Dec.* 3. 1664, *inter eoſdem*.

XXIII. The fourth effect of an appriſing is, that being led by the ſuperior againſt his vaſſal, it *needs no infeftment but* conſolidates the property with the ſuperiority, and is preferable to all poſterior appriſings, whatever be their diligence, *Spotiſ.* compriſing, *Stevinſon contra L. Craigmiller*. In other caſes, appriſing without further diligence, doth not tranſmit the real right, though it may exclude aſſignations to mails and duties or arreſtments upon perſonal debts, yet it is no ſufficient title for mails and duties, againſt any other having any real title. Superiors may infeft themſelves on their appriſing, or may obtain precepts from the Chancellary to infeft them, and declarators of conſolidation are inconvenient, not being in a ſpecial regiſter, and ſo cannot come to the knowledge of acquirers [r].

XXIV. As to the fourth point concerning the efficacy of appriſings, whereupon diligence is uſed before infeftment be obtained; they have no effect to remove tenants, tho' the ſuperior was charged, and the letters found orderly proceeded againſt him, and tho' only proponed by the tenants, and by no party pretending right, *March* 25. 1628, *Lockhart*; *nor was removing ſuſtained* againſt the perſon againſt whom the appriſing was led, *Feb.* 20. 1629, *Galloway*: but ſince the Act of Parliament, bringing in appriſers *pari paſſu*, the firſt effectual appriſing is declared to be, either by infeftment, or charge againſt the ſuperior to grant infeftment, which is ordinarily ſuſtained without further inſiſting, and therefore it muſt have the ſame effect as an infeftment, at leaſt during the ordinary years of the legal, even for removing [rr]: but the appriſing with diligence hath this effect; *firſt*, It is a ſufficient title for mails and duties againſt the poſſeſſors. *Secondly*, It excludes all poſterior infeftments or diligences by the colluſion, or voluntary deed of the ſuperior, or any other. *Thirdly*, It is effectual to compel the ſuperior to receive, and infeft the appriſer, upon payment to him of a year's rent, which was formerly by letters of four forms, till the ſtatute 1647, *cap.* 43. Whereby one charge upon twenty-one days is ſufficient, all which proceeds upon the allowance of the Lords, upon the back of the appriſing; and albeit that Act is not revived in the later Parliaments, yet the Lords continue that cuſtom.

XXV. This allowance of appriſings is appointed to be regiſtrated, and not the whole appriſing, *Parl.* 1641, *cap.* 54. Yet neither the want of the allowance, nor the want of regiſtration thereof, annulleth the appriſing, till the laſt Act of *Parl.* 1661, *cap.* 31. making the regiſtration of the allowance *within* 60 *days* neceſſary, otherways poſterior appriſings, firſt allowed, are to be preferred, unleſs without allowance the appriſer hath obtained infeftment, before the others diligence [s]; upon which grounds, the Lords upon ſupplication, without citation, ordained an appriſing to be allowed and regiſtrated, long after ſixty days, and after the debtor's death, ſeeing it would be thereby preferable to all other rights, after the regiſtration thereof, *June* 8. 1665 *.

XXVI. There

* It was a practice introduced by Act 54. P. 1641, and eſtabliſhed by Act 31. P. 1661, that appriſings, after decreet pronounced, ſhould be again preſented to the Lords by the clerk of the bills, and allowed by them. One advantage attended this, that the clerk of the bills was, upon ſuch occaſions, obliged to record an abbreviate of the appriſings; as this method of granting allowances was only a ſuperfluous piece of form; by § 24.

[r] See above, II. 11. 8. [rr] Above, II. 9. 41. 3. [s] See above, II. 3. 22.

of

XXVI. There are many debates which ariſe concerning the entry betwixt appriſers and ſuperiors, as whether the ſuperior can be compelled to receive the appriſer, without inſtructing that the vaſſal, from whom he hath appriſed, was infeft, or ſpecially charged, which hath been ſeveral times decided *negativè*, fifty years ſince. But now of a long time, charges againſt ſuperiors for infefting appriſers, *ſalvo jure cujuſlibet & ſuo*, have been ſtill ſuſtained, becauſe it is unuſual and difficult for the appriſer to get his debtor's evidents, unleſs it were the extract of his ſeiſin, and the ſuperior's receiving him upon obedience, cannot prejudge himſelf; and therefore the ſuperior was ordained to receive the appriſer, tho' himſelf was in poſſeſſion, by virtue of a right, *March* 5. 1634, *Black*; the like, whatever right the ſuperior might pretend, *March* 11. 1636, *Scot contra Elliot*.

XXVII. The quantity of the year's rent by the Act of *Parl.* 1469, *cap.* 36. is expreſt to be a year's mail, as the land is ſet for the time, wherein conſideration is had of ſuch real burdens affecting the land, as are taken on, with the ſuperior's conſent: but in the caſe of a liferent ſo taken on, the year's rent was modified full, but delayed to be paid till the liferenter's death, *July* 18. 1633, *Baird*; and in the ſaid caſe *Scot contra Elliot*. Conſideration is alſo had of feus ſet by the debtor before the appriſing, which while warranted by law, the ſuperior will only get a year's feu-duty for receiving the appriſer in the ſuperiority, *Feb.* 15. 1634, L. *Munktoun*. *Spotiſ.* compriſing, *Cowan contra Mr. Elphingſtoun*; or if there be a ſub-feu of lands holden feu at any time: but a ſubaltern blench-infeftment cannot make the blench-duty ſufficient as a feu-duty, ſeeing a feu is an heritable location, for melioration of the ground, and is therefore preſumed to be the rent at the time of the feu, which will not admit a contrary probation: but the ſuperior will not be obliged to receive the appriſer for a year's rent of the money appriſed, for, but of the lands appriſed, *March* 23. 1622, *Ramſay*; *March* 30. 1637, *Paterſon*. Yet, in this laſt caſe, the Lords modified the rent far within the *yearly* worth of the lands, for the rent being worth 800 merks it was modified to 300 merks [ss]. A ſuperior muſt not only receive the firſt appriſer, but all others who charge, tho' one was infeſt before any other charged, *March* 11. 1628, *Ferguſon*. And if more charge *together*, he muſt accept a year's rent for all, *by equal ſhares*, providing that he, who ſhall be preferred, refound to the reſt the proportions paid by them to the ſuperior, *July* 22. 1628, *Lo. Borthwick and Hay* [t].

XXVIII. If the ſuperior be contumacious, and will not enter, the appriſer upon diligence, *Craig*, *lib.* III. *dieg.* 2. § 20. preſcribes, that the ſuperior may be thrice required, and if he refuſe, letters may be obtained from the Lords to charge his ſuperior, to receive the appriſer, ſupplying his place, and ſo from ſuperior to ſuperior till he come to the King, who refuſeth none; by which the ſuperior would loſe the caſualities of his ſuperiority, during his life, as is ordinary in the entry of heirs upon retour; yea, if the appriſer offer a ſum, ſome way proportionable to the land appriſed, or the ſum appriſed for, with a bond to pay what *further* the Lords ſhall modify, and offer a charter, it will ſtop the ſuperior's caſualities, *by the death of the debtor thereafter*, *Feb.* 9. 1669, *Black*. But ſince the act 1661, *cap.* 62. whereby appriſings became effectual by a charge againſt the ſuperior, all inconvenience is avoided; the creditor is not put to trouble, the ſuperior loſeth no caſuality, but all remains with the debtor, till the creditor be infeft, or the legal be *expired*, and the creditor poſſeſſed [w].

XXIX. As to the next point, infeftment following upon an appriſing, doth conſtitute a real right, but under reverſion of ſeven years, being before the act of debtor and creditor, *Parl.* 1661, *cap.* 62. or ſince of ten years, which is counted from the date of the appriſing, and not from the allowance or infeftment, *Nov.* 11.

of regulations for the ſeſſion 1695, in place of it, an abbreviate is appointed to be ſigned by the Lord pronouncer of the decreet, at the time of pronouncing, which muſt be given in to be recorded within 60 days: by Act of ſederunt, *January* 18. 1715, one principal abbreviate is appointed to be left with the clerk of the bills, and the Lord pronouncer of the decreet is appointed to ſign two or more abbreviates, if required. See, *Statute law abridged*, Notes 2 and 12.

[ss] See above, II. 4. 32. 2. [t] See above, II. 4. 32. 2. [w] See above, II. 3. 30. See alſo, § 24. *h. t.*

Nov. 11. 1630, *L. Limpitlaw*, even againſt another appriſer, alledging he could not know the prior appriſing, till infeftment were taken thereon.

XXX. Yet it remains but as a ſecurity, which the appriſer may renounce, or make uſe of other ſecurities till he be ſatisfied, *March* 5. 1628, *Lo. Blantyre*. The like, tho' after the legal was expired, *Dec.* 7. 1631, *Scarlet*. But here the appriſer had attained no poſſeſſion, and there was a preferable annualrent exhauſting moſt of the rent [x].

XXXI. Remains the laſt point propoſed, how appriſings become extinct, and are taken off; and that is, *firſt*, When the appriſing is declared null, thro' defect of any eſſential ſolemnity. *Secondly*, When the ſum whereupon it is deduced, is not due, as when the half thereof was paid, *Hope* appriſing, *Blackburn contra Lamb, and Lamb contra Hepburn of Smeatoun*. Or being deduced for a term's rent, which was not due, albeit it was an aſſigny who appriſed, ſeeing it was to the behoof of the cedent, it was found relevant to reduce the appriſing *in totum*, *June* 20. 1678, *Scot of Burnfoot*, *(it was otherways determined)* *Jan.* 31. 1679, *Irwing*. Where a term not due being appriſed for, the appriſing was *(only)* retrenched to the principal ſums and annualrents, without accumulation of annualrents, penalties or ſheriff-fees. *And* an appriſing for two ſums, for one of which ſums the decreet was looſed and turned into a libel, before the appriſing was deduced; yet the appriſing was ſuſtained as a *foundation of bona fides to ſave from repetition of what ſums* therein were inſtantly verified, *Nov.* 23. 1677, *Boid and Graham*. And an appriſing was reduced, becauſe one of the ſums appriſed for, was regiſtrate *à non ſuo judice*, *July* 20. 1678, *Morriſe*. In which caſe the Lords would have ſuſtained the appriſing as a ſecurity for the true ſums reſting, if the appriſer would have paſt from the *extraordinary penalties*. An appriſing was not found null, tho' the inqueſt was only thirteen, albeit the cuſtom hath been long of fifteen, nor becauſe the ſeals did not appear, after twenty years, *Dec.* 3. 1690, *Bennet* *, the reaſon hereof was, becauſe the act introducing appriſings, bears, the inqueſt to be of thirteen perſons, *Parl.* 1469, *cap.* 36. The Lords do frequently ſupply defects in appriſings or adjudications, in ſo far as they may ſtand as ſecurities of true debt, and real expence, eſpecially when the queſtion is betwixt the debtor and the appriſer, but not in competition with more formal rights; and they are more ſtrict againſt appriſings or adjudications, when they are inſiſted upon, as expired, or for penalties, ſheriff-fees, and the annualrents thereof; and therefore a poſterior appriſing being ſolemn and formal, according to the cuſtom then in uſe, was preferred to a prior, not being ſo formal, *July* 15. 1670, *La. Lucia Hamilton*. And likeways, an appriſing being led for penalties and termly failzies, was reduced as to theſe, becauſe a part of the ſum was not due at the date of the appriſing, though it was deduced at the inſtance of an aſſigny: but if it were proved to the cedent's behoof, it was alſo found reducible, *quoad* the accumulation of the annualrents, and making them and the penalties principal ſums. But ſeeing the appriſer declared it redeemable, tho' the legal reverſion was expired, it was ſuſtained as a ſecurity of the firſt principal ſum, and current annualrents thereof, *Jan.* 31. 1679, *Irving*. And an appriſing was ſuſtained upon a bond, bearing a long term of payment, with a clauſe irritant, "That if two "terms annualrent run together unpaid, the whole principal and annual ſhould "be payable, without abiding the firſt term," though there was no declarator of the irritancy, it not being penal, but taking away the favour of the creditor to the debtor, by delay of the term, *June* 20. 1678, *Scot of Burnfoot*.

XXXII. Albeit the Lords do not ordinarily modify penalties after appriſing, yet if they be exorbitant, they do modify the ſame, and all termly failzies, as they did in the ſaid caſe of *Morriſe Orrock*, *July* 20. 1678 [y].

* This deciſion not found.

[x] See below, § 44. *h. t.*

[y] See below, IV. 3. 2. 2.

XXXIII. Appriſing was ſuſtained upon a ſum payable without requiſition, albeit there was no charge preceeding the appriſing, *July* 21. 1666, *Thomſon*. The like, tho' the bond bore annualrent before 1641, ſeeing there was no infeftment thereupon, or requiſition therein, *Jan.* 14. 1679, *Farquharſon* [z].

XXXIV. And an appriſing was ſuſtained, tho' the lands appriſed were not filled up in the letters of appriſing, or ſpecial charge, nor in the executions, becauſe the meſſenger who executed, was judge in the appriſing, which relating the denunciation of the lands particularly, and charging the apparent heir to enter thereto in ſpecial, was found a more ſolemn execution than any execution apart, *Jan.* 16. 1680, *Brown*: for decreets of appriſing, as they became to be by meſſengers, who appriſed all which was claimed, and could admit no exception, was a mere executive ſentence, as a poinding of moveables is.

XXXV. An appriſing was ſuſtained without producing the letters of appriſing, it being *in anno* 1636; but the inſtructions of the debt were found neceſſary to be produced, being within preſcription, *Feb.* 11. 1681, *Kenway*. Yea, an appriſing was ſuſtained upon a bond, payable upon requiſition, tho' the appriſing made no mention of the requiſition, the inſtrument of requiſition being produced, *July* 12. 1671, *heirs of Lundie*.

XXXVI. And tho' the diſpenſation to appriſe was neither at *Edinburgh*, nor at the head-burgh of the ſhire, but a place upon the open fields, and upon account of a great rain, the meſſenger did not appriſe that day, but adjourned the court of appriſing till the next day, the appriſing was ſuſtained, *July* 12. 1671, *heirs of Lundie*.

XXXVII. And an appriſing of the ground-right of lands, and all right belonging to the debtor, the ſuperior being charged thereupon, was preferred to a poſterior appriſer, who appriſed particularly an annualrent out of the lands, which was the only right of the common debtor, *Nov.* 21. 1673, *Fairholm*.

XXXVIII. Appriſings are elided by payment, without neceſſity of renunciation, reſignation, or reduction, as in the caſe of other infeftments [a], *July* 25. 1626, *Lo. Lovat*: the reaſon is, becauſe appriſing being but a legal diligence for ſecurity of the ſum, which ceaſing, it falleth without other ſolemnities; and the debtor's own infeftment ſtands valid, without renovation; which, with the infeftment upon the appriſing, ſtood but as a parallel right for ſecurity, ſo that all returned *ad priſtinum ſtatum*; and amongſt the reſt, the caſualities of the ſuperiority, if they were taken off by the appriſing; and therefore an heir not entering, but being charged, if he ſatisfy and redeem the appriſing, he will be in non-entry till he be received and infeft as heir.

XXXIX. Appriſings are excluded and qualified with the back-bonds and obligements of the appriſer, as in perſonal rights, which are valid againſt ſingular ſucceſſors; as a back-bond, that an appriſing ſhould not be prejudicial to another party's right, was found relevant againſt the appriſer's ſingular ſucceſſor, the King's donatar of the appriſer's forfeiture, *July* 31. 1666, *the E. of Southeſk* [b].

The laſt and moſt ordinary extinction of appriſing is by intromiſſion with the mails and duties of the appriſed land, over and above the annualrent, for theſe are imputed in the principal ſum, by the ſtatute, *Parl.* 1621, *cap.* 6. which is alſo extended to minors having the privilege *to redeem* after the ordinary legal of ſeven years: but it was not provided for in the ſaid ſtatute, that the appriſer ſhould be comptable *to the minor* for his intromiſſion after *the ſeven years*, which is therefore provided for, *Parl.* 1641, *cap.* 67. which, tho' it was neglected, and not revived, *Parl.* 1661, yet the Lords ſuſtained the ſame, as now in cuſtom twenty years and more, *Feb.* 18. 1663, *Roſs* *. But the tenor of the ſaid firſt ſtatute being,

* By act 10. P. 1663, the act 67. P. 1641, was revived. See above, § 14. 2. *h. t.*

[z] See above, § 15. *h. t.* [a] See above, II. 11. 6. 2. II. 10. 1. [b] See above, III. 1. 21.

ing, that *if* the quantities of the mails and duties ſhall extend to as much as will ſatisfy the whole principal ſum, and annualrents thereof, compoſition to the ſuperior, and annualrent thereof and expences, in deducing the appriſing, in that caſe the appriſing is declared to expire, *ipſo facto*; ſo that if any part thereof remain, and the debtor be ſo negligent, as not to uſe an order, and compt and reckoning within the legal, but ſuffer it to expire, the appriſing will ſtand valid, and carry the right of the whole lands, and will not be extinct in ſo far as ſatisfied proportionally, which was ſo found, where a part of the ſum was ſatisfied by payment, *Nov.* 28. 1623, *Craig*. But if the remainder be very ſmall, the Lords may be the more ſtrict in modifying prices, and if that be not ſufficient, a ſmall remainder will not take away the right, *de minimis non curat prætor*. Intromiſſion is not only extended to the rents and profits of the appriſed lands, but to the price *received for* any part thereof, ſold by the appriſer within the legal, *Jan.* 14. 1669, *M'Kenzie*. And an appriſing was alſo found extinct, by the intromiſſion of him to whom the appriſer granted back-bond, declaring the appriſing to be to his behoof, and that againſt a ſingular ſucceſſor, who thereafter was infeft upon the appriſer's reſignation, *July* 12. 1670, *Kennedy*. Yea, an appriſing was found excluded, as being ſatisfied by the debtor, and retired by him, with a blank aſſignation thereto, lying by him at his death, tho' his ſon thereafter filled up his name therein, which was inſtructed by the ſon's oath and witneſſes *ex officio*, *Feb.* 27. 1666, *creditors of Lo. Gray*. But an appriſing was not found extinct by intromiſſion, where the appriſer paid to his debtor the ſuperplus of the rent, above his annualrent, before the leading of any other appriſing. Yet where an order of redemption was uſed before the expiring of the legal, the appriſing was found extinct by intromiſſion, after the courſe of the legal, *July* 7. 1676, *Edgar*. The like was found in reſpect of an order uſed by a ſecond appriſer, and was ſuſtained, tho' the firſt appriſer had acquired right to an order of redemption by a third appriſer, uſed againſt the ſecond appriſer, which was not found to hinder the ſecond appriſer to declare the firſt appriſing ſatisfied by intromiſſion during the legal, *or ſince the order*, but prejudice to the third appriſer, or to the firſt appriſer, having right from the third appriſer to redeem the lands from the ſecond appriſer, by ſatisfaction of the ſums due to him, *July* 18. 1676, *Gordon*. Yea, an appriſing being both againſt the principal and cautioner's eſtates, an order of redemption uſed by the principal debtor was found to keep the appriſing unexpired, not only as to his own eſtate, but as to the cautioner's eſtate, *Feb.* 10. 1675, *La. Torwood-head*.

But the appriſer hath it in his option, whether he will enter in poſſeſſion of the mails and duties, or will uplift more thereof than his annualrent; yet if a poſterior appriſer inſiſt for poſſeſſion, the firſt muſt either poſſeſs, do diligence, and be accomptable, or ſuffer him to poſſeſs, *Feb.* 11. 1636, *Colquhoun*. But if the appriſer poſſeſs, he muſt do diligence for the rent of that land he poſſeſſed, and be comptable, not only for what he intromitted with, but for what he might have intromitted with; and if the lands were tenant-ſtead at his entry, he muſt compt accordingly at that rate, tho' thereafter given over and waſte, if he neither ſet nor laboured them himſelf, nor made intimation to the debtor ſo to do, *Feb.* 9. 1639, *Hamilton*. The like was found, that the appriſer was comptable according to the rental, allowing all reaſonable defalcations, *Jan.* 4. 1662, *Seaton*. But where the appriſer entered in poſſeſſion of the lands waſte, he was not found comptable, according as he ſet them thereafter, for the firſt year of his proper labourage, ſeeing by the ſeaſon without his fault, he loſt thereby, *Dec.* 23. 1629, *Dickſon*. An appriſer was found comptable for the rental of all the tenants of a ſmall tenement, lying contigue, having taken decreet againſt all the tenants, and yet refuſing to compt for ſome particular rooms, without ſhewing any hinderance to uplift from theſe, which, other appriſers calling to accompt, could not know, that he had foreborn theſe, but nothing was determined as to the common debtor's own labourage, *Jan.* 14. 1681, *Schaw*. Yet where the appriſer was

diſturbed

diſturbed in his poſſeſſion by the debtor, *via facti*, or *via juris*, he was not found comptable by a rental, but (*for*) what he recovered, till he attained to peaceable poſſeſſion, *Jan.* 20. 1681, *Burnet*.

XL. The act of *Parl.* 1661, *cap.* 62. hath lengthened the legal of appriſings, and hath brought in all who appriſe within a year of the firſt effectual appriſing *pari paſſu*. By this act theſe alterations are introduced as to appriſings: Firſt, Whereas before the firſt appriſer being infeft, or doing diligence, had only acceſs to the whole appriſed lands till he was ſatisfied: now the Lords are impowered to limit the poſſeſſion during the legal, as they ſhall ſee cauſe, the appriſer getting his annualrent, or ſecurity therefor; but the power granted to the Lords to reſtrict appriſers, is only perſonal and peculiarly *in favour of* the debtor, and not *of* the poſterior appriſers, *July* 28. 1671, *Murray*. Secondly, All appriſings led ſince the firſt of *January* 1652, before the firſt effectual compriſing, obtaining infeftment or charging the ſuperior to receive, or within a year after the ſame, or to be led thereafter upon any perſonal debt, within year and day of the firſt effectual compriſing, come in *pari paſſu*, as if they all had been contained in one compriſing, the other appriſers paying to the firſt effectual compriſer the expences of his compriſing, and infeftment thereupon; and accordingly it was decided by the Lords, that thoſe other appriſers behoved to pay the whole compoſition to the ſuperior, *Feb.* 5. 1663, *Grahame*. But the year is not to be counted from the infeftment or charge, by which the appriſing becomes effectual, but from the date of the decreet of appriſing, *July* 4. 1671, *L. Balfour*. Yet theſe appriſings that were prior to the act, were not found to come in *pari paſſu*, from the dates of the appriſings, albeit the act bear, that they ſhould come in as if they were in one appriſing, but only from the date of the act of Parliament; and as to what the firſt appriſer had poſſeſſed *bona fide*, before the act, *if* his intromiſſion exceeded his annualrent, the ſame ſhould be imputed to the expences of the compriſing and compoſition, and in payment of the ſums appriſed for *pro tanto*, *Jan.* 7. 1665, *L. Blackwood*. But in the ſaid act 1661, appriſings on annualrent-infeftments, or other *debita fundi*, continue as before that act.

Yet an appriſing led before *Jan.* 1652, tho' infeftment or charge were uſed thereon after *Jan.* 1652, was found to exclude all appriſers after *Jan.* 1652, whoſe infeftment or charge were poſterior to the infeftment or charge upon the appriſing led before *Jan.* 1652, and that the ſaid poſterior appriſing did not come in *pari paſſu* with that led before *Jan.* 1652, tho' within a year of it; becauſe the act of Parliament relates nothing to appriſings deduced before *Jan.* 1652, *Dec.* 12. 1666, *Home*. And albeit the firſt effectual appriſing was ſatisfied, and ſo extinct; yet it doth ſtand valid as to the ſecond appriſing, within year and day; but a third appriſing was not found thereby to come in *pari paſſu* with the ſecond appriſing, as being within year and day thereof, as if the ſecond appriſer became the firſt appriſer, *Dec.* 13. 1672, *Street*; *Feb.* 20. 1679, *tenants of Mortoun*. And where the firſt appriſer poſſeſſed but a part of the lands appriſed, the ſecond appriſer not infeft, was preferred to the third appriſer infeft, as to the remanent rents, becauſe the ſecond appriſer needed no infeftment, but the infeftment upon the firſt appriſing was ſufficient for all the appriſings led within the year of the firſt, *Dec.* 22. 1664, *Ramſay*. There is alſo an exception from this clauſe, by another act, *Parl.* 1663, *cap.* 22. that ſecond appriſers ſhall not be prejudged if they did acquire right to a former appriſing, redeemed and ſatisfied by them, for their own ſecurity, before the ſaid act, albeit led ſince *Jan.* 1652, which firſt compriſing ſhall remain in the ſame caſe as appriſings were formerly; it was ſo decided, without neceſſity to alledge that right was taken to the firſt appriſing, to ſhun the expiring of the legal, or any other neceſſary cauſe, *Dec.* 9. 1664, *Veatch*. Thirdly, The extent of the legal is altered from ſeven years to ten years [d]; ſo that where the legal was not expired the time of the act, three years were allowed to redeem them from *Whitſunday* 1661, which terminated at *Whitſunday* 1664; whereanent

[d] See above, § 29. *h. t.*

whereanent it being queſtioned, whether intromiſſion during theſe three years ſhould ſatisfy appriſings, which being deduced ſince *January* 1652, were expired according to the law then ſtanding, and diſponed to others, there being no mention of that point in the ſaid act, the Lords decided *affirmativè*, *Jan.* 20. 1666, *Clappertoun*.

XLI. Fourthly, The benefit of redemption is competent to creditors againſt the apparent heirs of their debtors, (acquiring right to expired compriſings, which was extended to *an* apparent heir even during his father's life; ſeeing apparent heirs are generally expreſſed, and the deſign of the act is alike whether the acquiſition be before or after the debtor's death, *June* 19. 1668, *Burnet*; but there is nothing provided in caſe a debtor acquire the appriſed lands, after the legal is expired, and the debtor is infeft and in poſſeſſion, and ſo is full proprietar; for tho' the reaſon and deſign of the law ſhould rather be extended againſt the debtor than againſt his heir, yet there are no words capable of that addition; but it were neceſſary that it were added by act of Parliament) or any perſon to their behoof, acquiring right to appriſings within ten years after the acquirer's right, for ſuch ſums only as they paid for acquiring thereof, and they were found extinct by the apparent heir's intromiſſion by exception, which was ſo far extended, that it reached an appriſing aſſigned to an apparent heir, tho' the aſſignation was before this ſtatute, ſeeing the infeftment which made the apparent heir's right real and effectual, was after; and tho' the appriſing was redeemable when acquired, but expired in the perſon of the apparent heir, *July* 21. 1671, *Maxwel.* This hath no ground from the ſtatute; but the apparent heir getting right to the appriſing *gratis*, it was not found to accreſce to the creditors, but the Lords inclined that it ſhould be redeemable within ten years after his right, for the ſum whereupon the appriſing proceeded, *Feb.* 13. 1673, *inter eoſdem.* An appriſing acquired by the huſband of an apparent heir, found not redeemable by what he paid, unleſs it were proved, that it was acquired by the wife's means, or upon her account, *June* 13. 1674, *Richardſon*; *Feb.* 21. 1673, *Richardſon*; *Jan.* 15. 1679, *M'Dougal.* But this ten years reverſion was not found competent to the debtor himſelf, to redem from his apparent heir, *Dec.* 3. 1680, *Naſmith.* But a ſecond brother acquiring an appriſing upon eaſy terms, when his elder brother was out of the country, was not found redeemable by this act, not being eſteemed as apparent heir *alioqui ſucceſſurus*, *Feb.* 17. 1675, *M'Lurg*.

And an appriſing coming in the perſon of the apparent heir of the principal debtor, was found ſatisfiable by the ſums payable therefore by the apparent heir, ſummarily without reduction, *Feb.* 22. 1671, *Dumbar.* The like was found by exception or reply, where the appriſing was to the behoof of the debtor's eldeſt ſon, *July* 4. 1671, *L. Balfour.* The like, tho' the appriſing came in the apparent heir's perſon, within the legal, albeit the act of Parliament expreſſeth only expired appriſings coming in the perſon of the apparent heir, to be redeemable for what he paid, *Feb.* 26. 1685, *Campbel*; this hath no warrant from the act. Yea, it was found redeemable by any perſonal creditor of the defunct's, tho' the act mentions only to be redeemable by poſterior appriſers, *Dec.* 1683, *Moll* *. Yet it was not found redeemable by children upon bonds of proviſion, granted after expiring of the legal, *Harcus*, *contracts of marriage*, *Naſmith*, *Jan.* 31. 1682, The like, where the appriſing acquired by the apparent heir was found ſatisfied by intromiſſion, equivalent to what was paid for the appriſing; the ſaid intromiſſion being either within the ten years, or after the intenting a ſummons of declarator, offering to pay what remained after compt and reckoning, it was found to prorogate the ten years reverſion, without any other order, *June* 26. 1677, *Kincaid* [e].

XLII. Appriſings deduced againſt apparent heirs, ſpecially charged to enter heir, are not redeemable by the heir of the party charged to enter heir who was

* This deciſion not found. See *July* 11. 1671, *Maxwel.*

[e] See above, § 14. 3. *h. t.*

never infeft, but by the heir of the defunct, for whoſe debt the appriſing was deduced, who died laſt veſt before the appriſing, *Feb.* 6. 1668, *Jan.* 19. 1669, *Johnſtoun.*

XLIII. Minors have a ſpecial privilege as to the legal reverſions of appriſings, *which run not againſt them during their minority*, and how far this is extended to majors ſucceeding to minors; *vide Lib.* 1. *tit.* 6. § 44. *Sect.* 9. amongſt the privileges of minors, and *vide* what hath been ſaid of appriſings, *Lib.* 3. *tit.* 2. § 14. *Sect.* 2.

XLIV. Appriſing while it is redeemable, is but a legal diligence for ſecurity; and the appriſer may relinquiſh the ſame, tho' he be in poſſeſſion, and may do any other diligence for recovering his debt; but if he continue to poſſeſs after the appriſing becomes irredeemable, the debt is thereby ſatisfied and extinct, which was ſo found, albeit the appriſing proved ineffectual as to a part of the lands appriſed, the remanent being equivalent to the debt appriſed for, *and it was not found, that a proportional part of the ſums adjudged for*, correſpondent to the lands that were evicted, ſhould remain due to the appriſer, *June* 18. 1675, *Leys.* The form and manner of procedure in appriſings will come in amongſt legal executions, of which hereafter.

XLV. Adjudication upon renunciation to be heir, is *remedium extraordinarium*, introduced by cuſtom, where appriſing could have no place, *as* when the debt to be ſatisfied is not a liquidate ſum, or goods ordinarily liquidable, but is a diſpoſition of lands, containing expreſsly or virtually, an obligation to infeft the acquirer, or ſome other: or an obligation conſiſting in ſome fact to be performed; or otherways, where the debtor's heir renounces to be heir, whereby there is no party from whom the lands can be appriſed; therefore *hæreditas jacens* is adjudged. This remeid is introduced by the Lords, who having ample power to adminiſtrate juſtice in all caſes, and to make orders to that effect, do ſupply the defect of the law, or ancient cuſtoms, by ſuch new remeids, as ſuch new occurring caſes do require, amongſt which adjudication is a prime one, which *Craig* teſtifieth to have been unknown to our predeceſſors, and being but recent in his time, and few deciſions thereupon, the nature and effect of it was little known, but is now by courſe of time further illuſtrated. Adjudication hath place in two caſes; the firſt and moſt ordinary is, when the heir renounces to be heir, in which caſe adjudication is competent, whether the debt to be ſatisfied be liquidate or not. The other is, when the obligement to be ſatisfied conſiſteth *in facto*, and relateth to a diſpoſition of particular things; which diſpoſition or obligement, not being fulfilled by the debtor or diſponer, tho' all ordinary diligence be done, then adjudication taketh place to make the ſame effectual.

XLVI. As to the firſt caſe, adjudication upon the apparent heir's renouncing to be heir, proceedeth upon theſe ways; if he be purſued as lawfully charged to enter heir, for ſatisfying of his predeceſſor's debt or obligement, he may renounce to be heir (if he have not meddled) either in the proceſs againſt him, as charged to enter heir in the firſt inſtance, or ſome time thereafter, by ſuſpenſion or reduction: if he renounce in the firſt inſtance, when the debt is not yet inſtructed and eſtabliſhed, as when it proceeds not upon a clear bond or writ, but abides probation by witneſſes, or otherways, than before the proceſs of adjudication, there muſt be a proceſs and ſentence againſt the heir renouncing *cognitionis cauſa*, for eſtabliſhing and proving the debt; in which, becauſe there is a neceſſity in all proceſſes to have a defender, the apparent heir renouncing, is only called to ſupply that place *cognitionis cauſa*, but without any effect againſt him, but only *contra hærditatem jacentem*. But if the apparent heir renounce in the ſecond inſtance, after decreet obtained againſt him; or, in the firſt inſtance, when the ground and title of the purſuit inſtructs the debt, then there needs no other decreet *cognitionis cauſa*; but the purſuer proteſting for adjudication, the ſame will be admitted ſummarily *. Adjudication itſelf is a moſt ſimple and ſummary proceſs, whereby

* If the heir does not renounce upon the general charge, a ſpecial charge is neceſſary. See below III. 5. 23.

whereby the heir renouncing, and the debt being eſtabliſhed, as ſaid is, the whole heritage renounced, or benefit whereto the heir might ſucceed, is adjudged by the Lords to the purſuer for ſatisfaction of the defunct's obligement, wherein the heir renouncing, is again called to ſuſtain the part of a defender, which is only for form's ſake; for he can propone nothing, and one ſingle ſummons is ſufficient without continuation; becauſe it is acceſſory to a prior decreet, as *Dury* obſerves, but expreſſeth not the parties, *Feb.* 26. 1629.

XLVII. And all is adjudged, *periculo petentis*, whatſoever the purſuer pleaſeth to libel, alledging that it might have belonged to the heir entering: yea, though any party having intereſt, ſhould compear and inſtruct that he hath the only right, and the defunct was fully denuded, it would be incompetent *hoc loco*, *Spotiſ.* Adjudication, *Cairncorſs contra L. Drumlanrig.* The reaſon is, becauſe the adjudication is but *periculo petentis*, and can give no right, unleſs the defunct's right, competent to the heir renouncing, be inſtructed. Neither can the adjudger, who is a ſtranger to the debtor's right, be put to diſpute the ſame, in obtaining the adjudication; yet the Lords admitted a ſingular ſucceſſor to propone upon his infeftment, that the defunct was denuded, and adjudged not the property, but all right of reverſion, or other right competent to the apparent heir, *July* 22. 1664, *Livingſtoun.* In this caſe the matter was notour to many of the Lords, that the Lo. *Forreſter* having no ſons, did contract his eſtate with one of his daughters, to lieutenant-general *Baillie*'s ſon, who was thereupon publicly infeft. But the reaſon why appriſings and adjudications have paſt ſo much at random is, becauſe appriſings have deborded from their antient form, which was by an inqueſt knowing the lands, who therefore would never have appriſed lands, but where the debtor was commonly reputed heritor, or heritable poſſeſſor: but when appriſings came to be deduced by ſheriffs in that part, conſtitute by the Lords by diſpenſation at *Edinburgh*, where perſons were made the inqueſt, who knew nothing of the lands, then all became to be appriſed which was claimed; and tho' the appriſer would not pay a year's rent for entering him in lands, where he had no probability of right in his debtor; the greateſt inconvenience was as to the lands holden of the King, (*where*) it was little addition of expences, to paſs one infeftment for all; and other ſuperiors getting a year's rent *ſalvo jure*, they were not ſuffered to controvert.

But now adjudications being in place of appriſings, and paſſing upon citation before the Lords, it is not like they will adjudge lands where the debtors are not, at leaſt reputed heritable poſſeſſors or liferenters; for now the Lords are in place of the inqueſt: and albeit as they ſuffer decreets in abſence, to paſs *periculo petentis*; ſo they will ſuffer adjudication to paſs of all that is libelled; *yet* if any other ſhall appear, and make it appear that they and their predeceſſors have been holden and reputed heritable poſſeſſors, and that there was no right reputed to be in the debtor, the Lords might readily ſuperſede to adjudge, in the firſt adjudication, if there be any compearance, till ſome evidence be given of the intereſt of the debtor; ſeiſins having been now regiſtrated, ſince the year 1617: And likeways reverſions, tho' adjudications of theſe might more eaſily paſs, becauſe no infeftment would follow: but where lands are adjudged, and infeftments follow, there ariſes thence grounds of pleas and purſuits, eſpecially for reduction and improbation, upon which all the heritors of the lands contained in the infeftments, would be obliged to produce their rights, and open their charter-cheſts, to parties having no pretence to their eſtates. Yet adjudication was ſuſtained of all lands generally, without condeſcending, *Dec.* 19. 1638, *Corſer*; which is the laſt way, when none appear to object againſt putting their lands in the adjudication.

XLVIII. In theſe adjudications all is competent to be adjudged, which ſhould have befallen the heir entering, as lands, annualrents, reverſions, tacks, liferents, and all heritable bonds; yea, not only theſe rights themſelves, but the bygone rents and duties thereof, preceeding the adjudication, and after the defunct's death, may be adjudged and purſued againſt the poſſeſſors and intromitters in that ſame proceſs,

proceſs, becauſe theſe are competent to the heir renouncing, and there is no other way to attain them, as was found in the ſaid caſe, *Corſer*, *Dec.* 19. 1638; and likeways heirſhip-moveables, for the ſame reaſon are competent in adjudications, but not againſt other moveables of the defunct, which muſt be confirmed, *Spotiſ.* adjudication, *Hagie contra her daughters*, *Nov.* 24. 1638, *Campbel contra Baxter:* And ſo it was not competent againſt an heritable bond, made moveable by a charge, *Jan.* 30. 1627, *Couper contra Williamſon and* L. *Bogmiln:* yet if an heritable ſum ſhould become moveable after the defunct's death, as by an order of redemption, it would be competent by adjudication, ſeeing it could be reached no other way. In this adjudication it is only competent to creditors to appear, having like proceſs of adjudication depending, for all will be brought in *pari paſſu*, who are ready before ſentence, with the firſt purſuer, *Spotiſ.* adjudication, *Stuart contra Stuart*.

XLIX. If the adjudication be of lands or annualrents requiring infeftment, the ſuperior will be compelled to receive the adjudger, tho' a ſtranger, his vaſſal, tho' he do not inſtruct his author's right, *ſalvo jure cujuſlibet & ſuo*, *Feb.* 9. 1667, *Ramſay* [g]. But as to the year's duty, payable by the adjudger to the ſuperior for their entry, tho' the Lords thought it equitable, that it ſhould take place, as well in adjudications as appriſings, the reaſon being alike in both, yet found not ſufficient ground, whereupon to decern it, ſeeing the ſaid year's rent is expreſſed in the Act of *Parl.* 1469, *cap.* 36. And the compoſition of the ſuperior, for receiving appriſers, *Parl.* 1621, *cap.* 6. Yet in the next Act of the ſame Parliament, anent adjudications, there is no mention of compoſition to the ſuperior, tho' the act relateth to the former act, anent appriſings; and therefore they thought it not competent to them to extend the ſaid compoſition, *ad pares caſus*, where it did ſo much appear, that the Parliament of purpoſe had omitted it; yet in the ſaid caſe, *Grierſon contra Cloſburn* upon the 21ſt of *July* 1636, they did forbear to intimate their deciſion, and deſired the parties to agree *. And no compoſition was found due by an adjudger, having charged before the late act of Parliament, *Dec.* 23. 1669, whereby, like compoſitions are appointed for adjudication, as for appriſing, *June* 10. 1671, *Scot.* In which caſe it was found, that the ſuperior might refuſe to enter the adjudger, if he paid his debt; but that he was to have nothing for compoſition, if he did ſo, in the ſame way as in appriſing, by the old act of *Parl.* 1469, *cap.* 36. by which that option is given to the ſuperior.

L. *Craig* obſerveth, that it was doubtful in his time, whether there was a legal reverſion competent to any renouncing, and afterward returning to redeem adjudications *as* appriſings, wherein he favoureth the affirmative; but the ſaid ſtatute, *Parl.* 1621, *cap.* 7. determineth the caſe, and granteth a legal reverſion, in favour of thoſe who have poſterior adjudications, within the ſpace of ſeven years, *from the date of the decreet of adjudication*, or ten years ſince the act of *Parl.* 1661, betwixt debtor and creditor, which is alſo competent to any renouncing in their minority, and being reſtored againſt the ſaid renunciation, but it is not competent to any other heir renouncing; yet if the heir, tho' major, find that he hath prejudged himſelf, by renouncing a profitable heritage, he may grant a bond, and thereupon cauſe within the legal, adjudge and redeem the former adjudications, which, tho' to his own behoof, will be effectual, there being ſo much equity and favour upon his part, being willing to ſatisfy the whole debts.

LI. It is clear by the ſaid ſtatute, the lands or heritage of a defunct may be adjudged, the heir renouncing, not only for ſatisfaction of the defunct's debt, but of the heir's own proper debt **.

LII. Adjudications are taken off and extinguiſhed in the ſame manner as appriſings are, by intromitting with the mails and duties of the lands adjudged, as is

* In the ſame caſe, as the parties did not agree, the Lords afterwards found, *Jan.* 20. 1637, that the ſuperior was obliged to receive the adjudger, without compoſition. This was altered by ſtatute, P. 1669, *c.* 18. by which ſuperiors are declared intitled to a year's rent from adjudgers. See above II. 4. 32.

** See above, II. 12. 29; The privilege introduced in favour of the defunct's creditors, in preference to the creditors of the apparent heir.

[g] See above, § 25. and 47. *h. t.*

is clear from the ſaid ſtatute. And though caſes be not ſo frequent in adjudications, as in appriſings, to clear the other ways of their extinction: yet the reaſon being the ſame in both, there is no doubt but the determination will alſo be the ſame.

LIII. The other manner of adjudications, is for making diſpoſitions or obligements to infeft effectual, whereupon, when the acquirer hath uſed all diligence competent in law, againſt the diſponer to fulfil the ſame, by obtaining decreets and horning regiſtrated thereupon, either againſt the diſponer or his heir, law being there defective, and cannot make the diſpoſition or obligement effectual, the Lords have allowed adjudication of the lands diſponed, whether in fee or liferent, *Had. July* 19. 1611, *Lo. Johnſtoun contra Lo. Carmichael:* and thereupon the ſuperior will be decerned to receive the adjudger, as was found in the caſe of an obligement to infeft a woman in liferent, holden of the ſuperior, wherein ſhe having uſed horning, the ſuperior was decerned to receive her, *July* 10. 1628, *Harris and Cunningham*; *Feb.* 24. 1675, *Hamilton*. This manner of adjudication is extended no further than to the thing diſponed, and hath no reverſion, unleſs there be a conventional reverſion in the bond or diſpoſition to infeft, but this kind of adjudication comes not in with others of that, or any other kind; and there is more reaſon that the ſuperior ſhould have a year's rent, if the diſpoſition be of the fee, and irredeemable, than in other adjudications; but theſe adjudications do not become effectual by a charge, yet as a legal diligence it will exclude poſterior voluntary rights; if the adjudication be for infefting a liferenter, no compoſition is due to the ſuperior: it requires no charge to enter heir, or renunciation *; but the adjudger muſt inſtruct his author's right, *June* 24. 1663, *M'dowgal*. And theſe adjudications do not come in *pari paſſu*, with other adjudications within the year, nor any other with them, *July* 16. 1675, *Campbel of Riddoch*, *Dec.* 2. 1677, *La. Fraſer*.

LIV. By the late act of Parliament, anent adjudications, *Sept.* 6. 1672, *cap.* 19. there are introduced two new forms of adjudications; the one ſpecial of lands effeiring to the ſum, and a fifth part more, in caſe the debtor produce his rights, and put the adjudger in poſſeſſion of his particular lands adjudged: but if he do not, adjudications are to proceed, as appriſings did, generally, of all the debtor's lands, or real rights, *periculo petentis*, redeemable within ten years: theſe adjudications are come in place of appriſings, eſpecially the general adjudications, which are declared to be in the ſame condition in all points as appriſings were by the act of *Parl.* 1661, *cap.* 62. Except as to the lengthning of a reverſion from ſeven to ten years: ſo that what hath been ſaid of appriſings, will have the ſame effect as to general adjudications; but ſpecial adjudications being equitable and favourable, will not meet with ſuch ſtrictneſs: this ſtatute hath taken away the greateſt reproach upon our law, which for every debt, indefinitely appriſed, every eſtate great or ſmall, which had no excuſe, but that the debtor might redeem within ſeven years: but all creditors being neceſſitated to appriſe within a year, or to have no more than the legal reverſion, paying the whole debts, the power of redemption came to be of little effect, few being able to pay all their debt in one day: but now if any debtor complain, that his whole eſtate is adjudged, and no proportion keeped betwixt the debt and his eſtate, it is altogether his own fault, ſeeing he might offer a proportional part, and liberate all the reſt of his eſtate; which part is redeemable alſo in five years: and though a fifth part be added, it is no more than the ordinary penalty, being an 100 pounds for a 1000 merks, and 50 merks for the ſheriff-fee, makes 200 merks, being the fifth part of a 1000 merks, and which was ſuſtained in the moſt favourable caſes of appriſings from the beginning, when the reverſion was for ſeven years. [After this act 1672, there is no uſe for adjudications on the renunciation of apparent heirs, becauſe

* The deciſion here quoted, mentions, that a charge to enter heir had been given, and that the heir had renounced.

there needs no more for adjudication, but the liquidation of the debt, which is but declaratory, unleſs the creditor inſiſt *petitoriè* againſt the apparent heir to pay, and if the heir in that caſe offer to renounce, the adjudication thereon will come in *pari paſſu*, as in other adjudications *.]

Adjudications being executive decreets, the Lords allow them the greateſt diſpatch; and to prevent colluſion, whereby ſome creditors might be poſtponed by debate and probation till the year paſs, which would exclude them; therefore the Lords do not ſuffer co-creditors to ſtop adjudications, that they may ſee *the proceſs* for their intereſt, and put the purſuer to abide the courſe of the roll, unleſs they produce an intereſt, upon which the ordinary will hear them immediately without going to the roll, *Jan.* 22. 1681, *E. Dundonald.* Neither is the ſuperior ſuffered to propone defences, *Nov.* 30. 1675, *Kinloch of Gourdie.* Yea, the Lords ſuſtained the eſtabliſhment of the debt in the ſame libel with the adjudication, *July* 26. 1676, *Boyd.* But if the debtor himſelf appear, the cauſe goes to the roll; and if there be prior adjudications inſtructed, defences proponed againſt the debt, or adjudication, which are not verified; the Lords adjudge and reſerve theſe defences *contra executionem*, by ſuſpenſion; in which ſuſpenſion terms will be granted, becauſe of the reſervation; but there is this advantage, that how long ſoever the ſuſpenſion be of expeding, the firſt decreet being within the year, brings the adjudger in *pari paſſu.* One adjudication being paſt, all others are called ſummarily by the ordinary amongſt the acts, after they are ſeen and returned, that they may paſs within year and day: yea, the Lords give ſummary proceſs in proceſſes *cognitionis cauſa*, that adjudications may come within year and day, reſerving all objections *contra executionem.* There is a clauſe in the act for adjudications, that the citation ſhall have the ſame effect, as the denunciation of lands to be appriſed had, whereupon, in a competition between an adjudication and a voluntary infeftment, which (*of them*) was firſt completed by infeftment, the adjudger alledged, that tho' he was not infeft, he was preferable, becauſe, after denunciation of lands to be appriſed, voluntary rights uſed to be excluded, and ſo muſt citations in adjudications, *exclude* [k] voluntary rights; the Lords preferred the voluntary right; and found, that either in the caſe of denunciation in appriſings, or citation in adjudications, the effect is only, that the common debtor may not grant voluntary rights *in curſu diligentiæ*, *Home*, *Jan.* 1682, creditors of *Enoch* **. But after the decreet of adjudication, and ſo much time as infeftment may be obtained, or the ſuperior may be charged, the adjudication [l] hath no ſuch preference, *Feb.* 18. 1692, *Kilpatrick of Cloſburn* ***. In ſpecial adjudications, a fifth part adjudged for, is added in place of penalties, which are very unequal in bonds, and in place of ſheriff-fees, which will hold though the right adjudged be a liquid ſum, *Falconer*, *Jan.* 10. 1683, *Ker.* Adjudication was ſuſtained not only for liquid ſums then due, but for other preſtations, as for an obligement to employ a ſum upon annualrent, *Falconer*, *Jan.* 2. 1684, *Bruce contra Hepburn.*

LV. There is yet another kind of adjudication introduced by the 17th act, *Parl.* 1681, and by the 20th act, *Parl.* 1690, by the firſt of which acts, "The "ſale of bankrupts lands were to be by perſons commiſſionated by the Lords, by "a public roup, not being under the rate determined by the Lords, upon pro-"bation of the worth of the ſeveral lands, and after publication at the market-"croſſes of the head-burghs of the ſhire, ſtewartry, or regality, where the lands "lie, and at the pariſh-kirks where they lie, and at ſix adjacent pariſh-kirks to "be named by the Lords, at diſſolving of the congregations, on Sunday after "forenoon ſermon, by letters of intimation under the ſignet, upon the Lords "deliverance,

* This ſentence is not in the Edition 1681, or MSS. It appears unintelligible.

** This deciſion is alſo obſerved by *Falconer*, *Jan.* 21. 1682. The adjudger was preferred to the voluntary right; but it is not mentioned, whether the adjudger was *in mora*, or had proſecuted his diligence to the utmoſt.

*** This deciſion not found.

[k] F. and. [l] See above, § 21. *h. t.*

« deliverance, ſpecially expreſſing the time and place of the roup, and the cre-
« ditors having real rights, and in poſſeſſion, being ſpecially cited upon 21 days,
« and all others having intereſt at the market-croſſes of the head-burghs where
« the lands lie; and thoſe out of the kingdom, at the market-croſs of *Edinburgh*,
« pier and ſhore of *Leith*, upon 60 days, expreſſing the lands to be rouped, and
« the price appointed by the Lords, and the time and place of the roup." But if there was a reverſion running, the proceſs could not proceed without conſent of the reverſer: but by the ſecond act it is declared, « That the buyers of bank-
« rupts eſtates, ſhall have a right thereto by the decreet of ſale to be pronounced
« by the Lords, adjudging the lands ſold to the buyer for the price decerned;
« and that the buyer ſhall thereupon be infeft, in the ſame way as upon o-
« ther adjudications, and that the ſale may proceed ſo ſoon as it ſhall be found
« that the debtor is bankrupt, and utterly inſolvent, whether the legal be ex-
« pired or not: and that if no buyer be found at the rate determined by the
« Lords, it ſhall be leiſom for them to divide the lands, and other rights, a-
« mong the creditors, according to their ſeveral rights and diligences; and be-
« cauſe the ſale may be obſtructed by donators of liferent-eſcheat, the Lords are
« impowered to determine the price and value of the liferent-eſcheats, and to
« ſell lands for the price thereof, according as the ſaid rights ſhall be found to
« have preference."

The order of procedure is continued as in the former act, but with theſe material differences, that the ſale is not by commiſſioners, but by a decreet of adjudication, and is competent, tho' there be legal reverſions running without the reverſer's conſent; and there is added that neceſſary clauſe, that if buyers be not found, the lands ſhall be divided to the creditors, according to their rights and diligences, whereby appriſers and adjudgers, which come in *pari paſſu*, are to have ſhares of the price proportional to their ſums; but in caſe there be a diviſion, they have their choice of the lands effeiring to their ſhare; but the Lords will not allow fractions, but whole roums to be choſen, the excreſce, to make up the price, being paid out, to be divided proportionally; and the choice to be made by the appriſers and adjudgers, according to the date of their appriſings or adjudications; but if there be more perſons who have right to the ſame appriſing or adjudication, they muſt have preference of their choice by lot, and none may chuſe in the middle of contiguous lands, but at a ſide.

There muſt be two parts of this proceſs, firſt to prove the rental, and the rate of the ſeveral lands; in which rate are to be conſidered the benefit or convenience thereof, by houſes, orchards, parks, coals, or other quaries, woods, fiſhings, ſervitudes upon other lands, *&c.* and likewiſe the burdens affecting the ſame, as ſervitudes to other lands, and likewiſe the manner of holding and warrandice; and for that effect the debtors muſt produce their rights, and muſt depone upon the having of any diſcharges, or grounds of compenſation of the debts. Conſideration alſo muſt be had of the tacks, or rentals of the teinds, and of infeftments of annualrents, and likewiſe of graſſums, and what the land might pay of ordinary rent, without graſſums, which probation muſt be of every ſeveral roum, that in caſe of diviſion, the price thereof may be known. The probation muſt alſo be of any caſuality of ſuperiority preſently affecting the lands, as non-entry, by general or ſpecial declarator, ward and marriage, and likewiſe the years of the perſon whoſe liferent-eſcheat affects the lands, and which muſt be eſtimated according to their age.

There is an act of ſederunt *Feb.* 24. 1692, declaring, that the like diſpatch will be granted in theſe adjudications, as (*is granted*) to others, without going to the roll, unleſs the debtor appear, and alledge that he is ſolvent; but if he hath not ſold his lands during the proceſs, and paid his debt, it is not a ſufficient defence, that his eſtate is better than his debt; for albeit the act bear, that he is utterly inſolvent, that is not the meaning, but that his eſtate is ſo incumbered, that none would buy unleſs he had ſold the whole together, at leaſt after the citation; for in the next

part

part of the proceſs, where the creditors are to be cited, it will appear whether he will be inſolvent, for they muſt be cited to produce the inſtructions of their debts, and to depone what is truly due and reſting of them; but if there be no common fame, or other evidence of the debtor's being broken, the proceſs of ſale will not be ſuſtained againſt him, as was found in the proceſs of ſale at the inſtance of *Wallace of Ingliſtoun contra Lo. Forreſter, Feb.* 1692 *.

If the debtor before the roup can ſatisfy his creditors, by the ſale of his eſtate, there will be no further progreſs. Likeas, there needs no continuation of this adjudication more than others, but one citation ſerveth for the rental and rate, which being determined, there is warrant to be granted for a ſecond citation againſt the debtor, and the creditors to appear at the day and place appointed for the roup, and to produce their rights to the lands, and the inſtructions of the debts, and to depone on both, as aforeſaid; which proceſs muſt contain a clauſe for ranking the ſeveral creditors, for which there muſt be an auditor named, who muſt hear, determine, or report all alledgeances occurring; and if there be buyers for the whole eſtate, there is no neceſſity to proceed in the ranking of the creditors, if the price can ſatisfy them all; otherwiſe they muſt be ranked in the ſame proceſs, and by the ſame auditor; *vide lib.* 4. *tit.* 35. If there be no complete ſale, the auditor muſt proceed to the diviſion of the lands amongſt the creditors in manner foreſaid **.

TITLE III.

Confiſcation, where, of Single-eſcheat, Liferent-eſcheat, Shipwreck, Waith-goods, Treaſure, Forfeiture, Baſtardy and Laſtheir.

I. *The tenor of letters of horning.*
II. *The execution of horning muſt bear perſonally, or at his dwelling-houſe.*
III. *The execution at the dwelling-houſe muſt bear ſix knocks.*
IV. *The knocks muſt be audible.*
V. *The delivery of a copy to any of the family is ſufficient without knocks.*
VI. *The days requiſite for the charge beyond the water of Dee.*
VII. *The denunciation againſt the party, and at the market-croſs.*
VIII. *The denunciation muſt bear three oyeſſes, or the equivalent.*
IX. *The execution muſt bear three blaſts of the horn.*
X. *The executions formerly were ſtamped.*
XI. *The horning muſt be regiſtrated, and how.*
XII. *Denunciation after ſatisfaction hath no effect.*
XIII. *The effect of general letters of horning.*
XIV. *The order and effect of relaxation from the horn.*
XV. *The ſingle eſcheat and extent thereof.*
XVI. *How far the denounced's debts or deeds affect his eſcheat-goods.*
XVII. *Gifts of eſcheat, and preference thereof.*
XVIII. *Gifts of eſcheat not expreſſing the particular horning whereon they proceed.*
XIX. *Gifts of eſcheat, how extended.*
XX.

* This deciſion not found.

** By article 26. regulations 1695, the ranking of the bankrupt's creditors muſt be concluded by an extracted decreet before the eſtate can be ſold.

By act 6. P. 1695, the purchaſer is allowed, after a year from the decreet of ſale, to conſign the price in the hands of the town of *Edinburgh*, there to lie at 3 *per cent.* till the creditors are ready to receive it; after which conſignation, or payment of the price to the creditors, the lands are declared diſburdened of all debts or deeds of the bankrupt, or his predeceſſors; and all actions affecting the eſtate are, from that time, only competent againſt the receivers of the price.

By two acts of ſederunt, *Nov.* 23. 1711, and *Jan.* 17. 1756, many uſeful regulations are introduced with regard to the method of carrying on rankings and ſales of bankrupts eſtates.

XX. *Eſcheats within regality.*
XXI. *In what caſes gifts of eſcheat are held ſimulated.*
XXII. *Who muſt be called in the general declarator.*
XXIII. *The titles and tenors of general declarators.*
XXIV. *Exceptions againſt general declarators muſt be inſtantly verified.*
XXV. *Special declarators of eſcheat.*
XXVI. *Liferent-eſcheat.*
XXVII. *Confiſcation of treaſures, waith, or ſhip-wreck goods.*
XXVIII. *Forfeiture.*
XXIX. *Several kinds of treaſon by ſtatute.*
XXX. *Forfeiture confiſcates without the burden of the debts or infeftments not confirmed by the King.*
XXXI. *How far feus are effectual againſt forfeiture.*
XXXII. *How far tacks of forfeited lands are effectual.*
XXXIII. *Forfeiture by a reſcinded act was burdened with the debts and deeds of the rebel.*
XXXIV. *Forfeiture, when, and how it may proceed in abſence.*
XXXV. *How far the poſſeſſion of the rebel gives right to the fiſk.*
XXXVI. *The effect of forfeiture of apparent heirs.*
XXXVII. *In what caſes forfeiture diſhabilitates or corrupts the blood.*
XXXVIII. *How far the forfeiture of apparent heirs may be extended.*
XXXIX. *Explanation of the act of Parliament* 1594, *cap.* 202. *importing burdening of forfeitures with the debts and deeds of the rebel, and alſo act* 33. *Parl.* 1690.
XL. *Forfeiture is not reducible upon any nullity, but only by way of grace.*
XLI. *How far forfeiture takes effect without declarator.*
XLII. *What children are lawful and what baſtards.*
XLIII. *Declarators of baſtardy.*
XLIV. *The effects of baſtardy as to ſucceſſion.*
XLV. *Legitimation and the effects thereof.*
XLVI. *How the debts and deeds of the baſtard affect his eſtate.*
XLVII. Ultimus hæres, *and the difference thereof from baſtardy.*

THE conveyance and tranſmiſſion of all kinds of rights from private parties to the fiſk, are here comprehended under one common term and title of confiſcation it is not proper in this place to treat of the fiſk, or the privileges thereof, or upon the ſeveral cauſes upon which confiſcation followeth, theſe being public rights; but we ſhall only conſider the ſeveral kinds of rights, or things that befal to the fiſk from private parties, and how they return to private parties again, by gifts and proceſſes thereupon; and this is either in reference to moveables, liferents, or the property and ſtock of heritable rights and others. Moveables fall to the fiſk either wholly and intire, and that is chiefly by denunciation and rebellion; or by ſome ſpecial ſtatute, the penalty whereof is confiſcation of moveables; ſuch are breach of arreſtment, or deforcement, wherein tho' the private party injured have an intereſt, yet in effect the whole is confiſcated, and a part belongs to that party, by virtue of the ſtatute thereanent, whereby they are conſtitute donatars: or otherwiſe ſome particular moveables befalleth to the fiſk, either by cuſtom or waith-goods, ſhip-wreck, *&c.* or by ſtatute. Liferents befal to the fiſk by the denunciation of the owner, and his remaining un-relaxed year and day, or *by* ſuch ſtatutes whoſe penalty is the loſs of the liferent.

The ſtock or property of heritable rights fall to the fiſk by forfeiture, or becoming caduciary; the confiſcation of the whole moveables is called the ſingle-eſcheat; and of the liferent, is called the liferent-eſcheat. We ſhall only ſpeak of the ſingle-eſcheat of moveables by denunciation; having ſpoken of breach of arreſtment and deforcement, *tit. reparation.* Secondly, Of liferent-eſcheat. Thirdly, Of eſcheat of particular goods, as ſhipwreck, *&c.* Fourthly, Of forfeiture. And laſtly, Of things caduciary, eſpecially by baſtardy, and laſt heir,

and of gifts and proceſſes thereupon. Eſcheat being a common term, ſignifying any confiſcation, yet it is reſtricted to moveables and liferents, and moſt properly to moveables, ſo that when it is ſimply expreſt, it is ordinarily taken for ſingle eſcheat, or eſcheat of moveables, which become confiſcated to the King, upon not obeying a charge of horning, to pay or perform ſome obligation, whereupon the party is publickly denounced rebel, tho' there be no crime, but ordinarily an inability to perform; yet eſcheat falls alſo upon denunciation for a criminal cauſe, as when parties are declared fugitive by the council or criminal court, and are thereupon denounced rebels.

I. Horning, (*the ordinary cauſe of eſcheat* [m]) proceedeth thus, by letters executorial, giving warrant to meſſengers at arms, to charge any party in the King's name, to obey what is contained in the letters, under the pain of rebellion; and if he obey not within the days of the charge, giving power to denounce him rebel by public proclamation at the market-croſs of the head-burgh of the ſhire, ſtewartry, bailliary of royalty or regality, within the which the denounced dwells; and that by public reading of the letters of horning, and giving three blaſts of a horn, for the clear manifeſtation and notice thereof, from whence it is called horning: and becauſe of the certification the party denounced is called rebel, a term too harſh, ſuch perſons not being in hoſtility againſt the King, nor being publick enemies, but only denounced upon cauſes civil, which they lie under frequently not through contempt, but inability to ſatisfy, as ſaid is. The Engliſh do more properly call this execution out-lawry, whereby the party becomes out-law, and hath not a perſon to ſtand in judgment *activè* or *paſſivè:* and if ſuch ſhould be called by us the *denounced*, it were ſmoother and more ſuitable than the odious term of *rebel*.

II. Seeing horning is the ground of ſingle-eſcheat and liferent-eſcheat, it will be fit to go through the ſeveral requiſites thereof in order, and the nullities ariſing thereupon *. Firſt, The letters of horning muſt be ſigneted; and therefore, tho' the bill (*for horning*) was paſt, and the matter ſmall, and the parties indigent, a horning not ſigneted was found null, *Had. June* 1. 1610, *M'Gill contra* ——. Secondly, The executions, or indorſations thereof, muſt bear, that the party was charged perſonally, or at his dwelling-houſe, deſigning the houſe: and therefore a horning was found null by exception, for not deſigning thereof, tho' the party was deſigned to be burgeſs of ſuch a burgh, which might have preſumed his dwelling-place to be there, *July* 14, 1626, *Adam*; yet a horning was ſuſtained, tho' not deſigning the dwelling-houſe *nominatim*, but by deſcription of it; thus the meſſenger's execution did bear, that he charged the party, deſigned by ſuch lands, at his dwelling-houſe *there*, it being proved, that he then dwelt there, *Nov.* 9. 1632, *Montgomery*.

III. If the charge be in abſence, at the party's dwelling-houſe, the execution muſt bear the meſſenger to have craved entry, to give the charge to the party, or his wife and family, and not getting entry, ſix knocks to have been given by the meſſenger at the moſt patent gate, or door thereof; yet this being wanting in the extract, the ſame was ſuſtained, it being proved by the keeper of the regiſter, and his ſervant, that when the horning was offered to the regiſter, theſe words were in it, and by the meſſenger, and witneſſes inſert in the execution, that the knocks were uſed, the intent of the cauſe being alimentary and favourable, *March* 28. 1637, *Scot*. But this is not to be drawn in example: for the regiſter of horning is that upon which the people ought to reſt, and nothing omitted to be expreſſed in the regiſter ſhould be ſupplied by the principal hornings, meſſenger or witneſſes: for executions of hornings cannot be proved by witneſſes, and conſequently no material point thereof.

IV.

* By act 75. P. 1540, the formalities required in the execution of ſummonſes are ſpecified, and the ſame rules muſt be obſerved in executing letters of horning.

[m] See below, IV. 47.---See firſt Ed. and MS G.

IV. Knocking at the door audibly is neceſſary, without which, executions might be clandeſtine, and never come to the parties knowledge. And therefore the meſſenger muſt expreſs this as truly done, wherein he runs the hazard of being a forger, if the executions be improved, that either the knocks were not given, or were given fraudulently, that theſe within might not hear; as if the gate had been only ſtruck with one's hand, a piece of earth or ſtick, which could not reach their ears that were within; for the *(other ſolemnity of)* affixing a copy may be more eaſily evaded; ſeeing the party *(charger)* may ſend of purpoſe to take the copy off, being none of the witneſſes in the execution; albeit ſometimes, even the witneſſes carry away the copy, and the meſſenger may imagine that his executions were true, when he ſaid he left a copy affixed, becauſe it was affixed when he began to move from the gate: yet if he ſaw it carried away, his executions would be found falſe, and he would not eſcape puniſhment. A horning was alſo ſuſtained, though it bore neither perſonally, nor at the party's dwelling-houſe, ſeeing it bore a copy to have been given *to the party charged*, which neceſſarily imported to have been perſonally apprehended, *July* 22. 1626, *Stewart*.

V. *Thirdly*, The execution muſt bear, that the meſſenger gave a copy of the letters to the party charged perſonally, or in his abſence, affixed it upon the moſt patent door of his dwelling-houſe: and therefore a horning was found null, becauſe it bore not delivery of a copy, but only of a ticket bearing the tenor of the letters, *Hope horning*, *Monteith contra Kirkwood*. But if the meſſenger get entrance into the houſe of the party charged, and deliver a copy to the party's wife, or ſome of his family; there the execution will be ſuſtained, tho' it bear not knocks at the door, or affixing of copies thereupon, theſe being only required where entry is not got, *Dec.* 11. 1679, *Counteſs of Caſſils contra E. of Roxburgh*.

VI. The charge muſt alſo be upon 15 days, being beyond the water of *Dee*, and ſix *if* upon this ſide, *Parl.* 1600, *cap.* 25. Yea, though fewer days be in the clauſe of regiſtration, it was not found valid, *Feb.* 4. 1625, *Stewart*. The contrary was found, *Dec.* 16. 1664, *L. Philorth*, *Jan.* 20. 1675, *L. Meldrum contra L. Tolquhon*, where it was found, that the act 1600, was not to be extended to hornings upon clauſes of regiſtration of conſent: and that the meaning of the ſtatute was both interpreted by the narrative, and ſubſequent conſuetude, *Nam conſuetudo eſt optima legum interpres*. And that the deciſion, *anno* 1625, hath been upon this conſideration, that the charger lived in *Fyfe*, and the debtor in *Orkney*, who could not poſſibly either come to the creditor and pay, or to the Lords and ſuſpend on ſix days, and ſo was not contumacious, but free by the *Parl.* 1592, *cap.* 140. annulling impoſſible conditions in contracts; whereby there is ſufficient ground of reconciliation of theſe deciſions, for it is only contumacy that makes the eſcheat fall, which gave the riſe to the act of Parliament, to allow 15 days for all beyond the water of *Dee*. And though parties conſent to leſs time, yet contumacy cannot be inferred, but where the party could by exact diligence come in time, either to ſatisfy the *charge*, or to ſuſpend, which ſome beyond *Dee* might do, if the charger were near, that they might offer juſt ſatisfaction, and if refuſed, they might have time to reach *Edinburgh*, and ſuſpend: but in other caſes that cannot be, as was evident in the ſaid caſe, *in anno* 1625; and therefore conſent in that caſe, can no more infer contumacy, than the expreſs conſent of parties, that charges and denunciations at the market-croſs of *Edinburgh* ſhall be ſufficient, which is declared null, *Parl.* 1592, *cap.* 140. But the narrative of the act ſhews, that it is only *(to be)* extended to hornings charging parties to appear at *Edinburgh*, to find caution in law-borrows or the like, and cannot be extended to parties beyond *Dee*, living near together, as in the ſaid caſe of *L. Meldrum and L. Tolquhon*, who lived in one ſhire or ſtewartry *.

VII. *Fourthly*,

* By Act 43. P. 1685; ſummonſes againſt the inhabitants of *Orkney* and *Zetland*, to appear before the court of Seſſion, or Juſticiary, and letters of horning or lawborrows againſt them, upon decreets of theſe courts, muſt be executed on 40 days; but this ſtatute does not regulate letters proceeding on writs, regiſtrated by conſent of parties.

VII. *Fourthly*, The executions muſt bear, that the party was denounced, conform to the charge, for not obedience thereof: and that either at the market-croſs of the head-burgh of the ſhire where the party charged dwells, or at the head-burgh of the ſtewartry, or bailiary of royalty or regality, if he dwell within theſe, *Parl.* 1597, *cap.* 268. Yea, though the writ *(or obligation)* bear, that letters of horning executed at *Edinburgh*, ſhould be ſufficient againſt parties out of that ſhire, the ſame is declared null by the act 1592, *cap.* 140. When there was no head-burgh of the regality known, the execution at the head-burgh of the ſhire was ſuſtained, *Spotiſ.* horning, *Stirling contra Abernethy*; and the head-burgh of the ſhire, where the denounced's dwelling lies locally, is ſuſtained by *(interpretation of)* the act of *Parl.* though his dwelling be upon lands by annexation, in another juriſdiction, unleſs that be commonly known, and in uſe; therefore horning was not found null, not being executed at the head-burgh of *Renfrew*, the dwelling being upon lands *locally within the ſhire of Edinburgh*, tho' annexed to the principality, *Jan.* 11. 1677, *Scot*; neither, becauſe the denounced dwelt in temple-lands within the regality of *Torphichen*, unleſs there were a known head-burgh and regiſter there, *Jan.* 12. 1672, *Scot.*

VIII. *Fifthly*, The execution ſhould bear, that the meſſenger at the denunciation did make three oyeſſes, before he read the letters of horning, that the people might thereby take notice of the intimation, which therefore ought to be with an audible voice, which, tho' it be not by any particular ſtatute, yet is requiſite by ancient cuſtom, and ſhould be expreſſed in the execution of all letters, which require to be publiſhed at the market-croſſes: the intent thereof being, that the publication thereof may come to the ears of the country, and be carried by common fame, that all parties concerned may look to their intereſt: and therefore, ſuch publications at market-croſſes, and at the pier of *Leith*, have, by law and cuſtom, as expedients to make them commonly known, three oyeſſes before reading of the letters, and affixing the copy of the letters upon theſe public places: and horning hath this ſuperadded, that there muſt be three blaſts of the horn after reading of the letters; but becauſe executions do not always bear three oyeſſes, but generally lawful publication; the Lords did declare, *Feb.* 15. 1681, that they would ſuſtain no executions of meſſengers, done in time coming, not bearing three oyeſſes, and public reading of the letters, upon a reduction at the inſtance of *Gordon* of *Park*, *Feb.* 15. 1681, *for* the want of three oyeſſes, which (*point*) came not to be decided, becauſe the executions were improved: and an inhibition bearing only, that the meſſenger did lawfully inhibite, and not bearing three oyeſſes, nor the reading of the letters; *the* Lords found the ſame null, and would not ſupply it by witneſſes, that theſe were truly done, *July* 11. 1676, *Stevinſon.*

IX. The executions muſt alſo bear, that the meſſenger did give three blaſts with his horn; and yet a horning was not found null, becauſe it bore not expreſsly the party to have been denounced *rebel*, or three blaſts to be given, but only generally, that the rebel was denounced by open proclamation, and put to the horn, *Jan.* 19. 1611, *Hepburn*, and an execution was ſuſtained, tho' it bore not three blaſts, it being proved by the witneſſes inſert that theſe blaſts were truly given, and the execution bore, orderly denounced, *March* 4. 1624, *Dryſdale.* But if theſe had been after the act of ſederunt *, the hornings would have been null; and even before they ought to have been annulled, for no part of a legal execution can be proved by witneſſes.

X. *Sixthly*, The execution muſt bear, that the meſſenger, for more verification, hath affixed his ſignet, or ſtamp, and the ſtamp muſt appear, if the executions be recent, elſe it will be null, *March* 6. 1624, *Stewart commiſſary of Dunkell.* So the execution of a horning was found null, becauſe it mentioned not the ſtamping

* No act of ſederunt was made in conſequence of the reſolution of the court in the above caſe, *Gordon, Feb.* 15. 1681.

ing thereof, *Hope*, *horning*, *Home contra Pringle of Whitebank*; yet the executions were ſuſtained, tho' they bore not theſe words, ſeeing they were all written with the meſſenger's own hand, and were ſubſcribed and ſtamped, as *Haddingtoun* obſerveth, *Feb.* 19. 1611, *Butter contra Cormock*: but now by act, *Parl.* 1686, *c.* 4. meſſengers being obliged to ſubſcribe with the witneſſes, ſtamping, which was when few could write, is *declared* not neceſſary.

XI. *Seventhly*, Horning muſt not only be executed at the head-burgh of the ſhire where the party dwells, but muſt be regiſtrated in the ſheriff-clerk's regiſter of that ſhire within 15 days after denunciation thereupon, otherways the ſame is null, *Parl.* 1579, *cap.* 75. Where the clerk is ordained to give an extract, and regiſtrate it within 24 hours after receipt of the letters *; and if he refuſe it, the charger may regiſtrate it in the next ſheriff-books, or in the clerk of regiſter his books, which, upon inſtruments taken of *the* refuſal, is declared ſufficient, *Parl.* 1597, *cap.* 269. wherein the regiſtration is ordained to be judicially, or before a nottar, and four famous witneſſes, beſides the ordinary clerk: but this part of the act is reſcinded, and it is declared, that the regiſtration in the ſheriffs, bailies, or ſtewards books by the clerk thereof, or by the clerk-regiſter, and his deputes in the books of council and ſeſſion, ſhall be ſufficient in itſelf, *Parl.* 1600, *cap.* 13. And for this effect, there is a general regiſter of hornings, relaxations, inhibitions and interdictions kept at *Edinburgh*, and a particular clerk-depute having the charge thereof; but if the party live within ſtewartry, or bailiary of royalty or regality, the horning muſt be regiſtrated there, in the ſame manner as other hornings muſt be regiſtrated in the ſheriff-books, elſe it is declared null, *Parl.* 1597, *cap.* 268. But denunciation againſt parties who have found ſecurity to underly the law, and compear not at the day appointed, is declared ſufficient, being at the croſs of *Edinburgh*, within ſix days, though not at the head-burgh of the ſhire, *Parl.* 1592, *cap.* 128. And likeways, denunciations againſt parties entring in the place of the criminal court, with more perſons than their domeſtic ſervants and procurators, are declared valid, though executed only at the market-croſs of the burgh where the juſtice-court ſits for the time, and regiſtrated in the books of adjournal, *Parl.* 1584, *cap.* 140. Executions of *a* horning was alſo found null, becauſe executed upon the Sabbath-day, *Spotiſ.* charge, *Frenchman contra Lawder*, but were not found null, becauſe regiſtrated after the rebel's death, being denounced before, *Dec.* 20. 1626, *L. Lie. Vid. Inhibitions*, *infra*, *Lib.* IV. *Tit.* 50.

XII. Though the horning be orderly uſed; yet if the ground, or debt, whereupon it proceeded be not due, or *be* taken away before the denunciation, the horning is thereby null, and reduceable, though no ſuſpenſion of the horning was raiſed before; but in this (*reduction*) the officers of ſtate muſt be called to prevent colluſion, *Spotiſ.* eſcheat, *Douglas contra creditors of Wardlaw* **. So a horning upon Lawborrows was found null by exception, becauſe caution in obedience was found before denunciation, *Nov.* 29. 1626, *Smeitoun*; yea, horning was reduced, becauſe, before denunciation, the charger had accepted a bond in ſatisfaction of the ground of the horning, which was found probable by the oath of the charger againſt the donatar, *Hope*, horning, *Muſhet contra Forreſter*. The like where the charge was ſuſpended before the denunciation, though the reaſon of ſuſpenſion militated only againſt a part of the charge, *Hope*, Horning, *L. Buckie contra E. Errol*: but the rebel's oath, or holograph diſcharges before denunciation, were not reſpected as preſumed colluſive, *Feb.* 10. 1663, *Montgomery* ***. In this caſe it was found, that reduction of the decreet upon informality, not being

* The clerk is required by the ſtatute 1579, *c.* 75. within 24 hours to regiſtrate the letters, *&c.* and to deliver back the principal to the party, after marking the regiſtration on the back of the letters.

** By Act 213. P. 1594, it is appointed, that, in all reductions of hornings founded upon prior payment of debts, the producer of the prior acquittance or diſcharge ſhall make oath, that it is a true diſcharge, and was ſubſcribed of the date it bears.

*** It does not appear from the deciſion, that holograph diſcharges were in this caſe offered as evidence; but the allegiance of prior payment was found probable only by the denouncer's oath.

ing upon material juſtice, did not annul the horning. Neither was horning taken away by compenſation, by the like ſum due to the party denounced equal to that in the horning, not having been actually applied by proceſs or contract before the denunciation. Nor was any warrant required for uſing the execution, though for a party living in *England*, and done againſt a daughter and her huſband: but the having the principal bond, was found ſufficient warrant for regiſtration of it, and execution thereupon. And the denunciation againſt the huſband was not taken off, by diſſolution of the marriage before declarator, *Dec.* 23. 1673, *Dalmahoy* *.

XIII. Horning, though orderly uſed, proceeding only upon general letters, by ſupplication againſt all and ſundry, unleſs it be againſt a burgh, college, or community, not proceeding upon a citation, and for a ſpecial and certain duty, the denunciation thereupon hath no effect, as to eſcheat, or liferent, though caption uſually follow thereupon, *Parl.* 1592, *cap.* 142. which act doth declare ſuch executions null: and therefore ſuch a horning was not found ſufficient to debar a party, as not having *perſonam ſtandi in judicio*, *Jan.* 24. 1674, *Blair of Glaſclun* **; much leſs can theſe general letters make eſcheat to fall, or annualrent be due; yet caption proceedeth upon it, and uſeth not to be quarrelled. But by the 13th act, *Parl.* 1690, general letters are diſcharged, except for the King's revenue, and miniſters ſtipends on decreets of locality, and poindings of the ground: but this act excludes not charges of horning ſummarily, when the parties are named, for the charges of commiſſioners of Parliament, the contribution-money *due to the Lords of ſeſſion*, which is a ſtent paid by known perſons [n], or the like, as precepts out of the chancery, which are not ſummonſes, but charges.

XIV. Horning is taken off, and ceaſeth by relaxation, which requireth the ſame ſolemnities of publication and regiſtration, as hornings do, as is clear by the forecited acts of Parliament thereanent: but it doth only operate to free the rebel relaxed, as to his goods and others, acquired after relaxation, *Feb.* 14. 1635, *Lockhart* [o]. It is alſo ordained, that all copies of ſummons, and letters delivered by the executor thereof, ſhall be ſubſcribed by him, *Parl.* 1592, *cap.* 141. I have not obſerved any exception founded upon this act, which, though it expreſseth not a nullity, yet ought to be a rule to meſſengers, eſpecially in hornings and inhibitions, which may prefer any other to a more orderly diligence; and the want of ſubſcriptions of the executor and witneſſes, is now a nullity of the executions by act 5. *Parl.* 1681.

XV. The effect of horning duly uſed, and regiſtrated in manner foreſaid, is, that thereby the whole moveable goods, and debts of the parties denounced, are eſcheat, and confiſcated, and all that he ſhall acquire thereafter, till he be relaxed; whereupon the treaſurer uſed to cauſe raiſe letters of intromiſſion, for uptaking of the eſcheat-goods, direct to ſheriffs and meſſengers: and in caſe they be deforced, or the ſheriff not able, or willing to execute the ſame, letters will be direct to noblemen, and barons within the ſhire, to convocate the leiges in arms, and to make effectual the former letters immediately, *Parl.* 1579, *cap.* 75. but this is long in deſuetude. This is alſo an effect of horning, that the party denounced, hath not *perſonam ſtandi in judicio*, either as purſuer or as defender, yet the Lords would not hold him as confeſt, if he appeared, and were hindered by the other party's caption, *July* 12. 1676, *Purves*. The ſame will hold in any thing requiring the perſonal preſence of the denounced, as biding by a writ quarrelled of falſhood, *&c.*

For

* The deciſion mentioned above, I. 4. 17. 7. *March* 20. 1627, *Knows contra Kneeland*, is not contrary to this doctrine: in that caſe the wife died within year and day after the denunciation, and the huſband immediately ſuſpended. See *January* 23. 1678, *Wilkie*.

** The objection to the horning in this caſe was, that the denunciation had been executed at the croſs of *Edinburgh*, not at the head burgh of the ſhire where the debtor lived.

[n] See below, IV. 47. 4. & 5. & 6. [o] See above, II. 4. 64. Below, IV. 47. 10.

For clearing the matter of eſcheats, it will be neceſſary to ſhow, *firſt*, What falls under ſingle-eſcheat. *Secondly*, How far the ſame is burdened, or affected with the denounced's debts or deeds. For the *firſt*, ſingle eſcheat extends to no heritable right, whether of land, annualrent, or heritable bond, but it carries the bygones of all theſe, preceeding the denunciation, and thereafter till year and day *expire*, *July* 1. 1626, *Haliburton contra Stuart*; *Hope*, horning, *Wardlaw contra Dick*. The reaſon is, becauſe, the liferent-eſcheat begins but after year and day, from the denunciation, ſo the interveening year belongs to the ſingle eſcheat. What rights are heritable, and what moveable, hath been ſhown before, *Title*, *Real Rights* [p]: ſo that all which is there moveable, except moveable bonds bearing annualrent, falls in the ſingle eſcheat, and ſome things are moveable, in relation to eſcheats, which are not moveable in relation to the ſucceſſion of heirs or executors, as tacks not being liferent-tacks, *Parl.* 1617, *cap.* 15 *. It carries alſo the office of a *ſheriff* clerkſhip, *Hope*, horning, *Kinroſs contra Drummond*: and likeways the *jus mariti* of a huſband, and therewith *per conſequentiam*, the liferent-right, or other right of the wife, belonging to the huſband *jure mariti*, *Spotiſ.* eſcheat, *Dawling contra Cochran* **. It carrieth alſo all caſualities befalling to a rebel denounced before the denunciation, as the liferent-eſcheat of his vaſſals, *Had. Feb.* 13. 1611, *Simpſon contra L. Moncur*. But if the caſuality fall to the ſuperior, after the ſuperior's own liferent had fallen by his rebellion, year and day, it would be carried with the ſuperior's liferent-eſcheat, *Feb.* 26. 1623, *Sibbald*. And if the liferent-eſcheat, or any other caſuality be gifted, the gift makes it moveable, and ſo to fall under the donatar's ſingle eſcheat, *March* 10. 1631, *Stewart*. Aſſignations to liferent-tacks, and other liferents have been found to fall under ſingle eſcheat, *Hope*, horning, *Sir Robert Ker contra Sir John Ker*, becauſe the direct right is incommunicable; for no liferenter can put another liferenter in their place, but can only aſſign the profits befalling to the liferenter by the liferent-right; ſo that it is no liferent in the aſſigny, but is as the *jus mariti* in a huſband, which is a legal aſſignation [q]: likeways, clauſes of relief in heritable bonds fall under ſingle eſcheat, becauſe there is no heritable clauſe adjected to the clauſe of relief; but aſſignations to heritable bonds makes them not to fall under ſingle eſcheat, becauſe the creditor's right is directly tranſmitted and ſtated in the aſſigny's perſon. The ſingle eſcheat of miniſters carries the melioration of their manſes, but the eſcheat of an executor carries no more than what is his own intereſt, and not the ſhare of the wife, bairns, creditors, legatars, or neareſt of kin, which is eſcheat by their own rebellion only, even though the teſtament were executed by decreets, at the executors inſtance againſt the debtors [r], *Dec.* 21. 1671, *Gordon* ***.

XVI. As to the *ſecond* queſtion, how far the denounced's debts or deeds affect his moveables fallen in eſcheat. It is clear, 1. That the debt contained in the horning affects the (*ſingle*) eſcheat [s], whether in the hands of the treaſurer or donatar, *Parl.* 1551, *cap.* 7. *Parl.* 1579, *cap.* 75. And likewiſe all intromitters with eſcheat-goods, by gift, aſſignation, or otherwiſe, upon a ſingle ſummons of ſix days, *Parl.* 1592, *cap.* 145. It is doubtful whether the debt in any horning whereon a gift is taken, ſhould burden the eſcheat; becauſe the firſt horning is only that which makes the rebellion, and ſo the debt therein ſhould only burden the eſcheat; and tho' whatever horning is produced, is preſumed to be the firſt, yet where more gifts are preſented on diverſe hornings, whoever be preferred, he ſhould be preferred with the burden of the debt of the firſt horning.

2. It

* By this ſtatute, liferent tacks are declared to fall under the gift of a liferent-eſcheat, not under that of a ſingle eſcheat.

** This deciſion not found.

*** In this caſe there was no opportunity to determine how far the intereſt of legatars or creditors would be affected by the eſcheat of the executor.

[p] See above, II. 1. 2. & 3. & 4. [q] See above, II. 6. 7. [r] See below, III. 8. 71. and above, II. 1. 4. *fin.* [s] See below, IV. 10. 2.

2. It is clear, that no aſſignation, diſpoſition, or other deed done by the denounced, after denunciation, not being for fulfilling an anterior obligement before denunciation, for a cauſe onerous to a lawful creditor, can affect the moveable goods or debts of the denounced: but when the denunciation is upon a criminal cauſe, the eſcheat takes not only effect from the denunciation, but from the committing of the fact: *and therefore a creditor intromitting with the eſcheat-goods for his own payment, before the horning, but after the fact, was decerned to reſtore the ſame*; *Hope, horning, Scot of Warden contra Scot.* Therefore *alſo* a donatar of eſcheat recovered a ſum due to the rebel, tho' aſſigned before the fact, and paid before proceſs, ſeeing intimation was not before the criminal fact, *Hope*, horning, *Chalmers and Gordon contra Gordon.* 3. Theſe (*anterior*) debts, or deeds of the denounced, do not ſimply affect the eſcheat-goods, unleſs they be conſummated, or lawful diligence done before the up-taking of the eſcheat-goods by the treaſurer or donatar; yea, before general declarator: for that being the intimation of the donatar's gift, it renders it to him a complete valid right, after which no creditor not having a real right, or legal diligence before, can have any acceſs: and therefore a donatar having obtained general declarator, was preferred to a lawful creditor arreſting after declarator, *Feb.* 22. 1628, *Anderſon.*

But the queſtion remains, how far lawful creditors, whoſe debts *are* before the denunciation, or criminal fact, uſing diligence thereafter, but before declarator, or obtaining aſſignations intimated, or diſpoſitions cled with poſſeſſion before declarator, may thereby affect the eſcheat-goods? For anſwer hereunto, tho' in *rigore juris*, the goods and debts of the denounced fall to the fiſk, as they are (*at*) the time of the denunciation, or criminal fact: and the declarator, according to the nature of all declarators, doth not conſtitute the fiſk's right, but declares the ſame to have been from the denunciation, or criminal fact, (albeit as an aſſignation it doth conſtitute the donatar's right) therefore the real right *paſſeth*[t] to the fiſk without poſſeſſion, or at leaſt the privilege of the fiſk might in the full extent thereof exclude all poſterior diligences or deeds: yet ſuch hath been the royal benignity of our Kings, and their favour to lawful creditors, that in this they accounted *id ſolum noſtrum, quod debitis deductis eſt noſtrum*; for which *end* the treaſurer hath been accuſtomed to prefer creditors, giving gifts of eſcheat to them before others, and in taking back-bonds from them, *or other donatars*, in favour of other creditors; yea, by long cuſtom, creditors, whoſe debts were anterior to the denunciation, or criminal fact, doing diligence before declarator, are preferable to the donatar, *Spotiſ.* eſcheat, *Niſbet contra Fullartoun, Feb.* 24. 1637; *Pilmure contra Gagie.* In this (*laſt*) caſe the eſcheat belonged to a Lord of regality, and (*in both caſes*) the arreſtment was laid on before the gift of eſcheat: but where the donatar's gift was in payment of his own debt, he was preferred to an arreſter, arreſting the rebel's goods after the gift, but before declarator, *Feb.* 27. 1623, *Haliburton* *: but voluntary aſſignations not intimated before declarator, for ſatisfaction of debt due before denunciation, or a criminal fact, are not preferred to the donatar, *Hope*, aſſignation, *Clerk contra Napier, and Crawfurd contra M'Aul*; but aſſignations or other rights, for which there were ſpecial obligations before rebellion, are not voluntary but effectual, being complete before declarator, *Hope*, aſſignation, *Stuart contra Wardlaw.* And tho' (*in that caſe*) an aſſignation not being intimated before rebellion, was preferred to the donatar, yet it was in conſequence of a decreet of council decerning that aſſignation to be made, and ſo not voluntary: ſo a donatar was preferred to an aſſigny, whoſe aſſignation bore a cauſe onerous, and was (*granted*) before declarator, but after rebellion, *Dec.* 6. 1631, and *Feb.* 26. 1633, *L. Conheth*; *Dec.* 18. 1629, *L. Capringtoun* **; *yet a lawful*

* In this caſe the gift was not prior to the arreſtment.

** The diſtinction between voluntary and neceſſary deeds, with regard to ſingle eſcheat, is this; voluntary deeds are not effectual unleſs granted *before* rebellion, and compleated before declarator. Neceſſary deeds muſt be compleated before declarator, but may be granted *after* rebellion.

[t] F. paſſing.

lawful creditor obtaining disposition of goods from the party denounced, cled with possession, before declarator, in satisfaction of a debt due before denunciation, was preferred to the donatar, Spotis. escheat, Mosman contra Lockhart. But the contrary was found where the assignation to a debt was not cled with possession, ibid. Johnstone contra Johnstone. In like manner a disposition made by the rebel for a just debt, before the gift or declarator, was preferred to the donatar; here it is not expressed, that the debt was before the rebellion, *Feb.* 10. 1635, *Mosman* *.

Whence there seems a difference in assignations of debts voluntarily made by the rebel, which are not valid, unless made and intimated before rebellion; *and* dispositions and delivery of goods; because moveables are more easily transmissible in favour of commerce, *and so* have always a presumptive title upon possession; so that if the goods be bought in a market, there is no question, or if bought out of market from a rebel, getting the price, which accresceth to the fisk, unless the buyer was in *mala fide*; *and tho'* getting the goods before declarator, in satisfaction of a debt due before the rebellion, *be more questionable than a present exchange of the goods and price*; *the former decisions favour that also.* 2. Legal diligences upon arrestment being complete before declarator, are valid, tho' after rebellion; yea, the decisions favour even the inchoate diligence, if the arrestment was before declarator upon a debt before rebellion; and it was so found, *Feb.* 19. 1667, *Glen.* But voluntary assignations are not effectual, if they be not complete by intimation before rebellion **, and tho' they be where payment or satisfaction, either in money or renewed bonds, innovating the rebel's bond, was not obtained before rebellion, the donatar was found preferable; but otherwise the creditor, by precept, assignation or otherwise, for payment of his debt, prior to the rebellion, obtaining payment before declarator, was found secure against the donatar, *Dec.* 10. 1673, and *Feb.* 9. 1675, *Veatch* ***. But tho' actual payment were obtained by assignation after declarator, it will not secure the creditor, *Dec.* 20. 1676, *inter eosdem.*

XVII. The matter of escheat being thus cleared, we come to the gift thereof, and declarator thereupon. A gift first sealed, was preferred to another first signed in exchequer, albeit so near in diligence as coming that same day to the seals, *Dec.* 6. 1662, *Stuart* ****. Gifts of escheat [w] are in effect the assignations thereof by the fisk, whereof the intimation is the declarator; so that a posterior gift, with a prior general declarator, is preferable to a prior gift, with a posterior declarator: but where there is yet no declarator, preference is by the first citation, if the same was followed with lawful diligence: and therefore a posterior gift, whereupon the citation was prior but three days, was preferred to a prior gift, *Jan.* 31. 1635, *L. Renton.* Here both donatars were creditors, competing for preference, but other donatars could not claim the preference, for the prior gift before decreet of declarator would be preferred, tho' posterior in diligence; neither could the possession of a second donatar, not being creditor, prefer him to a prior gift, or require no declarator. If there be no citation or declarator, the donatar's possession is sufficient alone, and will prefer a posterior gift, tho' granted to the rebel himself, being before any diligence upon the prior gift. And if two gifts

* In this case goods were delivered by the rebel in satisfaction of the debt. The decision is the same with that already quoted from *Spotiswood.* See a similar case, *Dec.* 19. 1676, *Grant.*

** It is the opinion of other writers on the law of *Scotland*, particularly of Sir *George M'Kenzie, Inst. B.* 2. *tit.* 5. § 31. and of *Erskine, B.* 2. *tit.* 5. § 28. that a voluntary assignation granted before rebellion, may be effectually intimated after denunciation, but before declarator; and that a necessary conveyance may be granted, as well as intimated after rebellion, but before declarator, agreeable to the decisions, *Hope*, escheat, *Stuart contra Wardlaw*, and *Maitland. July* 13. 1566, *Stuart contra Bruce, July* 9. 1662, *Bones contra Johnstone.*

*** This decision only proves, that where a voluntary assignation is not granted till after rebellion, intimation before declarator is not sufficient to prefer the assigny, but actual payment or innovation of the debt assigned is required. The same was found, *Jan.* 18. 1678, *Purves.* But the case seems entirely different, where the assignation was granted before rebellion, tho' not compleated till after it —By a decision observed in Sir *P. Home*'s collection, *Dec.* 1687, *Rome*, it was found, that a voluntary assignation, for satisfaction of a prior debt, tho' both granted and intimated after rebellion, was preferable to the donatar where the debt assigned was still *in medio.*

**** The decision doth not mention, that both gifts came the same day to the seals, but that the other party, after the second gift had passed the seals, took instruments against the keeper for having delayed him.

[w] Above, II. 4. 36. *fin.*

be produced as *intereſts*, without any diligence on either, the firſt gift is preferable.

XVIII. Gifts of eſcheat, as all other gifts by the King, are null, if granted before the caſuality fall, as an erection of kirk-lands in a temporal lordſhip was found null, becauſe a commendatar ſtood then in the right, and did not reſign or conſent: and therefore a poſterior erection to that commendatar, upon his own dimiſſion was preferred, *Feb.* 24. 1666, *Sinclair*. And ſo a gift of eſcheat before denunciation, *is null*; *it was alſo* found null by exception, becauſe it mentioned no particular horning whereupon it proceeded, tho' done by the King's own hand at court. And tho' anterior hornings were produced in the proceſs, and no other donatar nor officer of ſtate quarrelled the ſame, *Nov.* 20. 1628, *Waſton*.

XIX. Gifts of eſcheat not bearing expreſsly "goods to be acquired," extend no further than to the goods the denounced had the time of the gift, *Feb.* 2. 1627, *Somervel*. And tho' the gift bore expreſsly not only the goods the rebel had, but which he ſhould acquire thereafter during his rebellion: yet the ſame was only extended to what he had the time of the gift, and what ſuperveened within year and day, *after the date thereof*, *Nov.* 25. 1626, *E. Kinghorn*; *Jan.* 23. 1684, *Neilſon*.

XX. Eſcheats of perſons living within regality, belong to the lord or baillie of regality, infeft with that privilege: and therefore gifts by the King reach not theſe eſcheats, but only gifts by the lord or baillie of the regality, which was found to comprehend all moveable goods, and ſums belonging to the party denounced, as well within the regality as without the ſame, *June* 26. 1680, *Young*. But theſe gifts differ from the King's gifts, that they are effectual according to their tenor, both as to goods before and after the gift, and are valid, tho' granted generally, or tho' before the caſuality fall, if a ſpecial gift, after the caſuality fell, be not in competition; for the prior limitations of the King's gifts, are only in favour of the King, that he be not prejudged by the default of his officers; but private parties ought *ſibi invigilare*: and albeit the diligence of creditors be preferred to donatars, chiefly by the King's benignity; yet a creditor's arreſtment being prior to the gift, tho' after the horning, was ſuſtained againſt a donatar of eſcheat, by a lord of regality, *Feb.* 24. 1637, *Pilmure*. This deciſion inſinuates, that eſcheats within regality are burdened with the denounced's debts, and diligence after the horning before the declarator, as in the King's gifts.

XXI. The main difficulty anent gifts, is, when they are ſimulate, and to the behoof of the denounced, which is much cleared by that excellent ſtatute, *Parl.* 1592, *cap.* 147. declaring it a ſufficient evidence of ſimulation, of any aſſignation or gift of eſcheat, if the rebel himſelf, his wife, bairns, or near friends, remain in poſſeſſion of his tack and goods, to their own uſes and behoof; yet it is not declared how long their poſſeſſion muſt be, ſeeing the rebel ordinarily, for ſome time is in poſſeſſion, till the donatar uſe diligence: but where the rebel retained poſſeſſion till his death, a gift tho' declared was found null by exception, *July* 12. 1628, *Moriſon*; yea, it was found ſimulate, where the rebel poſſeſſed nine years, *June* 26. 1622, *Inglis* *; and other circumſtances concurring, four or five years poſſeſſion by the rebel was found ſufficient, the donatar having conſented to ſeveral tacks, and wadſets granted by the rebel: and yet the ſame gift was found valid in part, in ſo far as concerned heritable rights, acquired by the donatar from the rebel, *Dec.* 23. 1623, *Ballantyn*: ſo four or five years poſſeſſion of the rebel were found ſufficient to infer ſimulation, tho' the donatar was a creditor, and the rebel's lands appriſed *by others*, ſeeing the appriſer poſſeſſed not, but the rebel, *January* 6. and 9. 1666, *Oliphant*; ſo that the time of poſſeſſion ſufficient to infer ſimulation, remaineth *in arbitrio judicis*. The next ground of the ſimulation of gifts of eſcheat, and preſuming the ſame to the rebel's behoof, is, when it is taken in the name of the children in his family, which was

* This deciſion does not mention that the rebel poſſeſſed nine years; but it appeared that the gift was obtained chiefly at his expence, and remained long in his cuſtody.

was found relevant, without mention of the rebel's poſſeſſion, *June* 25. 1622, *Lo. Borthwick's bairns*. But the preſumption was not found ſufficient, that the gift was to the behoof of the rebel's ſon: *but* here it was not alledged, that he was then in his father's family, *March* 20. 1625, *Dalgarno*. The like, where the ſon was not in his father's family, and was a creditor, and made faith it was to his own behoof at paſſing the gift, tho' the party denounced did remain in poſſeſſion ſometime after declarator, *Dec.* 4. 1669, *Jaffray*.

The third preſumption of the ſimulation of gifts is, when the ſame is procured, and paſt by the rebel's means, which (*objection*) was ſuſtained, tho' a part was by the donatar's means, and a part by the rebel's, tho' the donatar was then a creditor, *June* 26. 1622, *Inglis*. The like found probable by members of the exchequer, as witneſſes, *Nov.* 28. 1626, *E. Kinghorn*; *Hope*, declarator, *L. Clunie contra L. Blandine*; *Cant and Porterfield contra Stuart*. The like againſt an aſſigny, conſtituted by the donatar, *Hope*, horning, *Hamilton contra Ramſay* *. Simulation of a gift of liferent to the rebel's behoof, was found probable by the rebel's oath, and the witneſſes inſerted in the gift, *June* 19. 1669, *Scot*. This ground of ſimulation is found relevant, not only againſt the donatar, but againſt a ſingular ſucceſſor, not partaking of the fraud, whoſe aſſignation was after the creditor's diligence, *Dec.* 10. 1623, *Douglas* [z]. And tho' there was no (*competing*) diligence, the gift being expede blank in the name, and filled up thereafter, in the donatar's name, it was found ſimulate even as to him, tho' obtaining it for his true debt, *Dec.* 17. 1670, *Langtoun*. Simulation is not otherwiſe valid againſt ſingular ſucceſſors; yet it was not found relevant to exclude the donatar, and to prefer another donatar, in ſo far as concerns the firſt donatar's debt, truly owing to him, tho' the gift was given at the rebel's requeſt, and paſt at his own charges: ſo that the excluſion, by this preſumed ſimulation, was only inferred as to the profit of the gift, above the donatar's own debt, *in quantum lucratus eſt*. For that was found no fault in the debtor-rebel, to concur in deſire and moyen to get a gift to his creditor, in ſo far as concerned that creditor's debt, *March* 11. 1624, *Douglas*, which deciſion is contrary to that of *Inglis* againſt L. *Capringtoun*, *June* 26. 1622, but is poſterior thereto and juſter; ſo the donatar (*was preferred*) having made faith, the gift was to his own behoof, ſhewing his debt and back-bond (*in exchequer*,) *Dec.* 12. 1673, *Dickſon*. This muſt be underſtood, if the rebel was *not* relaxed; for if un-relaxed, a gift, tho' taken expreſsly in his name, returneth and accreſceth to the fiſk, and next donatar, *July* 6. 1627, *E. Annandale*: yea, tho' he was thereafter relaxed before any other gift, *Nov.* 28. 1626, *E. Kinghorn contra Wood*, *Had. June* 2. 1610, *Lennox contra Turnbull*. But if the denounced were relaxed, the time of the gift, as it would be ſufficient in his own perſon expreſsly, ſo it is valid in another's perſon, tho' to his behoof, yet it will exclude none of the creditors. Theſe nullities are not only competent to poſterior donatars, but alſo to the rebel's creditors uſing diligence.

XXII. To come now to declarators of eſcheat; they are two, firſt general, the next ſpecial. In the action of general declarator the rebel or his bairns, or neareſt of kin (if he be dead) muſt be called, *Hope*, declarators, *Frazer contra M'Fenzean, and Muſchet contra Muſchet*; but the declarator hath no effect againſt moveable heirſhip, unleſs the rebel's heir were called. As to the other moveables, tho' there uſes ſeldom to be executors confirmed to defunct-rebels, and therefore the wife and neareſt of kin are ordinarily called; yet if the wife was only called, ſhe being executrix confirmed, it will be ſuſtained, *Jan.* 12. 1611, *Veatch*. And tho' ſummons of general declarator bear all parties having intereſt, who muſt be cited generally at the market-croſs of the head-burgh where the rebel's reſidence is, that is but *ſtilus curiæ*, and the want of it hinders nothing, the rebel being cited particularly, *June* 27. 1666, *Maſſon*.

XXIII.

* This deciſion, as obſerved by *Hope*, relates to a different caſe.

[z] See above, III. 1. 32.

XXIII. The title in the general declarator is the gift, and the horning whereupon it proceeds, the extract whereof does as ſufficiently prove as the principal, *Parl.* 1579, *cap.* 75. The tenor of the general declarator is, that the rebel was duly and orderly denounced by the horning libelled, and that thereby *his* whole moveable goods and gear, *&c.* became eſcheat, and belong to the purſuer by virtue of his gift; all which is inſtantly verified by the titles: and therefore, if no relevant exception be proponed, decreet is inſtantly given.

XXIV. No exception will be here competent againſt the horning, not being inſtantly verified; for all others will be reſerved to reduction: ſo it was found, it being alledged, that the rebel dwelt in another ſhire than where he was denounced, *Had. June* 12. 1611, *Mr. Ocheltrie contra L. Symontoun.* Yet if the reduction be depending, it may be ſuſtained as prejudicial, and be firſt diſcuſſed, *Had. Dec.* 12. 1622, *Dalmachoy contra Scot.* Neither will any exception be ſuſtained againſt the ground of the horning, as not due or ſatisfied; *and* that it proceeded upon a null bond, ſubſcribed only by one nottar, *Had. Jan.* 12. 1610, *Durham contra Cleland.* Or that payment was made before denunciation, *Nov.* 30. 1630, *Douglas contra Wardlaw*; *Hope*, horning and eſcheat, *Lo. Douglas contra Lo. Carmichael.* The reaſon is not only, becauſe the alledgeance is not inſtantly verified, but ſpecially, becauſe the King's officers are not called, that they may defend the King's intereſt, and obviate colluſions upon forged diſcharges, or otherwiſe; for oftimes the donatar hath but a ſmall intereſt, in reſpect of his back-bond, and ſo may readily conclude: and therefore, tho' the defence be inſtantly verified, it is not received by exception; tho' it might juſtly be without multiplication of proceſſes, intimation being made to the treaſurer and advocate, that they might appear for the King's intereſt: but if it be a viſible nullity in the horning, or an exception wherein there can be no appearance of colluſion, it is ſometimes admitted, as this exception, that the horning was ſuſpended before denunciation, and was falſe, was ſuſtained, *Hope*, horning, *Sheriff of Murray contra* Exceptions of any party compearing for their intereſt, and alledging aſſignation, or diſpoſition of the goods or diligence done, uſe not to be received in the general declarator, but *are* reſerved to the ſpecial, becauſe the general is but an intimation, and ſo proceeds ſummarily.

XXV. The action of ſpecial declarator, tho' it hath the name of declarator, yet hath little in it declaratory, but it is petitory of the goods ſpecially libelled in it. There is no neceſſity to call the rebel, or any repreſenting him, but the haver or intromitter with the eſcheat-goods, *Nov.* 21. 1626, *Seatoun of Meldrum.* The title in this action, is the decreet of general declarator, and there is no neceſſity to produce the gift or horning, *Feb.* 10. 1627, Donatar of *Stuart of Coldingham's* eſcheat, *Nov.* 20. 1629, *Lundie*, where another donatar was admitted for his intereſt, in the ſpecial declarator, tho' he had no general declarator: nor is any exception competent againſt the ſame, or ground thereof, but only by reduction; *yet the competitions of other donatars, or creditors having uſed diligence, or having got aſſignations intimated, or diſpoſitions cled with poſſeſſion, before general declarator, on debts anterior to the denunciation or criminal fact, or otherways upon the ſimulation of the gift, are here competent, as the ſimulation is competent alſo againſt the general declarator; and all exceptions proponed in the general declarator, and reſerved, are competent in the ſpecial declarator.* Special declarators may be purſued any other way, as upon arreſtment or particular libel, for reſtitution and delivery of the eſcheat-goods. It is alſo conſiſtent in the ſame libel with the general declarator; but, before the purſuer inſiſt in the other member for the ſpecial declarator, he muſt purſue that member for the general declarator, and extract his decreet.

XXVI. Liferent-eſcheat, tho' it be a penalty of contumacy and rebellion, and ſo is properly a confiſcation; yet ſeeing it doth not befal only to the fiſk, but is a common caſuality of ſuperiority, and hath been handled in the title, Superiority; we ſhall not here repeat, but only touch ſome differences between liferent-eſcheat, and ſingle eſcheat. *Firſt*, Single eſcheat is only a legal penalty, and there-

therefore belongs alone to the King, and his miniſters of juſtice, who are *either* comptable to him therefore as ſheriffs, *&c.* or (*receive it*) to their own behoof by their infeftments, as Lords and bailies of regality: but liferent-eſcheat is not only penal, but is a legal conſequence of the condition of the rebel, whereby he being out-lawed, and having no perſon in judgment, is excluded from the poſſeſſion of all his rights, and is eſteemed as *civiliter mortuus*, whereby his fees become open, and are in the hands of his ſuperiors, whether the King, or any other ſuperior, by his continuing un-relaxed year and day: and therefore the (*perſonal*) diligences done againſt, or the deeds done by the rebel, for ſatisfying of his lawful debts contracted before rebellion, do not affect his liferent-eſcheat, as they do his ſingle eſcheat, tho' they be done before year and day expire, being after the rebellion: and ſo arreſtments, or aſſignations, even tho' before rebellion, have no effect after year and day is run; becauſe theſe being but perſonal, and liferent-eſcheat a real right by the ſuperiority, whereby the vaſſal is denuded of the liferent, therefore the effect of theſe perſonal rights ceaſeth; but all real rights flowing from the vaſſal before the rebellion, as feus, annualrents, tacks, appriſings and adjudications, whereupon there was a charge *, are effectual, and not excluded by liferent-eſcheat, tho' theſe are excluded by ward, which is a caſuality following the nature of feudal rights; whereas liferent-eſcheat ariſeth not from the nature of fees, but is introduced by law or cuſtom; and therefore the fee falls in the hands of the ſuperior, as it was in the hands of the vaſſal, with all the real burdens he had fixed upon it [c]: neither do poſterior voluntary infeftments, tho' for debts prior to the rebellion, and granted before declarator, exclude the liferent-eſcheat, *Had. Jan.* 18. 1611, *Ord contra L. Craigkeith.* The like, where the infeftment was granted after rebellion, but within year and day, *Jan.* 23. 1627, *Wallace.* Where there is an exception inſinuated, unleſs there had been a prior obligement before the rebellion, to grant the infeftment, as if in that caſe (tho' in *curſu rebellionis*) it would be ſufficient to exclude the liferent. The like was found, that infeftment upon a voluntary diſpoſition, made in *curſu rebellionis*, within the year, and for a debt due before rebellion, excluded not the liferent-eſcheat, *March* 19. 1628, *Raith contra L. Buckie, Hope*, horning, *L. Frendraught contra Meldrum, Gordon of Leſmoor contra Gordon of Haddo.* But infeftments in *curſu rebellionis* upon ſpecial obligements, to grant the ſame before denunciation, are valid. *Vide Lib.* II. *Tit.* 4. § 65. *fin.*

As to legal diligences of creditors, whether appriſing and infeftment thereupon, being after rebellion, will exclude the liferent-eſcheat, was declared *above* [d], the ſum whereof is, that they are thus preferable to voluntary diſpoſitions, that being done in *curſu rebellionis*, for a debt before rebellion, there being infeftment, or charge in *curſu rebellionis*, they exclude the liferent. *Secondly*, Single eſcheats require general and ſpecial declarator: liferent-eſcheats require but one declarator for all, wherein the title is the horning, the gift, and the ſuperior's ſeiſin, without farther inſtructing the ſuperior's right, and without continuation, *July* 2. 1622, *Carmichael*; *March* 6. 1624, *Douglas*; *June* 23. 1625, *Viſcount of Stormont.* And there is no neceſſity to inſtruct the lands holden of that ſuperior by the defender [dd]. The reaſon is, becauſe that is preſumed, unleſs the defender diſclaim, or that the ſuperior be a ſingular ſucceſſor, never acknowledged by the vaſſal, or his predeceſſors **.

* It is ſaid above, II. 3. 30. in general terms, that the ſuperior will not be excluded by an adjudication and charge from any of his caſualities falling afterwards by his vaſſal, unleſs he has been in fault in refuſing to enter the appriſer, or adjudger, offering a charter, with a year's rent. The caſuality of liferent eſcheat is here made an exception; and the ſame doctrine is laid down, II. 4. 32. *fin.* & 66. No deciſion ſeems, however, to have occurred upon this point. See *July* 27. 1673, and *July* 25. 1676, Creditors of *St. Clair*, and donatars of his eſcheat.

** By Act 20. *Geo.* II. *cap.* 50. The caſualities of ſingle and liferent-eſcheat are taken away for ever.

[c] See below, IV. 9. 2. [d] See above, II. 4. 32. & 66. [dd] See above, II. 4. 69.

XXVII. Shipwreck, and waith-goods, or treaſures in the ground, whoſe owner appeareth not, are confiſcated as caduciary, whereby the owners are preſumed to relinquiſh, or loſe the ſame. And ſo *a jure ſuo cadunt*, and the things become *nullius*, and yet belong not to the firſt poſſeſſor, as things relinquiſhed do, by the common law, but do belong to the King, by his royal prerogative, or to others having right from him. We have ſpoken of theſe before in the title, Real Rights [e]; and ſhall only add this, that by that juſt and noble ſtatute, *Parl.* 1429, *cap.* 124. it is declared, that where ſhips are wreck in this conntry, the ſhip and goods ſhall be eſcheat to the King, if they belong to ſuch countries as uſe the like law anent ſhipwrack in their own land, otherways they ſhall have the ſame favour, as they keep to ſhips of this land broken with them. It is alſo declared amongſt the ſtatutes of king Alexander the II. *cap.* 25. That if any living man, or beaſt, as dog, cat, *&c.* come quick out of the veſſel, the ſame ſhall not be accounted ſhipwreck, but ſhall be preſerved to the owner, claiming and inſtructing his right within year and day, or otherways it ſhall belong to the King: ſo it was found, where an ox eſcaped alive out of the ſhip, and the Admiral's decreet, finding the ſame eſcheatable, as ſhipwreck was ſuſpended *ſimpliciter*, *Dec.* 12. 1622, *Hamilton*. In which caſe nothing was alledged but this old ſtatute, the genuine meaning whereof ſeems only to be, where any perſon came to land, the ſhip and goods ſhould not be confiſcated as wreck; but the poſterior act, *Parl.* 1429, *cap.* 124. repeats not that proviſion, but regulates the matter according to the cuſtom of other nations, to do to them as they do to us, without any other limitation. And therefore where ſome perſons came to land, the ſhip being broken, the ſame with the goods diſperſed were confiſcated, if confiſcation in the like caſe ſhould be proved to be the law, or cuſtom of that place, to which the ſhip belonged, *Jan.* 20. 1674, *Jacobſon*. But except by the law of repriſals, that we might treat other nations as they treat us, wherever the true owner claimeth and inſtructeth his right, he ought to have it, and the confiſcation ſhould only be where there is nothing upon the wreck ſhewing the owner, which is the reaſon of the old ſtatute; for an ox can be known whoſe it is, and ſo where the wreck ſhip is (*found*) the owner may be known by writs in the ſhip, and if writs or other evidences make the owner appear, it is relevant and juſt *.

XXVIII. Forfeiture is the great confiſcation, comprehending all other penal confiſcations; and is extended to the taking away of life, lands and goods, *Parl.* 1424, *cap.* 3. For it is the penalty of the higheſt crime, to wit, Treaſon; which at firſt, and by its native ſignification, expreſſeth crimes againſt the life of any party under truſt: ſo the ſlaughter of any perſon under truſt, credit, or power of the ſlayer, is declared Treaſon, *Parl.* 1587, *cap.* 51.

XXIX. Thence it is alſo called treachery, and the committers thereof traitors. And becauſe of that truſt betwixt the King and all the leiges, as their ſuperior and Sovereign, the chief point of Treaſon is againſt the King's perſon, as appeareth by the act firſt cited: thoſe alſo, who, without cauſe, wilfully raiſe a fray in the King's hoſt, commit treaſon, *Parl.* 1455, *cap.* 54. Upon the ſame ground, becauſe of the truſt betwixt the ſuperior and his vaſſal, ſuch crimes againſt the ſuperior, *are* alſo called treaſon, and thereby the committer loſeth for ever, all lands and heritage he held of that ſuperior, *Quoniam attachiamenta*, *cap.* 19. But this treaſon infers not a ſimple forfeiture, but only is a ground of recognition; but as now the terms are taken, treaſon, and forfeiture of life, lands and goods are adequate; and, wherever the one is expreſt in any act of Parliament, the other

* By Act 12. *Anne*, Seſſ. 2. *cap.* 18. ſheriffs and other magiſtrates, and the officers of the Cuſtoms, are appointed to aſſiſt ſhips in diſtreſs, and to take care of the wreck. If no owner appear in 12 months, the goods are to be ſold, and the price tranſmitted to the Exchequer, for the benefit of the owner who ſhall prove his right. By Act 4. *Geo.* I. *cap.* 12. this ſtatute is ratified and made perpetual. By Act 26. *Geo.* II. *cap.* 19. both acts are amended, altered and enforced; but it is provided, that this laſt act ſhall not extend to *Scotland*.

[e] Above, II. 1. 5. See alſo 1. 7. 3.

ther is underſtood; ſo the ſtriking or ſlaying of any perſon, within the Parliament-houſe, during the time of Parliament, within the King's inner chamber, cabinet, or chamber of preſence, the King being within his palace, or within the inner tolbooth, the time of ſeſſion ſitting; or within the privy council-houſe the time of the council ſitting; or, in his Majeſty's preſence any where, is declared treaſon, *Parl.* 1593, *cap.* 177. So impugning the dignity or authority of the three eſtates of Parliament, or procuring any innovation, or diminution of their power, is prohibited under pain of treaſon, *Parl.* 1584, *cap.* 130. And alſo the declining the King, and his council, in any matter to be inquired before them, *Parl.* 1584, *cap.* 129. Purchaſers of benefices at the court of *Rome*, are ordained to be denounced as traitors to the King, *Parl.* 1471, *cap.* 43. *Parl.* 1488, *cap.* 4. *Parl.* 1540. *cap.* 119. So forgers of the King's coin, and home-bringers *of falſe coin* [f] incur the loſs of life, lands and goods, *Parl.* 1563, *cap.* 70. [ff] Saying of Maſs, reſetting of Jeſuits, ſeminary prieſts, and trafficquing Papiſts: and theſe themſelves are liable to treaſon, *Parl.* 1592, *cap.* 122. *Parl.* 1594, *cap.* 196. *Parl.* 1607. *cap.* 1. Raiſing of fire wilfully, or burning of houſes, whether folk be therein or not, *or corns*, is declared treaſon, *Parl.* 1528, *cap.* 8. *Parl.* 1540, *cap.* 118. *Parl.* 1567, *cap.* 32. & 33. and wilful ſetting coal-heughs on fire is declared treaſon, *Parl.* 1592, *cap.* 146. Landed men committing or reſetting riot or robbery, incur the pain of treaſon, *Parl.* 1587, *cap.* 50. * And generally, all reſetters, maintainers, and aſſiſters of declared traitors, commit treaſon, *Parl.* 1592, *cap.* 146. Accuſers of others of treaſon, if the accuſed be acquit, commit treaſon, *Parl.* 1587, *cap.* 49. **

XXX. Forfeiture confiſcateth the forfeited perſon's whole eſtate, without any acceſs to his creditors; yea, without conſideration of diſpoſitions, infeftments, or other real rights granted by the forefeited perſon, ſince or before the committing of the crime of treaſon, for which he was forfeited, which fall and become null, by exception, *Hope*, exceptions, *Viſcount of Rocheſter contra tenants of Carlavrock*; *Had. July* 14. 1610, *Campbell contra Liſnories*; *Spotiſ.* Conjunct-fee, *Crawford contra L. Murdiſtoun*, unleſs theſe rights have been confirmed by the King as ſuperior, or conſented to by him [g].

XXXI. It hath been much controverted, whether feu-infeftments granted by forfeited perſons, before committing of the crime, be alſo annulled by the forfeiture. And if the act of Parliament anent feus, *Parl.* 1457, *cap.* 71. ſhould not only defend them againſt recognition, and the caſualities of ſuperiority, but even againſt forfeiture itſelf, it being therein declared, that the King will ratify the ſaid feus. The like is to be underſtood of other ſuperiors: ſo that, tho' *de facto* they be not confirmed, yet the declaration and obligement of the ſtatute ſtandeth

* The act mentions only the crimes of common theft, reſet of theft, or ſtouth-riefe.

** By Act 6*to Annæ*, *cap.* 7. it is declared high Treaſon to maintain *by writing or printing*, That the Pretender, who calls himſelf *James* III. of *England*, and VIII. of *Scotland*, hath any right to the Throne, or that any others have right than thoſe to whom the Crown is provided by Act 1. *William* and *Mary*, Seſſion 2. *cap.* 2. and by Act 12. *William* III. *cap.* 2. and by the acts for the union of *Scotland* and *England*; or to maintain that the Kings of this realm, with the authority of Parliament, are not able to make laws and ſtatutes to bind the Crown, and deſcent, limitation, and government thereof. Similar offences by *adviſed ſpeaking or diſcourſe* are puniſhed on information within three days, and proſecution within three months, as *præmunire*, 16 *Charles* II. *cap.* 3.

By Act 7*to Annæ*, *cap.* 21. ſuch crimes as are High-Treaſon in *England*, and no others, are declared High-Treaſon in *Scotland*; for trial whereof, courts of *Oyer* and *Terminer* may be appointed, which, as well as the Juſticiary and circuit-courts, are to proceed after the form obſerved in *England*. Conviction or attainder of High Treaſon infer in *Scotand*, the ſame corruption of blood, pains and forfeitures as in *England*. Theft in landed men, murder under truſt, wilful fire-raiſing, firing coal-heughs and aſſaſſination are declared no longer treaſon but capital offences. Murder of any of the Lords of Seſſion, or Juſticiary ſitting in judgment, or counterfeiting the King's ſeals in *Scotland*, are made treaſon. That, after the death of the Pretender, attainder for High-Treaſon ſhall prejudge the offender only, not his heirs; and in trials for Treaſon, copies of the indictment, with liſts of the witneſſes and Jury ſhall be given to the Pannel ten days before trial. But the limitation of the effect of attainder, is ſuſpended by 17*to Geo.* II. *cap.* 39. till after the death of the Pretender's ſons. See further Act 1. *Geo.* I. *cap.* 20. Act 21. *Geo.* II. *cap.* 34. Act 17. *Geo.* II. *cap.* 39. Act 19. *Geo.* II. *cap.* 9. & *cap.* 26. Act 20. *Geo.* II. *cap.* 30. & *cap.* 46. Act 21. *Geo.* II. *cap.* 19.

[f] F. thereof.— [ff] See act 15. & 16. *Geo.* II. *cap.* 28. [g] See in the following §, a diſtinction between immediate vaſſals of the Crown, and others.

ſtandeth as a confirmation thereof, or at leaſt as an obligement upon all ſuperiors, againſt which they, nor their donatars, cannot come. This is to be underſtood, while feus are allowed by law: *Vide title Infeftments*, § 34. It was ſo decided, *Feb.* 12. 1674, *M. Huntly*; *Nov.* 16. 1680, *Campbell of Silvercraigs*; not only becauſe the ſaid act of Parliament, imports a confirmation of feus granted thereafter, but alſo becauſe forfeiture is by ſtatute penal, and not by the feudal right, like unto liferent-eſcheat, which returneth the fee to the ſuperiors, but with the burdens put thereupon by the vaſſal, whether feu, blench, ward, or by annual-rent or tack. And therefore, when any perſon is forfeited, that is not the King's immediate vaſſal, his eſtate, both property and ſuperiority, falls to the King, but with the burden of all real rights conſtituted by the vaſſal *; yet forfeiture of the King's immediate ward-vaſſal, proceedeth upon crimes which infer recognition, and therefore returns his ward-lands to the King, as they came from the King free of all burden. So that the act of *Parl.* 1457, which ſecures againſt ward and recognition, muſt alſo ſecure feus againſt the forfeiture of the vaſſal-granter of the feus, but will not ſecure any other ſubaltern right, without the ſuperior's conſent, as a blench-infeftment, *Jan.* 10. 1677, *M. Huntly*. But forfeiture, which is not by the nature of the ward-holding, as done againſt the King, who is ſupreme ſuperior, and ſo infers (*not*) recognition, gives the King no more right, than the forfeited perſon had, as treaſon for raiſing fire, or burning coal-ſinks, or for accuſing another of treaſon unjuſtly.

XXXII. Tacks alſo being neceſſary and profitable, are not excluded by forfeiture, *Maitland, March* 17. 1569, *Home of Manderſtoun*. The like as to tacks for a competent duty, but not in tacks for graſſums, *Jan.* 28. 1674, *General Dalziel*.

XXXIII. But by the act of *Parl. July* 27. 1644, forfeiture was declared to be without prejudice to all perſons not acceſſory to the crime of the ſuperior, of their rights of property of any lands, wadſet, or others holden by them, of the forfeited perſon, or of the payment of their juſt debts, or relief of their cautionries out of the forfeited eſtates, which was reſcinded by the general act reſciſſory, *Parl.* 1661, *cap.* 15. But that act is now *revived* by the act of *Parl.* 1690, *cap.* 33. K. *William* and Q. *Mary*, as to poſterior forfeitures.

XXXIV. Forfeiture could not be pronounced in abſence of the forfeited perſon by the Juſtice-general, but only by the Parliament: ſo that no certification of the Juſtices could reach lands, but only moveables, *July* 30. 1662, *Yecman*. Neither could it extend to heritable bonds, *Nov.* 30. 1671, *Hag:* but now the Juſtices may proceed to forfeit abſents, in caſe of open rebellion and raiſing in arms, *Parl.* 1669, *cap.* 11.

XXXV. Becauſe of the difficulty the King or his donatar might have, in knowing the rights of forfeited perſons, *it is provided, that all lands and annual-rents, or heritable rights whatſoever, peaceably poſſeſſed by the forfeited perſons*, by labouring the ſame with their own goods, ſetting the ſame to tenants, and uplifting the mails and duties, as their heritage, and ſo being reputed heritable poſſeſſors *thereof*, for the ſpace of five years, immediately preceeding the proceſs of forfeitute, the lands ſo laboured or poſſeſſed *ſhall* pertain to the King, and his donatar, tho' they can produce no heritable right, or title thereof in the forfeited perſon: for trial whereof, commiſſion may be granted under the teſtimonial of the Great Seal, to ſuch perſons as ſhall be thought fit, by the advice of the ſecret council, to take cognition by an inqueſt, what lands were bruiked by the forfeited perſon, as heritable poſſeſſor thereof, ſo commonly reputed and eſteemed by the ſaid five years ſpace, with power to call before them all parties pretending intereſt, which being returned to the chancellary *ad perpetuam remanentiam*, ſhall be a ſufficient right, *Parl.* 1584, *cap.* 2. This right was ſuſtained to a donatar

* See, *Dec.* 6. 1682, Lady *Caldwell*, obſerved by *Falconer*, where this diſtinction was diſregarded, and rights granted by a ſub-vaſſal, found ineffectual. See above, II. 11. 34.

natar, tho' there was no precognition of the five yaers poſſeſſion, *ſuch precognition being found competent after intenting action, July* 19. 1623, *Maxwell.* But here the donatar was made to depone, that he had juſt reaſon to affirm, that the rights were wanting, *Hope*, poſſeſſion, *inter eoſdem.* This *right* was not elided, tho' it was offered to be proved, that the forfeited perſon's right was reduced in *foro contradictorio*, upon recognition before his forfeiture, *and the donatar was found intitled to poſſeſs until his right were reduced, Had. Feb.* 20. 1611, *L. Hairſtones contra Rambel:* ſo the ſaid five years poſſeſſion, being reputed heritable poſſeſſor, infers *præſumptionem juris & de jure* of the forfeited perſon's right, which admits no contrary probation, as to the forfeited perſon's right, if the quinquennial, peaceable and lawful poſſeſſion be proved; but the probation thereof by inqueſt will not exclude a contrary probation by reduction upon the poſſeſſion of others, within the five years: and if the poſſeſſion be not lawful and peaceable, but interrupted or vitious, the ſtatute takes no place: for by poſſeſſion, lawful, peaceable poſſeſſion of the forfeited perſons muſt be underſtood: and if any perſon have moved action within the five years, for taking away the rebel's right and poſſeſſion, they will be heard after the forfeiture, as before; yea, citation before the five years, and inhibition within the five years, with a ſubſequent ſecurity, *were* found ſufficient to take off the benefit of this act, *July* 23. 1666, *E. Southeſk.* This privilege is not competent by exception, offering to prove five years poſſeſſion, but by a retour upon a commiſſion ſerved by an inqueſt, *June* 13. 1666, *Hume.* In this ſtatute it is alſo provided, that where there were tacks, or poſſeſſions of lands, or teinds poſſeſſed by the forfeited perſon, in reſpect that the rights thereof might alſo be abſtracted, that the King and his donatar ſhould continue in that ſame poſſeſſion for five years, without any accompt for the profits thereof, and longer, if a right be inſtructed of the forfeited perſon: and if a feuar be forfeited, the land is not liable for the feu-duty preceeding the forfeiture; becauſe the diſcharges thereof might have been abſtracted. Poſſeſſion for fewer than five years by the forfeited perſon, was found ſufficient to continue for five years, tho' no tack nor temporary right was inſtructed, *Jan.* 24. 1667, *Hume.*

XXXVI. It is alſo declared in this ſtatute, that the forfeiture of the apparent heir carries therewith the right of the lands, to which he might ſucceed, tho' he were never entered heir, nor infeft, whereof *Craig* mentions a caſe, *lib.* 2. *dieg.* 18. § 23. that the daughters of the Laird of *Laiſindrum* were excluded from their ſucceſſion to their goodſire, becauſe their father was forfeited, tho' he was never received, nor infeft in theſe lands.

XXXVII. *Craig*, in the fore-cited place (II. 18. 23.) moveth, but determineth not this queſtion, whether the forfeiture inferreth a corruption of the blood of all the deſcendents of the forfeited perſons, whereby, till they be reſtored, they are incapable of any ſucceſſion, tho' deſcending to them by the maternal line? This corruption of the blood is frequent in *England*, where perſons are ſpecially attainted and convict of treaſon; and ſometimes with us it is called diſhabilitation, and is a part of the doom or ſentence, that the ſucceſſors of the perſons convict ſhall be incapable of lands, eſtate, honour or office; yea, their fame and memory is ſometimes condemned, and their ſirname aboliſhed, as was done in the forfeiture of the Earl of *Gourie:* but it is not conſonant to our cuſtoms, that forfeiture in other caſes ſhould infer this corruption of the blood: Firſt, Becauſe of the multiplication of caſes to which forfeiture is now extended, as to theft in landed-men, and falſe coin, *&c.* Secondly, If none of the deſcendents of forfeited perſons were capable of ſucceſſion to any perſon, that could not be by reaſon of any ſpeciality in the matter of ſucceſſion, but of ſomething in their perſon by reaſon of the forfeiture, excluding them thence, which would not only take place in heritage but in moveables; yea, the oye, or further offſpring of the forfeited perſon, could not ſucceed to their own immediate parents, which would infer, that they could be capable of no goods or means, but the ſame would be inſtant-

ly confiſcated. Thirdly, Tho' forfeitures in *Scotland* have been very frequent, the offspring of ſuch have ordinarily acquired lands and goods, and their children (*have*) ſucceeded them therein, without obtaining reſtitution of their blood: ſo that this corruption of the blood is rather to be thought a ſpeciality in ſome atrocious treaſons, by the tenor of the doom of forfeiture, than a general conſequence thereof.

XXXVIII. But whereas it hath been ſaid, that the apparent heir being forfeited, the King hath right to the heritage, to which he might ſucceed; it may be queſtioned, whether that may be extended to the apparent heir, if he be forfeited during his predeceſſor's life, or if it be only in the caſe that the heir apparent is forfeited, after the death of his predeceſſor, where *de preſenti* he may be heir. There is no doubt if the perſon forfeited ſhould be fugitive, and ſurvive his predeceſſor, but the heritage accreſcing to him, wherein he might *de preſenti be* infeft, would fall under forfeiture, tho' he were not actually infeft; and it ſeems no leſs clear, that being forfeited, if he ſhould die before his predeceſſor, that his brother, or collaterals, might ſucceed to their father, or any other to whom the forfeited perſon, if he had ſurvived, would have ſucceeded. It is more doubtful whether his deſcendents could, if any were; for theſe would exclude the collaterals: and there ſeems no reaſon to exclude them from their grandfather's heritage, not being diſhabilitated; and ſeeing I have not found it extended further, I conceive it more favourable, that the heir apparent dying before his predeceſſor, ſhould not hinder his deſcendents to ſucceed to that predeceſſor. But unleſs the forfeiture did incapacitate the predeceſſor to diſpoſe upon his own eſtate, the forfeiture in that caſe would be improfitable; yet ſeeing we have no complaints of exheridation in *Scotland*, but that parents may freely diſpoſe of their eſtates at their pleaſure, it would be hard to bind up the parent more in relation to the fiſk, than to his own child, unleſs fraud, to prevent the effect of the forfeiture, without a rational cauſe, do appear.

XXXIX. For the further ſecurity of the King and his donatar, it is provided, *Parl.* 1594, *cap.* 205. That no letter of penſion, factory, bond or aſſignation, granted by any forfeited perſon, ſhall be valid, unleſs it be confirmed by the King, or authoriſed by decreet of an ordinary judge, obtained before citation in the proceſs of forfeiture; which ſeems to inſinuate, that creditors ſhould be ſatisfied out of the forfeited eſtate: but it will reach no further than the moveables fallen by forfeiture, which ſeem to be affected in the ſame way, as falling by ſingle eſcheat, the full dominion in both being the King's, but with the burden of admitting the diligence of lawful creditors before declarator; but I have not obſerved this practiſed in moveables of forfeited perſons. The reaſon of this ſtatute appeareth by the act immediately preceeding, whereby a former act of Parliament, in favour of the vaſſals of forfeited perſons, is reſcinded, and appointed to be delete out of the books of Parliament; which reſcinded act, tho' it be not extant, but delete, as aforeſaid, hath affected forfeited eſtates with the debts of the forfeited perſons, and with the ſubaltern infeftments, granted by forfeited perſons not confirmed; and therefore ſuch rights being conſtituted by a law then ſtanding, could not be derogated from by a ſubſequent law: and therefore it was neceſſary to caution, by the foreſaid act 205, that ſimulate or ante-dated rights, might not affect eſtates forfeited before the ſaid reſciſſory act. Yet by the ſtatute 205. (tho' that which was in favour of vaſſals of forfeited perſons, was delete out of the records of Parliament) yet letters of penſion, bonds or aſſignations, granted by forfeited perſons before citation on the proceſs of forfeiture, being authoriſed by the ſentence of an ordinary judge, ſhall be valid, *viz.* to affect the forfeited eſtate; for, as to other effects, there would be no queſtion; therefore the act 1644 was not without ground nor precedent, even as to heritable rights, whereunto penſions are only relative; and likewiſe the 33d act, *Parl.* 1690, K. *William* and Q. *Mary*, tho' more extenſive in prejudice of the royal prerogative, wants not ground and example, that nothing ſhould be forfeited which could

could not have been alienated by the forfeited perſon; and therefore it is ſtatute, that no forfeiture thereafter ſhall prejudge tackſmen, creditors, ſuperiors, vaſſals, heirs of entail, huſbands or wives of forfeited perſons; which ſhall defend tackſmen poſſeſſing before the treaſon, it being open and notour, or before the proceſs if the treaſon were latent; and that the forfeited eſtate ſhall be ſubject to all real actions and claims, tho' they be not raiſed within the five years preceeding the forfeiture, excepting feu-duties, annualrents, and annual preſtations not inſiſted for within the five years; and ſhall be ſubject to all creditors real or perſonal, contracting prior to the treaſon, being notour, or to the citation in (*the*) forfeiture, being latent, the debts being always upon record by being regiſtrated, or diligence done thereupon, excepting debts contracted during open rebellion, and riſing in arms; and that no heir of entail ſhall *forfeit* more than what he could affect his eſtate with, ſo that the infeftment of tailzie be regiſtrated, conform to the act of Parliament 1685. And all the ſub-vaſſals rights are confirmed: yet this will not import, that the ordinary caſuality of recognition is hereby taken from the King more than from the ſubjects, by *deeds* [h] againſt the King, which, without forfeiture, would recognoſce.

XL. Sentence of forfeiture being pronounced, it is declared irreducible upon any nullity in the proceſs upon which it proceeded, till the crime be remitted by the King, or the party tried and acquitted thereof: but reſtitution ſhall only be granted by way of grace to the party forfeited, or their poſterity, *Parl* 1584, *cap.* 135.; which was not found to extend to diſhabilitation of the ſon of the forfeited perſon, but that it might by act of Parliament be taken off, without citation of any party, who had acquired right upon the diſhabilitation from the donatar, which fell in conſequence, *Feb.* 24. 1665, *Douglas and Sinclair.*

XLI. The doom or decreet of forfeiture, when paſt in Parliament, gives immediate acceſs to the mails and duties of the eſtate poſſeſſed by the forfeited perſon, and needs no declarator; becauſe it is a decreet of Parliament, and hath the like effect as ward, which requireth no declarator, *Jan.* 6. 1681, *Home.* The like tho' the doom of forfeiture was by the Juſtices in abſence, ſeeing it was ratified in Parliament, *Parl.* 1669, *cap.* 11. not by ratification paſſing of courſe, but by a publick law, ratifying that forfeiture by the Juſtices, as if it had been done in Parliament, and all ſuch forfeitures by the Juſtices being for open rebellion, and riſing in arms againſt the King, *Dec.* 15. 1680, *Gordon of Troquhen.*

XLII. Baſtardy and laſt heir makes things befal to the fiſk, as caduciary, becauſe ſuch things can be lawfully claimed by none; and therefore are applied to the fiſk [i]. Before we can conceive the effects of baſtardy, we muſt underſtand the efficient that makes a baſtard, which being relative and defective, is beſt taken up by the oppoſite, *viz.* a lawful child begotten of perſons lawfully married: ſo then a baſtard is a child whoſe parents were not lawfully married; and therefore ſuch are baſtards; Firſt, whoſe parents were not at all married. Secondly, Thoſe whoſe parents were married, yet were not in degrees capable of marriage. Thirdly, Thoſe who were married, and in capable degrees, yet the marriage was inconſiſtent, becauſe of ſome impediment, as if either party were married before, and the other ſpouſe on life, whether that were ſolemnly, or privately, by promiſe of marriage, and copulation following; in which laſt caſe, if the impediment be ſecret, and not known to both parties, *Craig* (II. 18. 18. *et* 19.) obſerveth, as his own opinion, and the opinion of the Canoniſts *, that the ſaid impediment, tho' it be ſufficient to annul the marriage, yet not to take away the legitimation of the children procreated *during the bona fides of* any of the parties, before knowledge of that impediment.

But

* *Craig* does not ſay, that a promiſe and ſubſequent copula will make a marriage; but that the Commiſſaries had ordered celebration of a marriage upon that ground, and that they held the parties refuſal as equal to celebration, ſo as to intitle the children to inherit.

[h] F. decreets. [i] See below, IV. 12. & 13.

But, becauſe who are the parents, is ſometimes dubious, procreation being ſecret both in the act and effect: for clearing thereof, it is the common rule in the civil law, and with us, *Pater eſt, quem juſtæ nuptiæ demonſtrant*, *L.* 5. *ff. de in jus vocando.* So he is preſumed to be the father, who the time of the conception was married to the mother; but in this caſe, lawful marriage is not oppoſed to clandeſtine, or irregular marriage, as not being after proclamation in the church, or by a perſon having power to marry by the canons of the church, or ſtatutes of the country; but that is only underſtood as unlawful marriage in this caſe, which materially is unjuſt and inconſiſtent, where marriage could not have ſubſiſted, albeit it had been orderly performed, as being by perſons in degrees prohibited by divine law, or where either party had another lawful ſpouſe then living, and undivorced: yea, marriage betwixt the adulterer and the adultereſs, after diſſolution of the former marriage, doth not infer baſtardy of the children of the ſubſequent marriage, tho' it may debar them from ſucceſſion, *by Act* 20. *Parl.* 1600.[k] [The preſumption, that the children born in marriage are the huſbands, requires ſuch time as they might have been lawfully procreated, when both parties were free and unmarried, which, if it was nine months before the birth, it is ſufficient; but if leſs, the preſumption will not ſuffice, unleſs it appear the child was unripe, and born before the time, otherways the child will be preſumed to be the former huſband's.] * This is *præſumptio juris*, and admits contrary probation; as *firſt*, if the father were abſent, or impotent, the time that the conception could be, which abſence is not neceſſarily beyond ſea, as the *Engliſh* require the father's abſence, and therefore if he be within the four ſeas during the time the birth is in the womb, this preſumption prevaileth againſt his abſence with them: but with us it will be ſufficient, that his abſence be ſpecial and circumſtantiate, that there remaineth no doubt, that he could not have been preſent. As if the father were (*proved*) in priſon, or at a very great diſtance, ſo that a ſhort time *of his eſcape from the witneſs* might not ſuffice him to be preſent. This preſumption will alſo be taken off, by the teſtimony of both parents agreeing, that the child belongs to another father, and ſo is a baſtard: but the teſtimony of either of them will not ſuffice, as *Craig* relates, (II. 18. 20.) of a Lady, that having controverſy with her ſon, ſhe was accuſtomed to confeſs that he was a baſtard: and of a Queen, related by the doctors, whoſe name they *ſuppreſs*, who at the time of her death, declared to her ſon, that he was not the King's ſon, yet he was received as King, in his father's place. It hath been more frequently ſeen, that the father hath diſowned the child born of his wife, which, tho' it might infer ſuſpicion and reproach, yet not baſtardy, unleſs the mother alſo, of conſent, or by proceſs, were made to acknowledge it.

It will not be ſufficient to elide the foreſaid preſumption, tho' the wife's adultery ſhould be proved, yea, tho' at a time anſwering to the time of conception, *as Craig obſerveth* (II. 18. 20.) *For the time of conception, tho' it* hath an ordinary courſe of nine months, yet hath had ſuch variations, that the child hath been accompted belonging to the father, by reaſon of the marriage, tho' it preceeded the birth of the child, only by the ſpace of 8, 7, or the beginning of 6 months; eſpecially if, by the judgment of phyſicians, the immaturity of the child concurred; yea, this preſumption will attribute the child to the father, tho' the child be born 9, 10, or 11 months after the father's death: but, in theſe caſes, the probability of the circumſtances may make the mother's teſtimony alone ſufficient to inſtruct the baſtardy of the child. Neither is marriage here accounted, by the ſolemnization thereof in the church, which, in ſome places, is ordinarily without that; and tho' with us, it be a requiſite ſolemnity, yet it is not of the being of

* This paſſage is obſcure. The doctrine is laid down in general terms, altho' the author ſeems to have had in view a particular caſe only, *viz.* that of a woman who marries a ſecond time, and brings forth a child. If nine months had elapſed from the 1ſt huſband's death, when both parties were free and unmarried, the child will belong to the 2d huſband; if leſs time interveened, the 1ſt huſband will be held the father, except the child was born unripe.

[k] See above, I. 4. 7.

of marriage. And therefore cohabitation, as man and wife, ſupplieth the ſolemnity of public marriage, which, being a tranſient act, and having no record, could ſeldom be proved; yea, though it could be proved by the oath of both parties, or otherwiſe, that there was never a formal marriage, if the parties were capable of marriage, cohabitation would ſupply; for after contract, or promiſe of marriage, or *ſponſalia*, if copulation follow, there is thence preſumed a matrimonial conſent *de præſenti*, which therefore cannot be paſt from by either, or both parties, as having the eſſential requiſites of marriage. If diligence be uſed for performing that ſolemnity, tho' it take no effect, the contract of marriage will make the child lawful, as when, in the time of proclamation thereof, the one party died, whereof *Craig* (II. 18. 19.) relateth a caſe; yea, in the caſe of *Edward Younger* there mentioned, who having begotten children under promiſe of marriage, but refuſing to acknowledge or perform it, the woman having obtained ſentence of the Commiſſars (who are judges of matrimony and legitimation) againſt the ſaid *Edward*, for ſolemnizing the marriage, which, tho' he obeyed not, the children were accounted lawful, and capable of ſucceſſion.

Marriage, as is before ſhown, title, *Conjugal Obligations* [1], is proved by cohabitation of the father and mother as married perſons, which was ſuſtained *againſt a declarator of baſtardy*, upon ten years cohabitation *of the parents*, as man and wife, tho' it was offered to be proved the child was reputed baſtard, *July* 7. 1626, *Somervel*. And there being a mutual probation, whether a defunct was lawful, or a baſtard, and ſix witneſſes being examined on either ſide, tho' ſeveral of the witneſſes on the one ſide proved, that the defunct was reputed baſtard, and that his mother gave ſigns of repentance publicly in the church, for fornication with his father; *yet* others proving that they were in the *father's* houſe, and ſaw them cohabit as man and wife, but did not mention how long, the defunct was found to be no baſtard, but a lawful child, *Jan.* 15. 1676, *Swintoun*; yet this was elided by contrary probation, that the father had then another wife, and a lawful child by *her*, and that the perſon in queſtion was reputed baſtard. Baſtardy is alſo elided, by proving the perſon in queſtion, to be holden and reputed lawful, unleſs the purſuer condeſcend, and inſtruct the contrary by particular circumſtances, *Hope*, baſtardy, *Roy contra Roy*; *Chirnſide contra Williamſon* *. The like where the perſon in queſtion was 50 years old, *Hirpet contra Scot*: the like being 30 years after the baſtard's death, who died an old man, the Lords would not grant proceſs *de ſtatu defunctorum poſt tantum tempus*, *Feb.* 25. 1642, *Crawfurd*.

XLIII. Baſtardy hath no effect till declarator, which proceeds upon a general citation againſt all and ſundry, at the market-croſs of the ſhire where the baſtard dwelt, at the inſtance of the King's advocate, or donatar, becauſe the baſtard can have none to repreſent him; but if the baſtard's debtors be called ſpecially, there will not only follow a general declarator, that the perſon was baſtard, but a decerniture againſt the debtors, which is a ſpecial declarator, tho' theſe may be diſjoined in ſeveral proceſſes: but if any party appear, as neareſt agnate, he would be admitted to defend, *Dec.* 11. 1679, *Somervel*. It was alſo found, that a declarator of baſtardy was not relevantly libelled, that the father and mother were not married, unleſs it were added, that the defunct in his life was holden and reputed baſtard, which was found and inſtructed, by his taking legitimation from the King, *Feb.* 19. 1669, K. Advocate; *June* 15. 1670, *Livingſton*; *Jan.* 6. 1680, *Somervel*.

XLIV. As to the effects of baſtardy, from the former principle, *Pater eſt quem juſta matrimonia monſtrant*; children begotten of parents *not* lawfully married, are called *vulgo quæſiti*, and are counted in law, to have no father, agnates

* Theſe deciſions, as obſerved by *Hope*, are in theſe words: "The Lords found this exception, that the "perſon alledged to be baſtard, was 80 years of age, and was reputed lawful, relevant, except the purſuer "would condeſcend upon the name of the baſtard's father and mother, and alledge certain circumſtances, that "they were never married, or that the defunct was eſteemed baſtard, *Roy contra Roy*. The like decided be"fore *Chirnſide contra Williamſon*."

[1] See above, I. 4. 6. med.

nor kinſmen on the father's ſide, and therefore they cannot ſucceed to their father, or any of their agnates; neither can any of theſe agnates ſucceed to them, either in heritable or moveable rights, but only their own *deſcendants* by lawful marriage: ſo then baſtards dying without lawful iſſue, their goods become caduciary and void, and ſo fall to the fiſk; yea, if the lawful iſſue of the baſtard at any time fail, for the ſame reaſon, their goods become caduciary, and return to the King, either by reaſon of the baſtardy, or as *ultimus hæres*, *July* 13. 1626, *Haltro*. Though baſtards can have no aſcendent or collateral heirs of line, yet they may have heirs of tailzie, in lands which did exclude the fiſk, when the ſame was provided to the baſtard, and the heir of his body; which failing, to any other perſon and his heirs, *Spotiſ.* baſtardy, *Innes contra King's donatar*. They may alſo be heirs of tailzie ſpecially nominate, as *Craig* obſerveth, (II. 18. 11. & II. 16. 19.) in the caſe of E. *Errol contra Hay of Cockſtoun*, who, and the heirs of his body, made a member of tailzie, which was ſuſtained, though he was baſtard. Baſtardy hath only effect againſt ſucceſſion to the baſtard, but doth not incapacitate the baſtard, to diſpoſe of his own eſtate, heritable or moveable, in his *leige pouſtie*: and likewiſe the baſtard's wife hath her ſhare of his moveables, as other relicts have, *July* 7. 1629, *Wallace*; but if the baſtard have no iſſue, he hath no power of teſting, and can neither nominate executors, nor leave legacies, unleſs he obtain legitimation from the King *. A baſtard's wife having a diſpoſition of all he had, was found to have right thereby to the half of the moveables, though the marriage was diſſolved by the baſtard's death within year and day, which was not found to give the benefit of the moveables to the fiſk, as they would have returned to private parties, *Nov.* 28. 1691, *Stuart of Noll*, &c. **

XLV. Legitimation, though it hath many ample clauſes, yet the main effect of it is, that the baſtard having no lawful children, hath thereby power to teſt, *June* 18. 1678, Commiſſioners of the ſhire of *Berwick*. But it hath no effect as to his heritable rights, which his teſtament cannot reach: it will have the like effect, if the baſtard obtain from the King, the power of teſting: and therefore a baſtard's legatar was preferred to the donatar of baſtardy, *July* 7. 1629, *Wallace*. In which caſe it was found, *that* the relict had her half: and if the baſtard had lawful children ſurviving, he may teſt without any gift, none being concerned but his children, to whom alſo he may name tutors, as was found, *March* 8. 1628, *Mure*; and theſe will ſucceed him as heirs, or executors. The effects of baſtardy, in hindering their ſucceſſion to others, falleth to be conſidered in the ſubſequent titles, concerning ſucceſſion.

XLVI. It remains to be cleared, whether the baſtard's debts follow his eſtate, and what diligence of lawful creditors will exclude, the donatar or fiſk: it was ſo found, that the baſtard's creditor, arreſting before his death, had acceſs, notwithſtanding the baſtardy, *Had. Feb.* 26. 1611, *Clerk contra E. Perth*. The difficulty will be of the diligences competent after the baſtard's death, ſeeing he hath none to repreſent him; yet baſtardy is but a ſpecies of *ultimus hæres*, the ground in both being the ſame, that the King is heir, becauſe there can be no other heir, and ſo is laſt heir. And therefore in both caſes, the eſtate is liable to the debt, which may affect it, *contra hæreditatem jacentem* by adjudication, calling the officers of ſtate and donatar; *Craig* is of the ſame opinion, *lib.* 2. *D.* 17. § 12. & *Dieg.* 17. § 16. and *it* was ſo found, *Spotiſ.* baſtardy, *July* 29. 1566, it was alſo found, that the donatar of baſtardy purſuing for payment of a bond due to the baſtard, was liable to to fulfil the baſtard's back-bond, *June* 20. 1671, *Alexander*.

XLVII. *Ultimus hæres* [m] may ſeem to be a ſucceſſion from the dead, and to come in amongſt other heirs; yet though it hath the reſemblance of an heir, becauſe

* *Craig*, II. 18. 16. ſeems to differ from the learned author. His words are: "Nam apud nos ſi baſtardus *inteſtatus* obierit, nec liberos ex legitimo matrimonio ſuſceptos habuerit, in mobilia ſolus Rex baſtardo ſuccedit, ſalvo eo jure, quod ad uxorem pertinet, nempe demidia parte."

** This deciſion not found.

[m] See below, IV. 13.

FH
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auſe it hath effect, when there is no other heir, and makes the heritage liable to ay the defunct's debts, it is only a caduciary confiſcation of the defunct's eſtate, vith the burden of his debt, but no proper ſucceſſion to him therein, which appear-th thus; the heir is one perſon in law *with the defunct*, and is therefore perſonal-y obliged for all the defunct's debts, ſo is not the fiſk, againſt whom or the do-natar there lieth no perſonal action for payment, but for reſtitution, if he have in-romitted, and *if not*, *only* real action *contra hæreditatem jacentem*, which is moſt pro-per by adjudication, being the ſupplement of ordinary actions, or executions com-petent by law. For there being no party to repreſent the defunct debtor, there can be no decreet, but *cognitionis cauſa*, and adjudication following thereupon, in which the fiſk, or donatar is to be called paſſive, as the party having intereſt, to ſee that the debt be due, which will affect the defunct's caduciary heritage, to the detriment of the fiſk, or donatar. So then *ultimus hæres*, and baſtardy, are of the like nature, which being caduciary confiſcations, fall to the fiſk, be-cauſe no other can have right. There may be this difference betwixt them, that in the caſe of the laſt heir, creditors, for their ſatisfaction, may confirm the de-funct's moveables, and ſo recover the ſame, for their own ſatisfaction; in which caſe they would be liable, as other executors, to the remanent creditors of the defunct, and to the fiſk, or donatar, for the ſuperplus, as in the place of neareſt of kin, and to the relict alſo for her part; but this being only for obtaining their own ſatisfaction, and for ſhunning a more extraordinary way, by adjudication (which alſo they may uſe at their option) they ought not, in prejudice of the fiſk, to have the third part of the defunct's part, as other executors: but in the caſes of baſtardy, confirmation of executors is not competent; becauſe the baſtard, being excluded from the power of making *a* teſtament, can have no executor.

Concerning laſt heir, the greateſt doubt is, who they are, and in what caſes they take place. As to the firſt, *Craig*, *lib.* 2. *Dieg.* 17. § 11. is not poſitive, whether ſuperiors be laſt heirs of the defunct, in the fees held of them, or if the King be the laſt heir for all: and according to the antient feudal cuſtoms, there is no doubt, the feus returned to the ſeveral ſuperiors; for thereby none could ſucceed (without expreſs proviſion in the contrary,) but the lawful iſſue, *or* the deſcendents of the firſt vaſſal, whoſe perſon and race was peculiarly choſen and confided in by the ſuperior. But now fees not being gratuitous, as at firſt, but for onerous cauſes, beſides the *reddendo and ſervice*; they are ordinarily granted to the vaſſal, and his heirs whatſomever; which failing, the King by his prero-gative royal, excludeth all other ſuperiors, who are preſumed to retain no right, nor expectation of ſucceſſion, unleſs by expreſs proviſion of the inveſtiture, the fees be provided to heirs-male, or of tailzie; which failing, to return to the ſu-perior, in which (*caſe*) he is proper heir of proviſion *.

As to the other doubt, in what caſe the King is laſt heir, *Craig*, in the forenamed place (II. 17. 11.) relateth, that ſome were of opinion, that if the defunct had no heirs within the ſeventh degree, the King taketh place as laſt heir: and that others thought it to hold in collateral ſucceſſions; but his own opinion is in the contrary, that any heir, of what degree ſoever, hath right, which ſuiteth with the ground now laid down, that the King hath right, as laſt heir, to the heritage becoming caduciary; becauſe no other party can be inſtructed lawful heir: ſo he reporteth, it was found in the caſe of the Earl of *Marr*, who was ſerved heir to Lady *Eliſabeth Douglas* Counteſs of *Marr*, beyond the tenth degree. And that the Lord *Seatoun*, that he might have a title to the redemption of the lands of *Longnidrie*, againſt *Forreſter*, ſerved himſelf heir to the granter of the wadſet, beyond the ſeventh degree, whereof ſeveral degrees were collateral. And the *French* King *Henry* IV. ſucceeded to *Henry* III. though not within the tenth de-gree.

The

* *Nov.* 1687, *Wallace contra heirs of line of James Tenant*, obſerved by Sir *Patrick Home*; The Lords found, where an infeftment was granted to heirs-male, and theſe had failed, that the King had right as *ultimus hæres* preferably to the heirs of line.

The gift, or right of *ultimus hæres* hath no effect, till decreet of declarator be obtained thereupon, in the ſame way as in baſtardy, *July* 30. 1662, *L. Balnagowan*; *July* 31. 1666, *Crawford*. Where a general ſummons againſt all and ſundry was found ſufficient. But if there were a relict or executor, they ought to be particularly cited.

TITLE IV.

Succeſſion, by the Law of Nature, by the Jewiſh Law, by the Civil and Feudal Law, and our Law, where, of Deathbed, *Annus deliberandi*, and Kinds of Heirs in *Scotland*.

I. *Whether in equity there be a rule in ſucceſſion.*

II. *That rule is the expreſs will, or preſumed will of the defunct.*

III. *Children are the firſt degree of ſucceſſion by the preſumed will of defuncts.*

IV. *Whether in equity, there be right of repreſentation.*

V. *Failing deſcendents, aſcendents ſucceed in equity.*

VI. *Failing both, brothers and ſiſters ſucceed.*

VII. *Failing theſe, the neareſt agnate ſucceeds.*

VIII. *The ſucceſſion of cognates.*

IX. *The Jewiſh ſucceſſion.*

X. *Fathers could not prejudge the primogeniture of their eldeſt ſons, failing ſons, daughters ſucceeded, and the right of repreſentation took place.*

XI. *By the Jewiſh ſucceſſion, failing deſcendents, it paſſed to agnates-male.*

XII. *Whether in the Jewiſh collateral ſucceſſion, there be right of repreſentation.*

XIII. *Why no females but daughters ſucceeded among the Jews.*

XIV. *Why parents ſucceeded not amongſt the Jews.*

XV. *Succeſſion amongſt the Romans was firſt by teſtament.*

XVI. *If there was no heirs inſtituted by teſtament who ſucceeded.*

XVII. *Failing children, the neareſt agnates, but no parents ſucceeded.*

XVIII. *The Roman ſucceſſion by the Prætorian law.*

XIX. *Their ſucceſſion, by* Juſtinian's *novel conſtitution.*

XX. *In feudal ſucceſſion, the firſt rule.*

XXI. *The next rule.*

XXII. *Primogeniture how eſtabliſhed in feudal rights.—Expediency thereof.*

XXIII. *Succeſſion in* Scotland, *in moveables and immoveables.*

XXIV. *The ſeveral degrees of ſucceſſion in moveables.——By will.—How limited.—*Ab inteſtato.*—Relicts ſhare.*

XXV. *Succeſſion in heritable rights.*

XXVI. *The difference betwixt the two ſucceſſions.*

XXVII. *The privilege of heirs, as to deeds on deathbed.*

XXVIII. *What is eſtimated deathbed, and how proved?*

XXIX. *Againſt what rights deathbed is extended, where, of holograph writs.*

XXX. *Deathbed annuls no deeds for cauſes onerous.*

XXXI. *Diſpoſitions of heritage in teſtaments are equally ineffectual, as if on deathbed.—The heir is univerſally liable.*

XXXII. Annus deliberandi. — *Even real actions are delayed.*

XXXIII. *Kinds of heirs in* Scotland.—*Of line, tailzie, or proviſion.—Succeſſion* ab inteſtato, *or heirs of line.*

XXXIV. *No place for adoption, nor baſtards, or cognates in ſucceſſion, with us.—Repreſentation takes place.*

XXXV. *Parents ſucceed to their children, and exclude collaterals, or their repreſentatives, except brothers and ſiſters, and their deſcendents.*

SUCCESSION to defuncts is the moſt important title in law; for thereby the rights of all perſons do neceſſarily paſs once, and frequently oftener, in every generation; and therefore the rule and courſe of ſucceſſion ought to be accurately ſearched out, and followed; and becauſe the channel of ſucceſſion is with us divided in two currents, by the one whereof all heritable rights, and by the other all moveable rights, are conveyed from the dead to the living, the firſt paſſing unto heirs, the ſecond unto executors: we ſhall in this title conſider that which is common to ſucceſſion, and in the ſubſequent titles, that which is proper to the ſeveral kinds thereof. As to the common conſideration of ſucceſſion, we muſt ſeverally inquire; Firſt, What natural equity holdeth forth of ſucceſſion. Secondly, What the judicial law. Thirdly, What the civil Roman law. Fourthly, What the feudal cuſtoms. And laſtly, What our own law and conſuetude provideth concerning ſucceſſion.

I. For the firſt, It may ſeem that ſucceſſion hath little foundation, far leſs a competent regulation, in equity, or by the law of nature; becauſe the matter of ſucceſſion is ſo variable, that every nation, yea, almoſt every province, and many cities, have their ſeveral conſtitutions and cuſtoms for ſucceſſion, arguing it to be wholly in the arbitriment of *the* people, and *of the* authority over them. Yet this will not follow, that ſucceſſion hath no riſe, nor rule in equity: for, as hath been oft-times ſhown before, moſt of the rights of men are ordered in equity; yet ſo, as they are put in the owners power, who may alter the ſame by their will. So it will be found in the matter of ſucceſſion, which appeareth thus: 1. Succeſſion was before conſtitutions or cuſtoms: of conſtitutions, there will be no doubt, theſe are but rare to this day, ſucceſſion being yet ordinarily by cuſtom, and cuſtom neceſſarily implieth antecedent acts of ſucceſſion, inductive thereof, which therefore behoved to have ſome other rule than the cuſtom thereby introduced. 2. Where there is neither law nor cuſtom concerning ſucceſſion: as when people from divers countries do gather into new plantations in America, and live not ſeverally, as parts of their mother-countries, but jointly, ſuch have goods, which by their death become not caduciary or *nullius*, to be appropriated by the firſt occupant. If therefore they remain in the property of ſome perſons, which needs muſt be by ſome law, it can be by no other than natural equity, or the law of rational nature. 3. It is not to be thought that GOD, who hath allowed property, would leave man deſtitute of a natural rule, whereby to regulate it after the owner's death, tho' there were no human law nor cuſtom about it.

II. But it is not ſo dubious, that there is a rule of equity in ſucceſſion, as what it is; for clearing whereof, we ſhall parcel it out thus: Firſt, Every right, being a faculty, or power of exaction or diſpoſal, it is a chief intereſt and effect of it, that the owner may diſpoſe thereof not only to take effect preſently, but, if he pleaſe, to take effect after his death; and, by the law of nature, the ſole will of the owner is ſufficient to paſs or tranſmit his right, if communicable, to take effect when he willeth in his life, or after his death. So then the firſt rule of ſucceſſion in equity, is the expreſs will of the owner, willing ſuch perſons to ſucceed him in whole, or in part. It may be objected, that the will of the owner is not the rule of ſucceſſion; becauſe there lieth upon the owner a natural obligation to provide for his relations, not only during his life, but after his death; as it is ſaid, 1 *Tim.* v. 8. "He that provideth not for his own, eſpecially "thoſe of his own family, hath denied the faith, and is worſe than an infidel;" which importeth, that infidels have naturally that principle: and therefore the firſt member of ſucceſſion in equity muſt be thoſe of the defunct's family, and not thoſe of his inſtitution or choice. This doth indeed well conclude a natural obligation on all men to provide *for* their own; but, 1. It will not extend ſo far, as to incapacitate the owner to diſpoſe of his own, either in his life, or after his death; ſo that there remain a competent proviſion for his own, otherwiſe he might not even gift in his life; but he may gift, both to take effect in his life, and after his death: and is not neceſſitated to inſtitute his own as *his* heirs,

but to provide them. 2. The duty of proviſion is a perſonal obligation, but the power of diſpoſal, and ſucceſſion thereby, is a real right, which are *toto genere* different rights; now real rights are not hindered, nor altered by perſonal obligations, tho' the diſponer hath failed (*therein*,) and remains debtor; as an obligement to diſpone is no diſpoſition: but the preſent diſpoſitive act of the will doth *alone* conſtitute or convey the right; which, tho' it be poſterior to an obligement in favour of any other, that doth not annul the diſpoſition, tho' it oblige the diſponer.

If there be no expreſs will of the defunct, the main difficulty is, what is the ſecond member of natural ſucceſſion, wherein the preſumed will of the defunct takes place, which hath this rule, *quod naturaliter ineſſe debet, præſumitur*: and therefore the defunct's will is preſumed to inſtitute his own, whom he is naturally obliged to provide in the firſt place; ſo that it is not the obligement to provide, but the defunct's will preſumed thence, which diſpoſeth upon his ſucceſſion; for the obligement to diſpone, and the actual diſpoſition, are different *toto genere*; and if the obligement to provide were the rule, the expreſs will of the owner could not over-rule it. Where there is a cuſtom of ſucceſſion, the defunct's will is preſumed to be according to that cuſtom; which being a law by the common authority where the defunct lived, importeth his will or conſent, at leaſt by ſubmiſſion. The preſumed will of the defunct to provide his own, is not indefinite of all his own; but it hath a natural order, or ſubſtitution (*of perſons*) ſtanding in the neareſt degree of conſanguinity: for natural reaſon ſheweth, that as there is not an equal relation, ſo there cannot be an equal diviſion to all; and there being no natural rule of proportion, the neareſt degree muſt exclude the further degrees in ſucceſſion; which is clearly held forth in the foreſaid text, having an explicatory and applicatory term, "eſpecially thoſe of his own family;" and as the proportion is unknown, ſo the benefit, being extended to all degrees, would evaniſh; therefore whatever natural affection, or charity, *might* oblige the defunct to have done expreſsly, his preſumed will hath no rule beyond the firſt degree.

III. Fourthly, Therefore the firſt degree of ſucceſſion, by the conjectured will of the inteſtate, is of children, according to that, *Rom.* viii. 17. "If children, then "heirs:" which conſequence doth neceſſarily import, that all children are heirs: neither can this be an alluſion from the judicial law, by which all children were not heirs, but the male excluded the female; therefore it muſt needs be a conſequence from the law of nature: and ſeeing there is no different proportion held forth by this text, or by the light of nature, the ſucceſſion of all children muſt be in equal ſhares, whether male or female; for in all communions, and partnerſhips, an equal diviſion takes place, except an unequal be expreſſed.

IV. It is more dark, whether by the law of nature, there be competent the right of repreſentation, whereby the iſſue of the defunct children repreſent them, and come in with the ſurviving children, to get that ſhare which their defunct parent would have got, if alive; whereby they would not ſucceed *in capita*, the whole ſucceſſors getting equal ſhare, but *in ſtirpes*; whereby the iſſue of the defunct child, tho' they ſucceed equally among themſelves, yet unequally with the ſurviving children; becauſe the whole iſſue of the defunct, get but an equal ſhare with each of the ſurviving children: as if a father having three children, the eldeſt dying before him, leaves one child, and two oyes by another child; if there be place for repeſentation, the heritage would divide in three, the two ſurviving children will have two third parts, the other third will divide in two, whereof the child of the defunct will get one half, and the other half will divide equally betwixt *his* two oyes: ſo then the queſtion is, whether the deſcendents will thus ſucceed, or if the ſurvivers will wholly exclude the iſſue of thoſe deceaſing.

This right of repreſentation taketh place with us, and moſt other nations, in the right of immoveables, which we call heritable rights, whether it be of deſcendents or collaterals; but doubtleſs in that the courſe of the law of nature is altered

ltered, for the preſervation of the ſtock or ſtem of the family: ſo that it is clear, hat there is no right of repreſentation in collaterals, by the law of nature; as hat the child, or grandchild of a brother ſhould come in with a brother, beauſe the propinquity of blood, natural affection, and ſo the preſumed will of he defunct, is diminiſhed: but it is not ſo clear in deſcendents, neither ſhall we e poſitive in it; but it ſeems moſt ſuitable to reaſon and the text adduced, that f the iſſue of defunct children remain in the family, that they ſhould come in y repreſentation in place of their defunct parent; for thoſe that are in the faily extendeth to all that are not foriſ-familiated, whether children or grandchilren, to whom there remaineth the like affection in the common parent: but when the defunct child was foriſ-familiated, and ſo preſumed to have been proided, and to have gotten a ſhare, and therewith put out of the family, to live n a diſtinct family; in that caſe there ſeems no ground for repreſentation, which loth agree to our cuſtom in the ſucceſſion of moveables, wherein there is no right f repreſentation; but the neareſt of kin exclude the iſſue of the defuncts, which were of the ſame degree, which ſucceſſion is certainly more near unto the natural ucceſſion: ſo what hath been ſaid, may ſufficiently clear the natural ſucceſſion of he deſcendents, whether children or grandchildren, and while there are any deſcendents, there is place for no other.

V. The third branch of natural ſucceſſion, failing the expreſs will of defuncts, and their deſcendents, or the iſſue of their bodies, is of parents; among whom thoſe in the neareſt degree are preferable, as father and mother: and if he father be dead, there ſeems to be place for repreſentation to his father to come n with the ſurviving mother equally; but other parents of, or by the female ine, who are in another family, from the ground laid in the text, "of pro"viding thoſe in the family," ſeem not to come in to exclude brothers and ſiſters, nd other collaterals in that family; as the grandfather and grandmother on the nother's ſide. It will not be oppoſite to this, which is ſaid, "Children are not "to lay up for parents, but parents for children;" which is not to be underſtood abſolutely, but comparatively, and according to the ordinary courſe of nature.

VI. The fourth link of natural ſucceſſion is brethren and ſiſters, among whom brethren and ſiſters-german, being related by both bloods, exclude thoſe who are only of one blood by the father's ſide: the reaſon is, becauſe the preſumed will of the defunct, being from the intereſt and relation, thoſe of double relation, by both bloods, are preferable to thoſe of ſingle relation.

VII. The laſt degree of natural ſucceſſion is, of uncles, aunts, nephews, neices; all which being in equal propinquity to the defunct, come in together, and failing theſe, the ſucceſſion would befal equally to the neareſt degree of couſins, among whom the neareſt degree excludeth the further, without right of repreſentation: and theſe conjoined by both bloods, exclude thoſe conjoined by one; huſband and and wife do not ſucceed properly, either to other, but having a communion of goods, there is a diviſion by the death of either.

VIII. The main queſtion is here, whether there be naturally any difference in ſucceſſion, betwixt the collaterals on the father's ſide, who are called agnates, and the collaterals on the mother's ſide, who are called cognates, *Juſtinian* in his Novel Conſtitutions, *cap.* 4. N° 118. took off all diſtinction of agnates and cognates in ſucceſſion [m]: for which he is generally reprehended by interpreters, who hold ſuch a difference even in equity, cognates being conjoined by women, who ordinarily are under the power of others, even naturally by marriage: and ſo being of another family, they are not of the defunct's own family, as the agnates are, (amongſt theſe the mother, father's mother, or other aſcendents on the father's ſide in his family, are not hereby excluded) and ſo theſe, neither by their expreſs nor preſumed will, can tranſmit any goods or eſtates. Yet this point remaineth more dark; and I conceive what hath come by the mother's ſide, or by the

[m] See below, § 19. *h. t.*

the grandmother, *&c. that* therein the cognates of her blood would naturally ſucceed, becauſe there are two grounds of preſumption joined, propinquity of blood and gratitude, or remuneration to that lineage, by whom ſuch things by ſucceſſion came: ſo that *paterna paternis, materna maternis,* ought to take place in equity, as the preſumed will of the defunct, unleſs the expreſs will, or the law or cuſtom of the place, be to the contrary [n]. If the propinquity of degrees be alike, gratitude may caſt the balance. And ſo much for the natural courſe of ſucceſſion, which hath been the more inſiſted in, not only to ſhew the goodneſs and righteouſneſs of GOD, inſtructing man with an inbred law, written in his heart, tho' he were deſtitute of any human conſtitution or cuſtom, ſo that he might walk juſtly in this important matter of ſucceſſion, albeit all the lines of this divine impreſſion be not clear to our ſin-dimmed eyes: but alſo that, where poſitive law or cuſtom is dubious, in the matter of ſucceſſion, or is defective therein, emendation and extention may be fetched thereto, from the law of nature; therefore we ſhall now proceed to the poſitive law of God given to *Iſrael*, concerning ſucceſſion.

IX. The judicial law, in the caſe of the daughters of *Zelophehad*, *Numb.* xxvii. 8. determineth the order of ſucceſſion, in lands or immoveables, to ſtand as a perpetual ſtatute to the children of *Iſrael*. Thus the firſt degree of ſucceſſion is of all the ſons, whereby the daughters and their deſcendents are excluded; but the ſons do not ſucceed equally, for the firſt-born had a double portion of all that the father had, *Deut.* xxi. 17. by which the eldeſt ſon had twice as much as (*any of*) the other ſons: ſo that the heritage being divided in one portion more than were ſons; of theſe the eldeſt had two, and each of the reſt one; as if there be two ſons, it divides in three, whereof the elder hath two third parts, and the younger one third part; if there be three, the heritage divides in four parts, whereof the eldeſt hath two fourth parts, which is the half, and each of the reſt hath one fourth part. This right of primogeniture was ſo ſecured, that the father could not prefer any other ſon thereunto, *Deut.* xxi. 16.

X. *The ſecond degree of Jewiſh ſucceſſion is, that*, failing ſons, the inheritance paſſeth to the daughters equally; for tho' the text expreſſeth it to paſs to the daughter, in the ſingular number, yet it is cleared by the context, that all the daughters are therein included; for the daughters of *Zelophehad*, tho' more in number, are found to have the ſame right, and to get an inheritance among their father's brethren, by which it appeareth that the right of repreſentation had place there; for all the daughters of *Zelophehad* were but to have that ſhare which their father would have had, if he had been alive among his brethren; for they claimed the right of their father, whom they ſhow not to have been in the company of *Korah*, thereby forfeiting his right: ſo then the right of repreſentation muſt take place amongſt all deſcendents; ſo that the children of the ſons, tho' theſe ſons ſurvive not their father, would exclude the ſurviving daughters, or would come in with the ſurviving ſons, not equally and *in capita*, but *in ſtirpes*, whereby they would ſucceed to the ſhares of their pre-deceas'd fathers, by right of repreſentation.

XI. The third degree of Jewiſh ſucceſſion is, failing deſcendents, the inheritance paſſeth to the defunct's brethren; and theſe failing, to his father's brethren; and theſe failing, to the neareſt kinſman of his family, that is, the neareſt agnates on his father's ſide, where all the male-agnates of the ſame degree are underſtood. It doth not appear whether in this collateral ſucceſſion there be place for repreſentation; and tho' there be no mention of the ſucceſſion of women, or their iſſue, but only of daughters, ſome have thought, from the parity of reaſon, in every degree, failing the males, the females are to ſucceed, and to exclude further degrees of males, as if there be no brothers but ſiſters, theſe ſhould exclude the father's brother: it may be alſo thought ſtrange, that in all this courſe of ſucceſſion, there is mention of the ſucceſſion of parents.

XII.

[n] See below, § 34. *h. t.*

XII. In anſwer to theſe doubts; As to the firſt, I conceive, that in collateral ſucceſſion there is alſo place for repreſentation; ſo that the brother's ſons, as repreſenting the defunct brother their father, would exclude the father's brethren: and ſo of the reſt; becauſe it is ſaid, if there be no brethren, the inheritance ſhall paſs unto the fathers brethren; which failing, unto the neareſt kinſman; and, if there be no right of repreſentation, the couſin-german, or father's brother's ſon, would exclude the nephew, or brother's ſon; for uncle and nephew are never underſtood by the name of couſins or kinſmen; but have that ſpecial nominate relation of uncle and nephew, or father's *brother*, and brother's ſon; and therefore the brother's ſon, as repreſenting the brother, muſt ſucceed, and exclude the father's brother. 2dly, *Cæteris paribus*, ſucceſſion will certainly deſcend to the brother's ſon, and not aſcend to the father's brother.

XIII. As to the ſecond doubt, I hold, that only daughters and their iſſue do ſucceed, and no other females or their iſſue; the reaſon is, 1. From the text, where failing ſons, daughters are expreſſed; but failing brothers, ſiſters are not ſubſtitute, but uncles. 2. The diviſion and ſucceſſion *of* the land of *Canaan* was typical, and was not to paſs from tribe to tribe; and therefore daughters ſucceeding are appointed to marry in their own tribe; becauſe ordinarily they were to be married when their father's ſucceſſion did probably appear; but this could not have been if fathers ſiſters, and thoſe of further degree, had ſucceeded, theſe being ordinarily married before their ſucceſſion.

XIV. As to the third, concerning ſucceſſion of parents, It is ſure, mothers and all cognates by the mother's ſide, being ordinarily of other tribes and families, were, for the reaſon now adduced, excluded from the ſucceſſion. The text is clear, that only kinſmen *of* the family, that is on the father's ſide, ſucceeded; but the reaſon why there is no mention of fathers, *&c.* * may be becauſe the land of *Canaan* being typical, it is fixed to tribes and families, and uſes not to paſs by teſtament or proviſion, or to be acquired further than by wadſet, to return at the jubile; therefore among the Jews lands paſſed by the ordinary courſe of legitime ſucceſſion, and ſo came from the fathers to the children, which preſuppoſes the father to have been pre-deceas'd, and could not ſucceed. By this tract of the Jewiſh ſucceſſion it is clear, that GOD, by his poſitive law, altered the effect of equity, and of his moral law, in ſucceſſion: for it hath been now ſhown from that place, "if children, then heirs," that all children muſt needs be heirs, not by the judicial law, but by equity; and yet by the judicial law, not all children are heirs, but ſons exclude daughters, and other females are excluded by males of a far diſtant degree, which neceſſarily infers, that for expediency, the courſe of ſucceſſion may be altered. The like muſt alſo be in other effects of equity, which are in our power.

XV. The order of ſucceſſion in the civil law, did exceedingly vary, being in many points different, in the antient law of the twelve tables, in the honorary law, introduced by the edicts and cuſtoms of the Pretors, who had authority to ſupply and correct the antient law, and in the imperial conſtitutions, eſpecially in the Novel Conſtitutions of *Juſtinian*. They did all agree in this, that the chief mean of ſucceſſion, is the will or teſtament of the defunct, which they held ſo ſacred, that all pactions or proviſions, which might any way hinder the free liberty of teſting, or any act whereby defuncts might be reſtrained, or conſtrained in the free diſpoſal of their eſtates, were not only null, but excluſive, of ſuch perſons, from having any intereſt in the defunct's inheritance; yet were the *Romans* ſo ſenſible of the natural obligation of parents to provide their children, that their middle laws, neceſſitated fathers either to inſtitute their children, or expreſsly to exheredate, or diſheriſh them, expreſſing their delinquency of ingratitude, the kinds and meaſures whereof the law did determine; ſo that if the children

* See below, § 35. *h. t.*

were paſt by in ſilence, and neither inſtituted nor exheredate, the law declared the teſtament void; and if they were exheredate without a due and true offence, it did allow the children *querelam inofficioſi teſtamenti*, that is, complaint againſt the teſtament made *contra officium*, *viz.* the natural obligation, or duty of parents to provide their children; for the like reaſon, the ſame complaint was competent to the fathers, againſt the teſtament of their children; but becauſe that remeid might have been elided, by exhauſting the heritage by legacies, whereby the inſtitution of the children might prove ineffectual for their proviſion, therefore the law allowed children a legitime portion, being the fourth part of the heritage; which, *in ſome ſort*, *did* extend to all heirs. *Falcidius* was the author of that noble law, reſtraining legacies, ſo that there might remain a portion to the defunct's heirs; which *Law* and *Portion*, in honour of his name, was called the *Falcidian Law*, and *Portia Falcidia*, whereby the fourth part of the free goods of the teſtator, remained always ſecure againſt legacies, and when a new ſubtility was invented, to fruſtrate the *Falcidian* law, by taking away the heritage, not directly by legacies, but indirectly by truſt or *fidei commiſſas*. *Trebellianus* procured that ordinance of the Senate, called *Senatus conſultum Trebellianum*, whereby that portion called alſo *Trebellianica*, ſhould remain ſafe againſt fidei-commiſſary truſts: and though it be the common opinion of the Doctors, that if the defunct expreſsly prohibit the heir, to take the benefit of his *Falcidia* or *Trebellianica*, he will be thereby excluded, (*Nov.* 1. *cap.* 2. § 2.) yet the common opinion is alſo, that it cannot be extended to children, as to their legitime, whom the law hath fully ſecured, either by ordaining them to be inſtituted heirs in whole, or at leaſt in a fourth part, which is their natural or legitime portion: and if they be inſtituted in leſs, they have right to the ſupplement of their legitime portion, or otherwiſe they muſt be expreſsly and juſtly exheredate, and they have the common benefit of other heirs, of their *Falcidia*, or *Trebellianica*, which the teſtator cannot fruſtrate, without expreſs prohibition.

XVI. If there be no lawful teſtament, by the law of the twelve tables (which is the antient *Roman* law, and in compariſon of the *Prætorian* or Imperial law, is only called the law, or the civil law) the ſucceſſion of the defunct falleth, in the firſt place, to the defunct's children, or neareſt deſcendents, without diſtinction of any lawful children, though adopted, or poſthumous, or though of divers lawful marriages, whether male or female, ſo that they remain in the defunct's family, and in his paternal power; for thoſe who are emancipated, and demitted from the family, and from under the paternal power, they are either really or preſumptively provided, and ſo have no ſhare of the ſucceſſion: of this paternal power and emancipation, ſee before, title, Obligations of Parents, (I. 5. 11. & 13.) thoſe in the family were called *hæredes ſui & neceſſarii*; becauſe they were *ipſo facto* heirs without ſolemnity or entry; among theſe, the right of repreſentation had place, ſo that for example, the grand children ſucceeded with the children, but not equally, *& per capita*, but *per ſtirpes*; for the grandchildren had but the ſhare of their defunct parent equally among them, and ſo of all other deſcendents being in the family. The Prætors did in a part alter this, and brought in the children or iſſue emancipated with thoſe in the family, without diſtinction; providing the emancipated brought in their goods, and adjected the ſame to the inheritance, *per collationem bonorum*; yet becauſe, only the law, that is, the antient law, could make heirs, the emancipated were not called heirs, but *bonorum poſſeſſores*. The *Prætorian* law did alſo take off the neceſſity and damage of the ſucceſſion, that none might be neceſſitated to be heirs, yea, all heirs had the benefit of an inventary, being timeouſly and duly made, beyond which they were not liable for the defunct's debts.

XVII. The next degree of ſucceſſion, by the antient *Roman* law, was failing deſcendents in the family, the neareſt agnates of the ſame degree ſucceeded; but there was no ſucceſſion of parents, nor of cognates related by the mother's ſide; here

here mother comprehends grandmother and all other aſcendents of that kind; ſo the next degree was of brethren and ſiſters, *&c.*

XVIII. The *Prætorian* law did alſo emend this, and firſt brought in the fathers, with the brothers and ſiſters-german, or of both bloods: and thereafter the *Tertullian* Senatus-conſult, failing the father, brought in the mother *equally* with the ſiſters in their ſhare; but not with the brothers-german, who, if there were no ſiſters-german, excluded their mothers totally; as if, for example, there were a brother-german, and a ſiſter-german, the father being dead, the brother had the half, and the ſiſter's half was divided equally betwixt her and her mother, and ſo the mother is preferred to the father's father, and to the defunct's brethren, and ſiſters of one blood; failing thoſe of this degree, the brothers and ſiſters by the father's ſide; and theſe failing, the neareſt degree of agnates, in which the parity of reaſon inferreth, that as in brothers and ſiſters, ſo in other collaterals, thoſe of both bloods make a nearer degree, than thoſe of one blood; failing all theſe, the *Prætorian* law admits ſpouſes to be heirs, each to other, the huſband to the wife, and the wife to the huſband; and laſtly, the fiſk takes place as laſt heir.

XIX. But the Emperor *Juſtinian*, by the Novel Conſtitution, 118. *cap.* 4. took off all diſtinction of agnates, and cognates, and brought in the mother equally with the father; with what reaſon or approbation, we have touched before [p]. This is the ſum of ſucceſſion by the *Roman* law (wherein there is no diſtinction of moveables or immoveables) and which takes up no ſmall part of the body of the civil law, and writings of lawyers; wherein to inſiſt particularly, would raiſe a great bulk, unneceſſary for our purpoſe; whereunto, we conceive this ſummary may ſuffice. But while the *Roman* Empire and laws were trampled down by the Northern nations, the feudal law aroſe, and doth yet continue with the civil law of the *Romans*, and other nations, by which there is a great diſtinction introduced, in the ſucceſſion, in moveables, and in lands or immoveables, which are now of a feudal nature: we ſhall therefore go on to the common feudal cuſtoms.

XX. The feudal cuſtoms are local, and it is hard to find a common rule therein for ſucceſſion, which is variable, according to the diverſity, of place; only, if we call to mind what was formerly ſaid, title, Infeſtments, (II. 3. 5. & 6.) of the diſtinction of antient and proper fees, and of declining, and improper fees; the nature of proper fees will hold forth the matter of ſucceſſion therein; for a proper fee, being freely granted by the ſuperior to his vaſſal, for military ſervice, the vaſſal's perſon being choſen by the ſuperior, and a ſpecial truſt repoſed in him, and the like hope of his iſſue, *Patrem ſequitur ſua proles: which* was at firſt ſo ſimply done, that entering the vaſſal in poſſeſſion, in preſence of his peers, was a ſufficient conſtitution of his right, and the inveſtiture ſignified then, *rather* the act conſtituting, *than* the writ evidencing the fee; in which caſe, from the nature of the right, it is conſequent, *firſt*, That none ſhould ſucceed in the fee, but ſuch as were fit for the military ſervices; and ſo women, and their iſſue were utterly excluded, and all the males ſucceeded equally. 2*dly*, In proper fees, none could ſucceed but the lawful iſſue of the firſt vaſſal, whoſe perſon and iſſue was ſpecially choſen; among which, firſt the male iſſue of the vaſſal who died laſt infeft, according to their nearneſs, do ſucceed with the right of repreſentation; next unto the deſcendents among the collaterals, brothers, and their male iſſue; and among theſe, the brothers-german, and their iſſue, exclude the brothers by one blood; and after brothers, fathers brothers, and their male iſſue; and ſo other agnates of the laſt deceas'd, being always of the male iſſue of the firſt vaſſal, which being extinct, the fee ceaſeth, and returneth to the ſuperior, not as the vaſſal's heir, but by virtue of that *directum dominium*, which ſtill remained in the ſuperior. In this courſe of feudal ſucceſſion, there could be no place to the v ſſal's father, or other aſcendents; becauſe, if the fee were a new fee or conqueſt by the ſon, his

[p] See above, § 8. *h. t.*

his father nor his brethren could not ſucceed, as not being of the iſſue of the firſt vaſſal: and if it were an old fee, not purchaſed by the ſon, but whereunto he did ſucceed, it doth neceſſarily pre-ſuppoſe the death of the father, and other aſcendents, to whom the ſon could not be heir, nor ſucceed, till they were dead; but if the ſuperior receive the ſon upon the father's reſignation, it is not to be held as *feudum novum*, whereby both the brothers, father, and fathers brothers, would be excluded; and therefore if the ſon die without iſſue, and have no brother, the father ought to be preferred to the father's brother, being ſtill of the blood of the firſt vaſſal. But when by the courſe of time, fees declined from the proper nature of antient fees, and the inveſtiture did expreſs the tenor, and ſpecial nature thereof, the tenor of the inveſtiture became the firſt rule of ſucceſſion in ſuch fees, and came in place of the teſtament or will of the defunct; for, ſeeing the vaſſal could not alter the ſucceſſion, without conſent of the ſuperior, he could not effectually teſt thereupon.

XXI. In the next place, what is not the expreſs will of the vaſſal, and the ſuperior by the tenor of the inveſtiture, is regulated by their conjectured will, from the nature of the fee, and propinquity of blood: ſo if the fee be originally granted to a woman, her iſſue female ſucceed, as well as the male; or if the *reddendo* be not military ſervice, but money, grain, or ſervices competent to a woman, or manual ſervices, wherein there is no choice of perſons, *as tilling*, &c. and ſo generally fees holden blench or feu, in all theſe women may ſucceed; becauſe they are not excluded by the nature of the ſervice. 2. If the fee be granted to heirs whatſomever, not only doth the iſſue of the firſt vaſſal, but all other his lawful heirs, or the lawful heirs of the laſt deceaſing vaſſal, whether of the iſſue of the firſt vaſſal, or not, do ſucceed: and now fees being ordinarily acquired by ſale, excambion, or the like onerous titles, *feuda ad inſtar patrimoniorum ſunt redacta*; heirs whatſoever are commonly expreſt, and if they were not, they would be underſtood; for that which is ordinary is preſumed.

XXII. The courſe of feudal ſucceſſion, hath given the prerogative of primogeniture, to the eldeſt male of the neareſt degree to the defunct vaſſal, who excludes not only the females of that degree, but the males alſo, and their iſſue, not only among us, but in *England*, *France*, and moſt other nations, which is more conſonant to the nature of feudal rights, that the fee be not made inſufficient to maintain the vaſſal, and that many vaſſals be not ſubſtitute in place of one. Before we deſcend to our own cuſtoms, it will be fit to conſider the juſtice and expediency of this common cuſtom in feudal ſucceſſion, the lawfulneſs of primogeniture, will be eaſily evinced from what hath been ſaid already upon ſucceſſion, wherein the will of the proprietor is the rule even in equity: and though he be naturally obliged to provide for his own, that perſonal obligation reacheth him, but not the inheritance, nor doth it oblige him to make theſe to ſucceed, but to give them competent proviſions; and therefore the judicial law, which is the poſitive law of God, evidenceth ſufficiently the lawfulneſs, and in ſome caſes the expediency of altering the natural courſe of ſucceſſion; and therefore, not only the male iſſue is thereby preferred to the female, but all the females are utterly excluded, except daughters, that the inheritance may remain within the tribe; and the preference of males is, becauſe females are leſs fitted for management of lands, and therefore are to have a portion, which the judicial law calleth the Dowry of Virgins.

The expediency of primogeniture, is partly public, and partly private: the public expediency is, that the eſtates of great families, remaining intire and undivided, they, with their vaſſals and followers, may be able to defend their country, eſpecially againſt ſudden invaſions; for with us in *France*, *Holand*, and *in* many other places, the great families are the bulwarks of their country; having means to maintain themſelves, and their followers, for ſome time, without ſtanding armies, conſtant pay, and ſubſidies. The private expediency is, for the preſervation of the memory, and dignity of families, which, by frequent diviſion of the

the inheritance, would become deſpicable or forgotten. Primogeniture taketh place in *Germany* and *France*, in proper fees like unto our ward-holdings, but not in allodials and lands holden freely, or for cane or rent, *Guidelinus de jure noviſſimo*, *lib.* 2. *cap.* 13. relateth, that, in many of the *German* and *French* provinces, the male gets two third parts, and the females one; in other provinces the children of the firſt marriage, ſucceed in all the lands the parents had, during that marriage, and ſo in order the children of after-marriages; and in other provinces and cities, the youngeſt ſon ſucceedeth in all, excluding the reſt; and generally, baſtards are not admitted, even to the ſucceſſion of their mothers; and in *England*, though primogeniture have the prerogative by the common law, yet it hath an exception of the cuſtom of *Kent*, where primogeniture hath no prerogative, and therefore that cuſtom is called the *Gaball* kind of *Kent*, which is as much as "to give to all the kind." The cuſtoms of *England* and *Germany* are contrary in this; that, in *Germany*, parents come in, *in* the next place after deſcendents, and exclude brothers and ſiſters, and all other collaterals; but in *England*, parents do never ſucceed; ſo if the defunct have no iſſue, brothers nor ſiſters, nor their iſſue, the father's brother ſucceeds, and excludes the father, though his relation be by the father, and *be* much further diſtant than the father; and it ſometimes falls out, that the uncle ſucceeding, dying without iſſue, the father *of the defunct nephew* ſucceeds his brother, and ſo accidently and mediately ſucceeds to his own ſon.

XXIII. To return to our cuſtoms in ſucceſſion, in reſpect of the matter, it is divided in two branches, the one is of moveables, the other of immoveables, which do as much differ, as do the cuſtoms of divers nations; the ſucceſſor in immoveables doth only retain the name of heir, and therefore immoveables are called heritable rights, and that part of the moveables which belongs to the heir, is called heirſhip-moveable. The ſucceſſor in moveables, from the office of executing the defunct's will, expreſs, or preſumed, is called executor. We ſhall here ſummarily, at one view, ſet forth the whole matter of ſucceſſion with us, which we ſhall more fully and diſtinctly follow in the enſuing titles. Heirs in law are called univerſal ſucceſſors, *quia ſuccedunt in univerſum jus quod defunctus habuit*, they do wholly repreſent the defunct, and are as one perſon with him, and ſo they do both ſucceed to him active, in all the rights belonging to him, and paſſive, in all the obligations and debts due by him; and when they do not orderly enter, they become ſucceſſors paſſive, liable to the defunct's debt, but not heirs active, having power to claim his right, till they be entered according to law: other ſucceſſors are called ſingular ſucceſſors, as aſſignies and purchaſers, but heirs only are univerſal ſucceſſors: and now, when heirs are of divers kinds, as ſome in moveables, ſome in lands and other heritable rights; and of theſe, according to the inveſtiture, ſome ſucceed to lands provided to heirs of line; ſome to lands provided to heirs-male; ſome to lands otherwiſe tailzied; in all which ſome heirs ſucceed alone, and in *ſolidum*, ſome ſucceed in *parte & pro rata*: yet all may be ſaid to ſucceed in *univerſum jus quod defunctus habuit*: By *univerſum jus*, *is underſtood* the whole right, not ſimply, & *in ſolidum*; but the whole rights of ſuch a kind, either *in ſolidum*, or at leaſt *pro rata parte*, as he who ſucceeds in a half, or third part of all the defunct's rights *activè & paſſivè*, ſucceedeth *in univerſa & ſingula jura*, in all and every right, though not *in totum & ſolidum*, *in* the whole or every part of every right.

XXIV. As to moveables, we ſhall not repeat, what hath been ſaid, title, *Real Rights*, (II. 1. 2. & 3. & 4.) of the diſtinction of heritable and moveable rights, whether goods or moveable debts; but ſhall only hold forth, what becometh of moveable rights, after the owner's deceaſe. And, firſt, if the defunct be married, there was thereby a communion of goods, betwixt the defunct and the other ſpouſe, which, being diſſolved by death, the ſurviver may withdraw their ſhare, which ſhare is eſtimated by the condition of the family at that time; for if, in the family, there were a huſband, a wife and children not foris-familiated, the wife's

ſhare is the third; but if there were no child unforis-familiated, the wife's ſhare is the half, which is not properly a ſucceſſion, but a diviſion. The firſt degree of ſucceſſion, in moveables with us, is by the will of the defunct, by his teſtament, or codicil, whereby the defunct may name executors, and diſpoſe of his moveables, either in part, by particular legacies, or in whole, by an univerſal legacy, whereby, in effect, the univerſal legatar is inſtituted heir in the moveables; and if the executor nominated, be not alſo univerſal legatar, he hath but *an* office, and is not heir for himſelf, but in name, and to the behoof of the legatar, and hath but a *fidei commiſſum* of the moveables, and ſo is but *hæres fidei commiſſarius*, obliged to reſtore to the wife, bairns, their neareſt of kin, and to pay creditors *ſecundum vires inventarii*, and what remains free, to the legatars. Theſe legacies, whether particular or univerſal, do immediately tranſmit the right to the legatars, and their ſucceſſors [q]: the ſolemnities of teſtaments, or legacies, are very plain with us, but we ſhall leave them to the title Executry.

The will of the defunct is reſtrained with us, in three caſes; the *firſt* is, Baſtards cannot at all teſt, or leave legacies, unleſs they be legitimated, or have power from the King of making teſtament, or have lawful children. 2*dly*, A father is bound up in reſpect of his children in his family, which are not foris-familiated and provided for, theſe having neceſſarily their portion natural, and bairns part of gear, wherefrom their father cannot exclude them by legacies, or otherwiſe, as by donations, in contemplation of death, or any other gratuitous deed done on deathbed; ſo an aſſignation to a moveable bond granted on deathbed, was found null as to the relict and bairns part, *Spotiſ.* aſſignations, *Pyrie contra Ramſay* *. Yea, it was found, that the gift of money by the defunct, out of his own hand, on deathbed was null as to them, *ibid. Moncrieff* **. The like of an aſſignation (*on deathbed*) to a confident perſon, to the behoof of the defunct's bairns, which was found not to prejudge the relict's third, *July* 10. 1628, *Cant.* And therefore a father hath only power to diſpoſe upon ſuch a part of his goods, which are thence called dead's part, whereof, if he have a relict, and bairns in the family, the bairns part is the third, the relict's part is alſo a third, and ſo the defunct's part is only a third; but if there be no relict, then the bairns part is the half, and the dead's part is the other half; but if there be neither wife nor bairns, the defunct may diſpoſe of the whole, as perſons never married, or wives upon whom there is no reſtriction, though they have huſband or children: the reaſon of this reſtriction is, that the natural obligement for proviſion of children, of which before, is extended only to the immediate children, and not to grandchildren, neither doth it reſtrict the mother, but only the father [r], for they may diſpoſe of their ſhare of the huſband's moveables; or if they acquire, or ſucceed to any moveables, in viduity, they may entirely diſpoſe thereof, though they have children; if legacies exceed the defunct's own part, then they abate proportionally, unleſs there be a preference granted by the teſtator, or a privilege *by law*, whereof I know none with us, for even a legacy *ob pias cauſas*, viz. a mortification to a kirk, was found to have no privilege, but it and other legacies ſuffered proportional deduction, ſeeing they exceeded the dead's part, *July* 6. 1630, *Monro.* The third reſtriction of the *will of* defuncts, is in favour of their heirs of line, heirs having the ſole intereſt in heritable rights, are, by our cuſtom, juſtly excluded from coming in with other children in moveables, except that which is called heirſhip-moveables, which is the beſt of every kind of moveable, wherein the defunct's will cannot prejudge the heir.

The ſecond member of ſucceſſion in moveables is, from the inteſtate; ſo that failing the defunct's will, with the reſtrictions aforeſaid, the neareſt of kin have intereſt, both in the defunct's moveables, and office of executry; and tho' they claim

* This deciſion is not found in *Spotiſwood*. The doctrine is, however, proved by other deciſions, *June* 16. 1676, *Mitchel*; *March* 15. 1683, *Sandilands*.

** This deciſion not found. The doctrine is proved by a diviſion, *March* 15. 1634, *Brown*.

[q] See below, III. 8. 38. [r] See below, III. 8. 43. & 50. & 52.

claim not the office, yet they have a right to the goods, leaving a third of dead's part to the executors, for adminiſtration of the office. Theſe neareſt of kin take place in order, all the neareſt degree, male or female, come in equally, and there is no right *of* repreſentation in moveables. The firſt degree is children, male or female, with whom grandchildren come not in by right of repreſentation, in place of their defunct parents: ſo children have *two* intereſts in their father's moveables, *viz.* their bairns part, wherein their father cannot prejudge them, and their intereſt as neareſt of kin, whereby they ſucceed to the dead's part, in ſo far as inteſtate. Next unto children are grandchildren, or any deſcendents of the neareſt degree. Next unto theſe are brethren and ſiſters, wherein brethren and ſiſters-german, or by both bloods, exclude thoſe by one blood. Next unto brethren and ſiſters are their deſcendents, in the neareſt degree, without repreſentation. And laſt are the neareſt degree of agnates, male and female jointly, without repreſentation [s]. If there be no deſcendents, or agnates, as in the caſe of baſtards, who can have no *agnates* or others, who happen *de facto* to have no children or agnates, their goods become caduciary, and are confiſcated to the King as laſt heir, or by reaſon of baſtardy; of which before, title Confiſcation, (III. 3. 42. *et ſeq.*)

In the ſucceſſion of moveables the ſame goods or debts are not in all caſes accounted moveable, ſince the act of Parliament 1641, *renewed Parl.* 1661, *cap.* 32. whereby bonds bearing annualrent, which before in all reſpects were heritable, by the deſtination of the annualrent (which, being perfected by infeftment, is an immoveable and heritable right) are declared to fall under executry, and ſo to be moveable; and yet by the ſaid ſtatute, the relict and fiſk are excluded. The reaſon expreſſed in the ſtatute is, becauſe the obligement upon the debtor to pay annualrent, is for the profit of the creditor; and not a deſtination of infeftment of annualrent in favour of the heir, to exclude the bairns: and therefore ſuch clauſes make not ſuch ſums heritable as to the bairns, and neareſt of kin, unleſs they bear an obligement to infeft the creditor in land or annualrent: in which caſe they are properly heritable, and belong only to the heir, but if not, the ſame belongs to the bairns and neareſt of kin, *excludendo fiſcum et relictam*; whereby there ariſes a different diviſion of moveable ſums, falling under executry: *one* of ſuch as were moveable before the ſaid act, which, if there be a wife and children, are divided in three: whereof the bairns part is a third part, and the dead's part a third, *and the wife's part a third.* Another in the *ſame* teſtament of bonds bearing annualrent, which if there be bairns, is diviſible in two parts, whereof the one half is the bairns part, and the other half the dead's part, and the relict hath no part being excluded; *the fiſk is alſo excluded:* ſo that in caſe of eſcheat, ſuch ſums are not moveable, and fall not under eſcheat.

Yet, if ſuch debts become ſimply moveable by a requiſition or charge, or by the death of the debtor or creditor, before the term of payment of annualrent *, or otherwiſe, they remain in the ancient condition; and the ſtatute doth not exclude the fiſk and relict. But where a charge could not be given, through the debtor or creditor's death, and there was no requiſition provided, a decreet for payment was not found to make the ſame moveable, as it would have been if the bond had been heritable, by a clauſe of infeftment: and that becauſe, by a poſterior bond of corroboration for the ſame ſum, executors were excluded, which no change nor requiſition doth alter; but it is ſtill preſumed, that the debtor would re-imploy the ſum in the ſame way to his heirs excluding executors. And therefore a proceſs and decreet for payment, was not found to make it moveable, tho' theſe would make it moveable as well as a requiſition or charge, if it had been heritable by a clauſe of infeftment, *July* 12. 1676, *Chryſtie.* It is alſo conſequent from the ſaid ſtatute, 1. That ſuch bonds bearing clauſes of annualrent, may be exhauſted by *like* debts due by the defunct, bearing a clauſe of annualrent.

* If the creditor died before the term of annualrent, his executors ſucceeded to the bond; if the debtor died before that term, his executors, not his heir, were liable to pay the bond, *July* 29. 1030, *Carnouſie.*

[s] See below, III. 8. 32.

rent. 2. It is conſequent, that the executor will get no relief againſt the heir, of debts bearing a clauſe of annualrent, without a clauſe of infeftment, in ſo far as there are ſuch debts in the executry, but the heir will have relief thereof againſt the executor. 3. It followeth, that debts bearing a clauſe of annualrent, and no clauſe of infeftment, will not exhauſt the relict's part; becauſe, as ſhe is excluded from any ſhare of ſuch debts due to her huſband, ſo ſhe muſt be free of any ſuch debt due by him, as was found, *Dec.* 23. 1668, *M'Kenzie* [t].

XXV. Succeſſion in immoveable and heritable rights, proceeds wholly in a different manner: for ſucceſſion in moveables is more near to the courſe of natural ſucceſſion, and to the civil law of the Romans, eſpecially their ancient and middle laws; but the ſucceſſion in heritable rights agreeth more to the recent feudal cuſtoms of moſt nations, whereby primogeniture is eſtabliſhed, for the honour and preſervation of noble families, and in them for the good and ſafety of their Kings and countries.

XXVI. Succeſſion in moveables and heritables do mainly differ; Firſt, That in moveables the expreſs will of the defunct, by his teſtament, legacies and donations, in contemplation of death, have the firſt place, but in heritable rights they have no place at all; yea, no perſonal contract, or obligement of the fiar, can have any effect in prejudice of his heir, to take from him any part of the heritage, directly or indirectly, by legal purſuits thereupon, if the foreſaid perſonal right or contract was done in *lecto agritudinis* upon the fiar's deathbed, *Jan.* 7. 1624, *Schaw*. And tho' the ſame diſpoſition or contract were made in the fiar's health, or *liegie pouſtie*, it doth not alter the ſucceſſion, unleſs it be in the inveſtiture, tho', as being of itſelf or having in it virtually a perſonal obligation, it may by proceſs compel the fiar, or his heir, to denude themſelves, and to obtain new infeftments conform thereto; as if by contract a party be provided to be the contracter's heir, in whole or in part; this proviſion doth not make that party heir in any right, whereupon infeftment hath followed, which only properly are heritable rights: neither can that party be ſerved heir of proviſion to the contracter thereupon; yet the contracter may be compelled to take his right accordingly to himſelf, and *to* theſe heirs of proviſion; which if he hath not done, his other heirs may be compelled to enter, and to denude themſelves in favour of that party provided to be heir, conform to the contract; but diſpoſitions, obligations, or contracts of any heritable right, *made* on deathbed, are null and reducible, in ſo far as may prejudge the heir. If the diſponer's apparent heir be not entered heir, as charged to enter heir, he will be liable, and after horning againſt him the right may be adjudged from him; but if he cannot enter heir, upon his renunciation the right will be adjudged, whereupon infeftment will follow.

XXVII. The privilege of heirs, not being prejudged by their predeceſſors deeds done on deathbed, is, (as moſt of our laws) by ancient cuſtom, time out of mind, and not by ſtatute or written law [u]; for tho' the book called *Regiam Majeſtatem*, treat thereof, yet does not introduce it, and it hath been compiled by ſome ſtranger, who hath not fully known our law, but, by miſtake, hath reſolved moſt caſes by the cuſtoms of other nations, eſpecially of *England*. The reaſon of this cuſtom may be conjectured, not only from the nature of feudal rights, not diſpoſable by teſtament but only by inveſtiture, but alſo for public utility; becauſe perſons on deathbed are weak, the mind being eaſily affected with the trouble of the body, and ſo is eaſy to be wrought upon by inſinuations or importunities, to do deeds contrary to their intereſt and former reſolutions, eſpecially by the Popiſh clergy, who having, for their own corrupt ends, forged purgatory and prayers for the dead, the power of indulgence and pardon of ſins, did thereby deceive the Chriſtian world, and obtained, *eſpecially* upon deathbed, ſo large donations to their clergy, to the prejudice of the donatar's lawful heirs; which therefore our ancient cuſtom hath wiſely provided againſt.

XXVIII. The

[t] See below, III. 8. 47. [u] See below, IV. 20. 37. *et ſeq.*

XXVIII. The main difficulty is, in what caſes the law accounteth parties to be on deathbed, or when they are in health, and *liege pouſtie*; for theſe are the two oppoſite terms of law, *liege pouſtie* or deathbed: for clearing whereof, theſe points muſt be conſidered; 1. Whether it be neceſſary to prove, that the defunct before the deed in queſtion, had contracted diſeaſe, or become ſick; and whether it be neceſſary to condeſcend and inſtruct the ſpecial kind of ſickneſs, as that it was *morbus ſonticus*, or a diſeaſe affecting the whole body and brain; or if the keeping the houſe, and the party's dying before he went abroad, be ſufficient to infer *preſumptivè*, that he had contracted the diſeaſe whereof he died ſo ſoon as he kept the houſe. 2. Whether a contrary probation of the party's being in health, be ſufficient; as that he was of a ſound judgment and memory, and kept the ordinary time of putting off, and on his cloaths, and of eating and drinking, as when he was in health; or if writing ſecurities that require clearneſs and diſtinctneſs of mind, be ſufficient; or if doing his ordinary affairs, making bargains and accompts, tryſting for others or himſelf, playing at cards or other games within doors, giving evidence of being merry, be ſufficient to inſtruct health and *liege pouſtie*. 3. If ſickneſs contracted be preſumed or proved, whether there be neceſſity to prove the continuance of the ſickneſs till death, or that the defunct died of that ſickneſs, or if the ſickneſs once contracted be preſumed to continue, unleſs convaleſcence and recovery of health be proved. 4. Whether *liege pouſtie* by convaleſcence, be ſufficiently proved by the defunct's going to kirk and market freely, without help: and whether it be ſufficient to go to the market-place, or to the kirk, tho' there be no convention nor congregation there; or whether it be requiſite, that going to kirk and market be when there are meetings conveened there, or in market-time. 5. Whether in that caſe ſupportation being proved, it is more pregnant and preferable to the probation of walking freely, and by what acts ſupportation is inferred, whether by helping the defunct by the oxter, or by his elbow, or by his hand, be ſufficient, or if helping up ſtrairs, or down ſtairs, to and from *his* horſe, or upon a ragged way, or whether being helped by a ſtaff, will infer ſupportation. 6. Whether going freely to kirk and market unſupported, may be taken off by any probation, that notwithſtanding thereof, the ſickneſs continue whereof the defunct died. 7. Whether convaleſcence and *liege pouſtie* may be proved by any other acts, than going unſupported to kirk and market, or if equivalent acts may be ſufficient; and if going abroad about the houſe unſupported be ſufficient.

Deathbed is of ſo great importance with us, as reaching the eſtate and heritage of parties, that the Lords have been very careful for clearing and fixing the ſame, that it may not be under uncertain conjecture or probation; and whereas, by an ordinary act of litiſconteſtation, the purſuer might prove his reaſon of deathbed by any two habile witneſſes, or the defender might in the ſame manner prove the going abroad to kirk and market, or acts equivalent in defence; or the purſuer might prove ſupportation by way of reply, and all by any two habile witneſſes: yet the Lords have taken a far more ſecure way to allow probation to be adduced by either party, concerning the condition of the defunct, as to his ſickneſs or health, and concerning his going abroad thereafter, and the manner thereof; whereby neither party hath the choice of the witneſſes, to be in a capacity to influence them, but either party adduces witneſſes, and there is ſcarce any one un-examined, who knew any thing of the matter; ſo that the truth comes to clear and evident light, and the probation ſtands in place of litiſconteſtation: for albeit it bear to be before anſwer to the relevancy, and that after the probation is cloſed, they are permitted to reſume the debate as to the relevancy, as to ſuch points as they deſire chiefly to be noticed, and wherein they do believe that ſufficient probation is adduced, (which probation was cloſed, and might not be debated upon, how far any point *was* proved, which was only proper to the Lords to conſider *with cloſs doors* [w]; but ſince the act of Parliament

[w] See act 26. P. 1693, appointing cauſes to be adviſed with open doors.

ment for publication of teſtimonies [ww], the advocates pitch upon the witneſſes for each point, which they ſuppoſe proved, ſo the Lords need read no more, as they do in adviſing writs, but conſider the clauſes pitched on) yet no new litiſconteſtation can be made, or any new fact admitted to be proved, after the probation before anſwer is concluded and adviſed or renounced, unleſs the Lords, *ex officio et proprio motu*, for clearing of any part of the probation that remains dubious, require further, as they may do at the adviſing of any cauſe, even upon litiſconteſtation; as was found, *Dec.* 5. and 6. 1672, *Clelands contra Cleland.*

To come then to the points propoſed to be cleared: for the firſt point, whether keeping the houſe preſumeth ſickneſs contracted, or if ſickneſs muſt be proved, and what kind of ſickneſs. Albeit the ordinary ſtyle of the reaſon of reduction bear, that before the deed in queſtion, the defunct contracted the mortal diſeaſe whereof he died; yet it is not neceſſary to alledge or inſtruct, that it was *morbus ſonticus*, *Jan.* 7. 1623, *Schaw contra Gray*. Neither that the defunct was bedfaſt when the deed was done, *Feb.* 1. 1622, *Robertſon contra Fleming*. And albeit the preſumption of the contracting of ſickneſs from his keeping of the houſe, be not always ſufficient alone, yet it is of great importance, and a ſmall probation of ſickneſs with it will ſuffice, otherwiſe it were eaſy to keep all acceſs from the defunct of indifferent perſons that might prove his condition, and none admitted but contrivers and concurrers in the deed: and therefore a deed done by a man incloſed for the plague, was found reducible as done on deathbed, as being done after the defunct was incloſed on ſuſpicion of the plague, and dying before he came out; without neceſſity to prove he was ſick or infected when the deed was done, ſeeing there was no further acceſs for a fuller probation, *Feb.* 23. 1665, *Jack*. This preſumption doth withſtand a far ſtronger oppoſite probation of health, when the defunct went *not* abroad, as was found in the ſaid caſe, *Robertſon contra Fleming*, where it was not found relevant to elide deathbed, that the defunct was in ſtrength and ability, to have come to kirk and market; nor that the defunct put on his cloaths daily, and that any diſeaſe he had was but lent, and not *impedimentum rebus agendis*; as was found in the ſaid caſe, *Schaw contra Gray*. Neither that the defunct lived a year and a half after the deed in queſtion, and was only hindered to come abroad by a palſy, which troubled his walking, and made him not come abroad, albeit he did all his affairs within doors as formerly, *July* 1. 1637, *Cranſtoun*. And albeit there be remembered a caſe of a diſpoſition, made by *David Graham* merchant in *Edinburgh*, for a pious uſe to the kirks, that his having on his cloaths, the contriving and writing the whole diſpoſition himſelf, was ſufficient to elide deathbed, and to inſtruct health; yet the circumſtances of that caſe are not fully known, not being obſerved by any of the Lords, and the deciſion hath ever been decried ſince: but, in the caſe of the creditors of Lo. *Balmerinoch* againſt the La. *Couper*, for reducing of the diſpoſition of his eſtate to her, which was decided, *June* 25. 1671, it was not found relevant to inſtruct *liege pouſtie*; that, after the diſpoſition, my Lord made bargains and compts, ſeemed to be merry, and laughed, kept on his cloaths, kept the table, came from his chamber to the hall, whiſtled to himſelf, and danced *, albeit no particular diſeaſe, but only ſickneſs was proved. In this caſe it was found, that convaleſcence was ſufficiently probable by going *either* to kirk or market freely. And, in the foreſaid caſe, *Clelands contra Cleland*, health was not found proved, albeit ſoundneſs of judgment and memory was proved; and that the defunct did not only all his own affairs, but tryſted for others **, and that he lived two years and a half after the diſpoſition, and was in like condition as he had been ſeven years before; ſo that it ſeems, that if the contracting of ſickneſs be proved, no contrary probation of any acts within doors will be ſufficient to elide the reaſon of deathbed; by all which deciſions, the ſecond point propoſed is ſufficiently cleared.

As

* The circumſtances of ſeeming to be merry, whiſtling and dancing are not mentioned in this deciſion.
** The deciſion does not mention this circumſtance of tryſting for others.
ww See act 18. P. 1686, for publication of teſtimonies.

As to the third point propoſed, Whether ſickneſs being proved once contracted, the continuance thereof till death muſt be proved. It is commonly held, that if it be proved ſickneſs was contracted, and that death followed, *probatis extremis præſumuntur media*; and ſickneſs once being proved, is preſumed to continue, otherwiſe it were ſcarce poſſible by a poſitive probation to inſtruct the continuance of the ſickneſs till death, and this is only *præſumptio juris*, laying the burden of probation upon the party that alledges convaleſcence.

The fourth point for proving *liege pouſtie*; either, that there was no diſeaſe, or convaleſcence; if there had been a diſeaſe, by going freely to kirk and market unſupported, is the ordinary and unqueſtionable defence againſt deathbed, upon which law and cuſtom hath pitched, as the moſt public and ſure evidence of health and convaleſcence: ſo that, albeit the going to kirk and market, were but of deſign to validate the deed, yet if the attempt be perfectly made out, it would be ſufficient; and much more will *it* be allowed, when the going abroad is principally to hear ſermon, or for devotion, or about affairs to the market: in which caſe, taking the party by the hand, or helping him at a ragged ground, would not infer ſupportation, there being no deſign of cautiouſneſs in the party, but uſing his ordinary way; as if a gentlewoman accuſtomed to be led by the hand, ſhould go ſo led to the kirk or market, by reiterated acts it might be ſufficient for inferring health or convaleſcence; but if it did appear to be upon deſign, ſhe behoved to forbear the prerogatives of her quality, and go freely alone without being led; or if an old man, infirm by age, or any defect in his legs or feet, not ariſing from inward ſickneſs, ſhould be helped in difficult places, in reiterated acts in going to kirk and market, without deſign. And as to that qualification, whether it be ſufficient to go to the kirk or market-place, or at the congregation, or gathering at the market, I have not obſerved it particularly debated or decided, but that parties, when they went to the kirk, ordinarily went to the prayers, and certainly it is the moſt ſecure way, that the going be to the congregation, or meeting at the market, otherwiſe pickt out witneſſes, may be choſen to wait upon the party to the kirk or market-place, which, in many caſes, will be very private, and will not expoſe the party to public view. Therefore the Lords publiſhed an act of Sederunt, *Feb.* 29. 1692, of which the tenor follows [x]: "The "Lords of council and ſeſſion, taking to their ſerious conſideration, that the ex- "excellent law of deathbed, ſecuring mens inheritances from being alienated at "that time, may happen to be fruſtrated and evacuated, if their coming to church "or market be not done, in ſuch a public and ſolemn manner, as may give ſome "evidence of their re-convaleſcence, without ſupportation, or ſtraining of na- "ture: and ſeeing ſome may think it ſufficient, if parties after ſubſcribing ſuch "diſpoſitions, come to the church at any time, and make a turn or two therein, "though there were no congregation at the time; and likewiſe, if they make "any merchandiſe privily in a ſhop or crame, or come to the market-place, "when there is no public market, and all this performed before their own pickt "out witneſſes, brought along by the party, in whoſe favour the diſpoſition is "made, that the ſtate and condition of his health or ſickneſs, may be as little "under the view and conſideration of other indifferent perſons, as can be: the "occaſion of which miſtake might have been, that formerly there were public "prayers, morning and evening in the church, in many places, to which thoſe "who apprehended any controverſy might ariſe upon the validity of their diſpo- "ſitions, were accuſtomed to come at the time of prayer, and ſome thought they "might come to the church, though there were no publick meeting thereat, "ſince theſe public prayers were not accuſtomed, and to take inſtruments of their "appearing there. For remeid whereof, the Lords declare, they will not ſuſtain "any ſuch parties going to church and market, where it is proved that he was "ſick before his ſubſcribing of the diſpoſition, quarrelled as done *in lecto*, unleſs "it

[x] See below, IV. 20. 42.

" it be performed in the day-time, and when people are gathered together in the " church, or church-yard, for any public meeting, civil or eccleſiaſtic; or when " people are gathered together in the market-place, for public market: and fur- " ther declare, whenſoever inſtruments are taken, for the end foreſaid, that the " ſaid inſtrument do expreſsly bear, That it was taken in the audience and view " of the people gathered together, as aforeſaid; otherwiſe the Lords will have " no regard to the ſaid inſtrument."

The fifth point concerning ſupportation, is the ordinary reply againſt going abroad; and as hath been ſaid, it is ever to be conſidered, whether the act appear to be of deſign or not; and that, if the acts be reiterated and of courſe, nothing that was ordinary for the defunct in taking of help, when he was in unqueſtionable health, will import ſupportation; and therefore in the caſe, *Pargilleis*, decided, *Feb.* 26. 1669, it having been proved that the defunct was a very old man, and that after the diſpoſition quarrelled, he had ſeveral times come to *Calder*, and done affairs there; and that he went up from the market-place, in the market-time, to the place of *Calder*, being a ſteep way, borrowed money from the Lord *Torphichen*, told and received the ſame, which was found ſufficient; albeit he was helped up ſtairs and down ſtairs, and was helped to his horſe, and from his horſe, and his man led his bridle, and that he had a ſtaff in his hand. But when the going to kirk and market, is upon deſign, the leaſt defect in the exact performance, will render it ineffectual; and ſo in the caſe of the diſpoſition made by the Lord *Couper*, *June* 25. 1671, it having been evident, that it was of deſign to validate the diſpoſition, that the next day after the diſpoſition my Lord went to the market at *Couper*, the laying his hand upon *Thomas Ogilvie*'s hand, who walked by him, and that only at ſometimes, and in ragged places where he was accuſtomed to take any walking by him by the hand before: yet ſeeing he put nature to the utmoſt reach, to manifeſt health by that act, and could not fully perform it, it was not found ſufficient; but he was found to be ſupported. And in the caſe *Clelands* contra *Cleland* of *Faſkin*, *Dec.* 5. and 6. 1672, the defunct finding that his diſpoſition was quarrelled, and ſtopped at the exchequer, as being done *in lecto*, immediately after he cauſed make a chair, with a fixed footſtool to bear his feet, in which he was carried with men, till he came within two pair *of butts*, or thereby, to the kirk, and thence he walked to the kirk, but there was no congregation, and returned to the chair, and ſo was carried home; and the witneſſes that were about him being examined, whether he walked freely or with help, many deponed, that ſeveral perſons having walked cloſs about him, they could not diſtinctly know; and ſeveral witneſſes having deponed, that he walked freely without help, and two having deponed that he was helped by themſelves, his ſo going abroad was not found ſufficient; neither was his being carried in the chair found equivalent, as if he had ridden upon his horſe; becauſe a ſick man might have required help even upon horſe-back, and would not have been able to have ridden freely without help, and yet might have been able to ſit in a chair: in this caſe alſo it was found, that ſupportation was more poſitively proved, albeit by fewer witneſſes, the witneſſes themſelves being ſupporters.

As to the ſixth point propoſed, whether going to kirk and market unſupported, inferreth health, or convaleſcence *præſumptione juris et de jure*; ſo that a contrary probation (*would not be admitted*), that even then he was ſick, and ſo continued till death, hath not yet been diſtinctly decided: albeit in *Pargilleis*'s caſe it was not regarded, that the witneſſes deponed, that *Pargilleis*, when he came to the market appeared ſick, and continued ſick thereafter; neither can any conjectural probation, in ſuch caſe be reſpected; becauſe *ſqualor morbi*, doth ordinarily remain, after convaleſcence, which, if it were ſuſtained, would render that defence uncertain and conjectural; ſo that there can be no queſtion, unleſs the probation of the being then ſick, were poſitive, and pregnant; as if a perſon in a hot fever, wherein there is ordinarily ſtrength enough, ſhould come abroad to market, the foam and fury of the fever continuing in his face, or if the party did

did groan, and bemoan himſelf, as ſick perſons uſe to do: or, if poſitive acts importing ſickneſs be proved, as fainting, or vomiting, which was ſuſtained in the proceſs between *Graham* of *Garvock* and *Drummond*, *Feb.* 1692 *, in which caſe it was proved, that the diſponer ſigned in his bed, and was ſick, but immediately after roſe, and went to the kirk, and returned unſupported, the apparent heir being preſent, which was ſuſtained, though there was no congregation, ſeeing the heir might have called unſuſpect witneſſes; yet his vomiting in his return was ſuſtained, to prove the continuing of his ſickneſs and deathbed.

For the laſt point offered to conſideration, whether convaleſcence can be proved otherwiſe, then by going unſupported to kirk and market. I have ſeen no deciſion, whereby deathbed hath been elided, upon ſuch equivalent acts; but, on the contrary, it was found, in the caſe of the Lord *Salton*, that his coming to a green, near his houſe unſupported, and ſtanding there, till he ſaw men play at foot-ball, was not ſufficient: and, in *Couper*'s caſe, his coming frequently with ſtrangers to their horſe, and ſometimes going up and down ſtairs unſupported, and oft-times going out and walking in his garden, and once to a houſe a quarter of a mile off, and all unſupported, were not found equivalent, to going unſupported to kirk and market. And, in *Cleland*'s caſe, his going ſeveral times to his barn, and to ſome trees, a pair *of Butts* from his gate unſupported, were not found equivalent to going to kirk and market; yet it cannot be doubted but there may be acts equivalent; as if any perſon ſhould go a far journey, but the equivalence muſt not ſtand in this, that the defunct did acts, requiring as much ſtrength, as going to kirk and market. In reſpect of this difference, that going to kirk and market, expoſes the party to public view; whereas other private acts about his houſe may be proved by a few perſons prompted for that purpoſe; which probation cannot be balanced, with any other for clearing, that there was ſupport or help, as in the caſe of going to kirk or market, or going a long journey, where there may be had many un-prepoſſeſſed witneſſes. Deathbed was not found elided, by riding on horſe-back a journey of about ſixteen miles, ſeeing the party had a man who rode behind him, and for ſome part of the way, he was tied to the man; which was found to be ſupportation. Nor was it reſpected, that, long before his ſickneſs, he had in his teſtament left the ſame things in legacy, and therefore was not prevailed upon with importunity, ſeeing his purpoſe might have altered after that teſtament, *Dec.* 11. 1677, *Lockhart* **.

XXIX. As to the extent of deathbed, it doth not only annul diſpoſitions of lands but aſſignations to heritable bonds, *Feb.* 24. 1624, *Donaldſon*. Or to a bond, moveable in itſelf, becoming heritable, by a poſterior obligement, to employ it for annualrent, *Nicol*, *hæreditariis actionibus Aytone contra Watſon*. Yea, it will annul any bond, though moveable, in ſo far as thereupon the heritage may be appriſed or adjudged, *Jan.* 7. 1624, *Schaw*. But an heritable ſum being paid to the defunct on deathbed, his diſcharge thereof was not reduced, *ex capite lecti*, though the money was inſtantly given away, after it was received, which was found valid as a legacy, *in ſo far as extended to* the dead's part, *March* 15. 1634, *Brown*. Deeds on deathbed will not prejudge the relict, or bairns part, but *are* null as to them, as well as to the heir, as hath been now ſhown [y]. Deathbed was extended againſt bonds, though granted by a father to a ſon, having no other proviſion, which were not ſuſtained, though offered to be reſtricted to a competent portion, due naturally by parents to children, *July* 1. 1637, *Lord Cranſton Riddel*. *The like of a diſpoſition granted for ſatisfying the defunct's debts, and portioning his younger children, tho' made eighteen months before his death, when he was of a ſound*

 mind,

* This deciſion not found.

** By Act 4. P. 1696, it is declared, that as to all deeds made after that ſtatute, it ſhall be a ſufficient defence againſt the objection of deathbed, that the granter lived 60 days after executing the deed, tho', during that time, he neither went to kirk nor market; but that ſuch deeds ſhall ſtill be reducible on proof that, by the ſickneſs of which he died, the granter was not, at the time of executing, of ſound judgment and underſtanding.

[y] See above, § 24. *h. t.*

mind, and did all his affairs as formerly; ſeeing he was taken with a palſy in one of his ſides, whereof he died, and came not out after to kirk or market; here the heir undertook the debts, Spotiſ. heirs, Heir of Pancaitland contra St. Clair. Yea, deathbed was found relevant to reduce a diſpoſition in favour of the diſponer's only daughter, in prejudice of the brother and heir-male; though the diſpoſition *in favour of the heir-male* contained a power to alter the tailzie, or diſpone at any time in his life, but bore not *etiam in articulo mortis*, *Feb.* 25. 1663, *Hepburn of Humbie.* But where the diſpoſition, *containing the power to burden*, was neither to an heir-male, nor of line, that clauſe was ſufficient to capacitate the diſponer on theſe terms to burden, though it mentioned not deathbed, or *in articulo mortis*, *June* 22. 1670, *Douglas of Lumbſdean.* And deathbed was not ſuſtained, to reduce a diſpoſition by a father to a ſecond ſon, ſeeing the father reſerved ſuch a ſum, to be at his diſpoſal, in his diſpoſition to his apparent heir, though it mentioned not, at any time in his life, *June* 28. 1662, *Hay.* And now, ſince the Lords have frequently decerned aliment to bairns, againſt the father's heirs, having competent eſtates, it is like the Lords will allow all proviſions on deathbed, in ſo far as they may be competent aliments.

Holograph writs without witneſſes, prove not their own dates to have been prior to the ſubſcriber's deathbed, and therefore they are preſumed to be on deathbed, without which that privilege would be evacuate, it being as eaſy to induce a ſick perſon to antidate a writ, as to prejudge his heir: but if it be proved by witneſſes, that the writ was ſeen and delivered, before the granter contracted the ſickneſs, whereof he died; or if it was ſubſcribed before his ſickneſs, though not delired; if it was in favour of his children, or had a clauſe diſpenſing with delivery, or did reſerve his liferent; the preſumption to have been done on deathbed, will be thereby elided. But a diſpoſition to nieces, having been proved to be ſubſcribed, before the ſubſcriber's ſickneſs, but blank in the name, was reduced, as upon deathbed, becauſe the name was not filled up; albeit the writer did depone, that it was delivered to him to fill it up with the niece's name, ſeeing he filled it not up till the granter's ſickneſs, *June* 22. 1678, *Birnies* *. But deathbed was not found to hinder the recalling of a diſpoſition made by a grandfather to his oye, and delivered to a third party in *liege pouſtie*; if it ſhould appear, that the delivery was not ſimply to the behoof of the oye, whereby it became irrevocable, but conditionally, that the diſponer might recal it; for evidence whereof, it was proved, by that third party's oath, that the defunct on deathbed called for it, and he delivered it; and that the defunct on deathbed delivered two blanks, for dividing the right in the firſt diſpoſition, which he delivered, with his ſaid firſt diſpoſition to a nottar, and ordered the filling up of the one half to the heir, the other half to a ſecond ſon, *father to the oye*; but for further clearing, the party to whom the firſt diſpoſition was firſt delivered, was appointed to be re-examined, what the defunct expreſſed, when he delivered the firſt diſpoſition to him, *Dec.* 9. 1676, *Ker.* But thereafter, the third party not being found to be examined, the Lords found, that there being nothing proved, expreſſed at the delivery, the recalling, and the re-delivery did import, that the firſt delivery was not ſimple to the behoof of the oye, making it irrevocable; but that it was conditional to be delivered to the oye, if the diſponer did not recal it; and that his recalling of it for a ſpecial effect, to divide the ſame betwixt his heir and the ſecond ſon, was effectual, both againſt his oye to whom he firſt diſponed, and effectual againſt his heir as to the one half, albeit the revocation was on deathbed, ſeeing thereby the heir had no prejudice, but benefit, being formerly excluded by the diſpoſition to the oye, delivered in *liege pouſtie*, *Jan.* 25. 1677, *inter eoſdem.*

XXX. Only free deeds on deathbed are thus reducible; for if there were an equivalent cauſe onerous, which was truly employed upon the defunct, or might affect

* In this caſe, the order for filling up the name of the nieces in the blank, was not given till after the granter's ſickneſs.

affect the heir, it is not to the heir's prejudice, and ſo not reducible; thus the reaſon of deathbed was elided, becauſe the bond quarrelled was offered to be proved for furniſhing truly delivered to the defunct, *July* 13. 1632, *Pollock*. The like of a diſcharge granted by a baſtard, after he was infected of the plague, againſt the donatar of the baſtardy, *Nov.* 22. & 23. 1609, *Mar.* In all theſe, witneſſes are ſuſtained to prove the cauſe onerous in the writ. And likewiſe a bond granted on deathbed, being proved for a cauſe onerous in part, *viz.* drugs, and ſervice to the defunct on his deathbed, was ſuſtained *pro tanto*, and reduced for the reſt, *Jan.* 7. 1624, *Schaw*. But a liferent granted to a wife on deathbed, and a liferent-tack of teinds of the lands liferented, were not reduced, *Hope, teinds, La. Dunlop contra L. Dunlop*. The reaſon whereof is obſerved to have been, becauſe the huſband before ſickneſs was bound to infeft his wife in lands, or annualrent equivalent, *Nicol, de hæreditariis actionibus inter eoſdem* *.

XXXI. As deeds on deathbed prejudge not the heir: ſo deeds in teſtaments, though done in *liege pouſtie*, have no more effect than on deathbed. And it is not *habilis modus*, by teſtament to diſpone any heritable right, *Dec.* 14. 1664, *Colvil* **: deathbed is not competent by exception, but by reduction, *Jan.* 11. 1666, *Seatoun*; but in declaratory or petitory actions, as recognition, it is receivable by exception, *July* 20. 1669, *Barcley* ***; or in a reduction it is competent by exception or reply, *Feb.* 3. 1672, *Home* ****.

XXXII. A third difference is, that ſucceſſors in moveables, or executors, are not liable *paſſivè* for the defunct's debt *in ſolidum*, but heirs are, tho' they far exceed the value of the inheritance, without the benefit of an inventary *****; and tho' *Craig*'s opinion is, that heirs may renounce, even after their entry, if the heritage appear over-burdened, the courſe of deciſions ſince his time hath cleared the contrary; becauſe heirs entering cannot renounce, there is *annus deliberandi* allowed to them by law, in which they may abſtain from entering, and intermixing themſelves with the heritage, and then they are not conveenable for the defunct's debt, upon charges to enter heir, or otherwiſe; but if they enter, or meddle ſooner, they are liable: this *annus deliberandi* is ordinarily accounted a year from the defunct's death, which was ſo accounted, tho' during a great part thereof the heir remained unborn; *Had. Feb.* 7. 1610, *Knows contra Menzies*. But the contrary was found thereafter, that the year was accounted from the birth of the poſthumous heir, that the benefit of deliberation might be profitable to his tutor in his name; *Spotiſ.* heirs, *Livingſtoun contra Fullertoun*; yet a ſummons on a charge to enter heir, the day of compearance being after the charge to enter heir, and after the year, will be ſuſtained [a], *June* 26. 1667, *Dewar* ******: in which caſe it was found, that even actions real, as reductions, declarators, *&c.* which require no charge to enter heir, are not competent within the year of deliberation; becauſe in theſe the heir cannot defend, without the hazard of behaving as heir.

XXXIII. Succeſſion in heritable rights in Scotland are either by the will of the fiar, or by law, *proviſione hominis* or *legis*. Heirs by the courſe of law are called heirs of line, as befalling by the line of ſucceſſion appointed, and known in law, all other heirs do croſs or cut that line; and therefore are called heirs of tailzie, from the French word *tailzer, to cut*; whence *Craig* conceiveth this tailzied ſucceſſion hath been firſt denominate amongſt the French and Normands, and thence being brought into England by the Normand conqueſt, both in cuſtom

* This deciſion not found.

** See *Nov.* 14. 1667, *Allanus Henderſon*, obſerved by *Dirleton* and by *Stair*; and *Dec.* 20. 1674. *Cranſton*.

*** Here a gift of the recognition incurred by the deathbed deed, had been taken in name of the diſponee, and action of declarator raiſed; the heir was allowed to object deathbed.

**** By Act 26. P. 1695, Papiſts are declared incapable, even in *liege pouſtie*, of making any gratuitous deeds, in prejudice of their apparent heir; and by Act 3. P. 1700, ſuch gratuitous deeds granted by Papiſts, are declared null, except as to the granter's perſon and moveable eſtate.

***** By act 24. P. 1695, apparent heirs are allowed to enter *cum beneficio inventarii*.

****** In this caſe the day of compearance was within the year, and the objection was ſuſtained.

[a] See below, III. 5. 22. 2.

cuſtom and name, hath been derived to us; yet it is liker to have come to us immediately from France, with which we kept greater intercourſe than with England of old; and our tailzies, at leaſt to heirs-male, are ancienter than the Engliſh, which begun but from the famous law, called the ſecond Statute of Weſtminſter, in the reign of Edward the Firſt of that name of the Nomand line.

Heirs of tailzie are alſo called heirs of proviſion; which terms are equipollate, both comprehending all heirs, which are not according to the line or courſe of law; and among others, heirs-male and heirs of marriage: yet our ſtyle doth ordinarily diſtinguiſh them ſo, that where there is no alteration from the lineal *ſucceſſion, but that females are excluded and males preferred, they are called* heirs-male; and where there are ſeveral ſubſtitutions of certain perſons or lines, failing others, by the tenor of the infeftment, they are ſpecially called heirs of tailzie; but when there is an alteration of the lineal ſucceſſion, yet not ſimply to heirs-male, nor to divers members of tailzie, they retain the common name of heirs of proviſion, as is moſt ordinary by contracts of marriage providing lands to the heirs of the marriage, whereby the heirs lawfully procreated betwixt the married perſons, whether male or female do ſucceed; ſo that daughters of that marriage will exclude ſons of another marriage. *But heirs of tailzie, ſtrictly ſo called, do ordinarily exclude females, unleſs in the laſt termination, or at leaſt do limit it to deſcendents; as to the lawful iſſue,* or heirs of the body of the members of the tailzie, whereby their collaterals, or aſcendents, are excluded: and in proper tailzies there are always divers lines or perſons, male and female, ſubſtitute as members of the tailzie; as when infeftments bear lands to be granted to the fiar, and to the heirs of his body, or to the heirs-male of his body, or to his heirs of ſuch a marriage; which failing, to ſuch another perſon named, and to the heirs of his body, or to the heirs-male of his body, *&c.* and ſo to a third and fourth; which all failing, to the firſt fiar, and his heirs whatſoever, or to return to the ſuperior, or to any other perſon, and to their heirs whatſoever: and where ſuch perſons and lines are not ſubſtitute, it is not properly called a tailzie; but if it be ſimply to heirs-male, it is ſo ſpecially denominate. All other heirs which are not heirs of line or heirs whatſoever, retain the name of heirs of proviſion, the chief whereof are heirs of marriage, which failing, the huſbands, or wives heirs whatſoever, in which *caſe* there is but one blood or line, and not divers perſons, and different lines ſubſtitute; in theſe tailzies the perſon nominate may ſucceed, and be ſerved heir of tailzie, tho' otherwiſe incapable of ſucceſſion as baſtards, as hath been ſhown in the former title (III. 3. 44.); but the perſons nominate are never the immediate and firſt heirs in lands, but always the fiar's heirs of his body; which failing, the perſons nominate: for if the heritage ſhould be granted, for example, to John, and after his deceaſe to William and his heirs, John would be thereby naked liferenter and William fiar, who could not be ſerved as heir to John *: but if it were granted to John, and the heirs of his body, which failing to William, theſe failing, William would be ſerved heir of tailzie to John: but this holds not in bonds, or ſecurities for ſums of money; for parents do frequently take their bonds, and infeftments for ſecurity thereof, to themſelves, they being on life, and after their deceaſe to ſuch children nominate; yet the parents are fiars, and the children are but heirs ſubſtitute.

So then all ſucceſſion with us is either of heirs of line, male, tailzie or proviſion: heirs of line are alſo called heirs general, ſo alſo are heirs-male and of conqueſt, and theſe may be ſerved heirs by a general ſervice: but other heirs of tailzie or proviſion by inveſtiture, cannot be ſerved heirs but by a ſpecial ſervice, ſerving them to ſuch particulars, whereunto they ſucceed by infeftment or proviſion: heirs of line are alſo called heirs whatſoever, becauſe they are abſolute without limitation; and in all caſes, where heirs whatſoever is not ſpecially altered by the infeftment,

* Sir *James Stewart* and *Dirleton* differ from the learned author as to this point. See *Stewart*'s anſwers, *p.* 148. & 149. *voce, heirs of proviſion and ſubſtitute.*

ment, rights follow the lineal ſucceſſion; as among heirs-male, the ſame courſe taketh preference, except that female-heirs are excluded, as that firſt deſcendents, then brothers, *&c.* do ſucceed; and amongſt heirs of marriages, the eldeſt ſon doth exclude the reſt, and ſo in the members of tailzies.

We ſhall not need here to debate the lawfulneſs or expediency of conſtituting heirs-male, or of tailzie, or of proviſion, having already cleared, that the firſt ground and rule in equity, is the will of the proprietar, tho' he be perſonally obliged to provide competently for his own, eſpecially thoſe of his family; and therefore, tho' ſeveral of our Kings, in their general revocations, have revoked tailzies, it can infer no more but a ſcruple in them, and a preſerving of their power, againſt the courſe of preſcription; but doth not infringe ſuch rights being lawful in themſelves. The expediency of tailzies is the ſame with primogeniture, to preſerve the memory and dignity of families: but as primogeniture, for that end, excludeth females of neareſt degree, heirs-male excludeth them ſimply; and heirs of tailzie have had their riſe from diſſatisfaction with ſome of the fiar's race, or preference of them, otherwiſe than by the propinquity of blood: ſome have alſo tailzied their lands, ſo as by infeftments to introduce a primogeniture among females, as the law hath done among males; as if the land were granted to the fiar, and the heirs-male of his body, which failing, to the eldeſt heir-male of his body, without diviſion, and their heirs carrying the arms and name of the family.

To come now to the heirs of line, the law hath ordered them thus: Firſt, The eldeſt lawful ſon, and his deſcendents in order by right of primogeniture, excludeth all other deſcendents, male or female; failing ſons, the daughters, and their deſcendents do all ſucceed equally, except in rights indiviſible, which fall to the eldeſt: failing deſcendents, the next degree is of the next immediate brother-german, and his deſcendents, and among middle-brethren, the immediate elder brother ſucceedeth in conqueſt, whereunto the defunct did not, nor could not ſucceed as heir; but in all others the immediate younger brother ſucceedeth, and therefore is called the heir of line, and the other the heir of conqueſt: if the fiar be a woman, her brother-german excludeth ſiſters-german, and of her brothers, the immediate elder brother ſucceedeth in conqueſt, and the immediate younger in heritage; failing brothers-german, ſiſters-german, and their deſcendents, exclude both brethren and ſiſters by the father's ſide only, *July* 2. 1629, *Cunningham*; failing brothers, or ſiſters-german, brothers by the father's ſide, ſucceed to the defunct, whether male or female, the immediate elder in conqueſt, and the immediate younger in heritage. *Failing brothers, ſiſters on the father's ſide ſucceed equally.* Failing all brothers and ſiſters, the father, or other maſculine aſcendent of his line, ſucceed to the defunct, whether male or female, and exclude the brothers or ſiſters of that aſcendent, as a grandfather excludes his brethren, *but not* father's brethren to the defunct. Failing aſcendents, the father's brothers, and father's ſiſters, and their deſcendents, ſucceed in all points as brothers and ſiſters, the double blood excluding the ſingle blood, and the immediate elder brother ſucceeding in conqueſt, and the immediate younger in heritage; and all failing, the grandfather; and failing him, his brothers and ſiſters the ſame way: and ſo upward, till there can be any propinquity of blood proved; which all failing, the King taketh place as laſt heir.

XXXIV. In this line of ſucceſſion obſerve, 1. That there is no place for adopted children, or their iſſue, but only for the natural iſſue of the vaſſal, which cannot be changed by a voluntary act of adoption, without conſent of the ſuperior in the inveſtiture; neither is adoption in uſe with us in any caſe. 2. Theſe natural heirs muſt alſo be lawful, whereby baſtards are excluded; and who are ſuch, appeareth by the former title. 3. There is no place for cognates, as to the mother, grandmother, or other feminine aſcendent, or thoſe of their ſide, but only to agnates conjoined by the father, grandfather, *&c.* which holdeth, even tho' the heritage deſcended from the mother, or thoſe of her ſide; for in the ſervice

of heirs the neareſt lawful heirs are only inquired, and retoured either by the lineal ſucceſſion aforeſaid, or by expreſs tailzie, or proviſion in the infeftment, without reſpect from whence the inheritance flowed, for which we have no ſtatute nor cuſtom: but in England it is otherwiſe; for *paterna paternis*, and *materna maternis* takes place [b]; but with us the contrary was found in the caſe of *John Gilbert*, as *Craig* obſerveth, *lib.* 2. *dieg.* 17. § 9. And he there relateth that many afterwards changed their opinion therein; and tho' there be equity in it, yet no law nor practique ſince hath favoured the maternal line; but the father was found heir to his ſon, even in the lands where the ſon was infeft, as heir to his mother, and did exclude his *ſon's* brother-uterin by that mother, *Feb.* 5. 1663, *Lennox.* 4. In all this line of ſucceſſion there is place for repreſentation of deſcendents, in place of their defunct parents: ſo that females of a further degree, by the right of repreſentation, exclude males of a nearer degree; as the eldeſt ſon's daughter will be preferred in the grandfather's inheritance, to his other ſons in private rights, tho' that be contraverted by the more common feudal cuſtoms, as is largely and learnedly diſputed by Tiraquellus.

XXXV. In this lineal ſucceſſion the father, grandfather, or other aſcendents of the paternal line, ſucceed in heritable rights, next unto brothers and ſiſters, and before all other collaterals or agnates. We have ſhown before [c] why there is no mention of aſcendents in the Jewiſh ſucceſſion, becauſe ſuch a caſe could hardly occur among them, *Craig*, *lib.* 2. *dieg.* 13. § 46. *c.* 47. affirmeth, that it was doubtful, in his time, whether aſcendents could ſucceed in heritable rights, and that he *had* heard the opinion of ſome learned men in the contrary, and that he had not found the Lords decide in it, and that it is contrary to the feudal law, and alſo to his own opinion; yet he brings both evident reaſon and example in the contrary: the reaſon is, that no inqueſt can juſtly retour, that the father's brother is nearer than the father: he bringeth alſo the example of the E. of Angus, ſerved heir in the Earldom of Angus to his own ſon, whom he had infeft therein; and the Lo. Colvil (*was ſerved*) in the like manner, having infeft his ſon in all his eſtate, tho' ſome affirmed, that this was by proviſion in the (*ſon's*) infeftment; yet that the ſervice was, is ſure; but that (*there was a*) proviſion, is uncertain: and tho' ſome alſo were doubtful, whether the E. of Angus was ſerved *heir to his ſon, wherein Craig inclineth to the negative, becauſe a poſterior E. of Angus was ſerved*, and infeft as heir to that ſame ſon, which well inferreth, that the father was not infeft as heir to his ſon, but not that he was not ſerved heir to him therein; for he might have been ſerved and not infeft, whereby the ſervice as incompleat became void, and the next Earl behoved to ſerve of new to the ſon, who died laſt veſt and ſeized as of fee. The cuſtom and common opinion ſince is for the aſcendents; and ſo the Earl of Roxburgh was ſerved as heir-male to his ſon the Lord Ker, and many others, which ought to be the more favoured, as *being* more conform to equity, and the law of nature, which *in dubio* ought to take place, where there is no law nor cuſtom to the contrary, as with us there is none; neither did I ever hear of one who attempted to exclude a father by the father's collaterals: and tho' there had been no deciſion upon it, neither have there been upon many other uncontraverted cuſtoms, eſpecially in ſucceſſion; but the acquieſcence of all parties, having intereſt in matters of ſo great moment, is a ſtrong evidence of the national conſent by cuſtom: but it hath alſo been ſo decided by the Lords, *Hope*, ſucceſſion, *Burnet contra Mauld*; yea a ſon, being infeft as heir to his mother dying without iſſue, his brother-uterin by the mother was not found heir to him, but his father, *Feb.* 5. 1663, *Lennox.* As to the alledged oppoſition of the feudal law, as hath been oft-times ſaid, it is local; and therefore, as in England, all aſcendents are excluded, ſo in Germany, they ſucceed in the next place after deſcendents, and are preferred to brothers and ſiſters, according to the natural courſe of ſucceſſion. The reaſon why brothers and ſiſters of the defunct are preferred to the father with us, may be, becauſe ſuch fees do commonly proceed from the father: and therefore, by the continuance of

[b] See above, § 8. *h. t.* [c] See above, § 14. *h. t.*

of that ſame fatherly affection, are derived to the brothers and ſiſters, and becauſe they ſtand in more need of proviſion than the father, who commonly reſerves his own liferent.

TITLE V.

Heirs, where, of apparent Heirs, Heirs-male, Heirs-portioners, Heirs of Conqueſt, Tailzie and Proviſion, and their Brieves and Services, *&c.*

I. *Apparent heirs may purſue exhibition* ad deliberandum.
II. *They may defend their predeceſſors rights and poſſeſſions*, &c. *and receive the rents.*
III. *The aliment of heirs from the donatars and liferenters.*
IV. *Heirs not entered have ſeveral benefits. Tacks require no ſervice.*
V. *Heirs have intereſt in rights granted to their predeceſſors, tho' not mentioning heirs.*
VI. *Heirs have the benefit of all rights heritable, and ſometimes without a ſervice.*
VII. *Heirs have right to moveable heirſhip and obligements, wherein executors are excluded.*
VIII. *Heirs of line, their intereſt.*
IX. *Heirſhip-moveables.*
X. *Heirs of conqueſt their intereſt.*
XI. *Heirs-portioners their intereſt.*
XII. *Heirs-male, tailzie and proviſion, their intereſt.*
XIII. *All heirs are liable* paſſivè *for the defunct's debt.*
XIV. *Heirs-portioners how far liable.*
XV. *The effects of different proviſions by defuncts, in favour of divers heirs-portioners.*
XVI. *Heirs not being portioners, nor ſubſtitute in bonds, are liable* in ſolidum.
XVII. *The order by which heirs are liable* paſſivè, *and may be diſcuſſed.*
XVIII. *Heirs of tailzie, how they repreſent not the defunct.*
XIX. *Heirs of marriage, how they may quarrel their predeceſſors deeds.*
XX. *Heirs have the benefit of diſcuſſing.*
XXI. *The exception of the order of diſcuſſing, how not ſuſtained. Heirs become liable* paſſivè *three ways.*
XXII. *The order and effect of a general charge to enter heir.*
XXIII. *The order and effect of a ſpecial charge to enter heir, not neceſſary in all actions.*
XXIV. *Renunciation to be heir, its order and effect.*
XXV. *The entry of heirs general, and the effects thereof.*
XXVI. *The entry of heirs upon precepts of* clare conſtat.
XXVII. *The entry of heirs by haſp and ſtaple within burgh.*
XXVIII. *Entry of heirs by brieves out of the chancellary.*
XXIX. *To whom theſe brieves are directed.*
XXX. *The manner of citing the inqueſt, and proclaiming the brieve.*
XXXI. *Exceptions competent againſt the members of inqueſt.*
XXXII. *The apparent heir's claim.*
XXXIII. *Exceptions againſt the claim.*
XXXIV. *The firſt head of the brieve.*
XXXV. *The ſecond head of the brieve.*
XXXVI. *The third head of the brieve.*
XXXVII. *The fourth head of the brieve.*
XXXVIII. *The fifth head of the brieve.*
XXXIX. *The ſixth head of the brieve.*
XL. *The ſeventh head of the brieve.*
XLI. *The ſervice and retour.*
XLII. *Retours are eaſily annulled.*
XLIII. *Reduction of retours by a great inqueſt.*
XLIV. *Reduction thereof otherwiſe.*
XLV. *Reduction of retours how long competent.*
XLVI. *Precepts on retours out of the chancellary to ſuperiors to infeft.*
XLVII. *Suſpenſions of the precepts, and the reaſons competent therein.*
XLVIII. *The certification of the loſs of the ſuperiority. How far extended.*

XLIX.

XLIX. *Further reaſons of ſuſpenſion of theſe precepts.*
L. *Whether the neareſt heir at the defunct's deceaſe may be entered where a nearer is* in ſpe.
LI. *Who are fiars of conjunct-fees, or of proviſions ſubſtitute.*
LII. *The intereſt of heirs of proviſion, and of conqueſt.*

BY the former title it appeareth who are heirs; let us now conſider what their intereſts are by being heirs: and that is either active by the benefit, or paſſive by the burden whereunto they do ſucceed; for heirs being ſucceſſors *in univerſum jus quod defunctus habuit*, they do fully repreſent the defunct, both in the rights belonging to him, and in the debts due by him. Firſt, then of the intereſt common to all heirs; and next of the intereſt ſpecial to the ſeveral heirs.

I. The intereſt of heirs is moſt properly competent, when they are entered heirs according to the due courſe of law, of which afterwards; yet ſome things are competent, not only to heirs entered, but to apparent heirs; as firſt, they have intereſt to purſue exhibition of all writs made by their predeceſſors to their wives, children, and others *in familia*, but not of writs made by them *extra familiam*, *Dec.* 6. 1661, *Tailfer*; or to their predeceſſors ſimply, to the effect they may know the condition of the heritage, and may deliberate whether they will enter heirs or not [a]; ſeeing if they do enter, they are liable for all the defunct's debts, tho' they far exceed his eſtate, and have no benefit of inventary *, as in moveables; and therefore they are allowed to purſue for inſpection of all writs, importing a debt of the defunct; yet not ſo as to open the charter-cheſts of ſtrangers, who have purchaſed lands from the defunct, on pretence of the burden by the warrandice; for in that caſe the ſtrangers infeftment will exclude them, and only diſpoſitions made to thoſe in the family hinder not inſpection of the heirs, whoſe rights flow from the defunct or his predeceſſors: but I doubt not but all will be obliged to produce bonds, or perſonal obligements, which might burden the apparent heir if he enter; as was found in the caſe of diſpoſitions, and bonds granted by the defunct to ſtrangers, *Feb.* 26. 1633, *L. Swinton*. But if infeftment had followed upon the diſpoſition, the defender would not be obliged to produce the diſpoſition, becauſe the apparent heir might, by the regiſters, find his predeceſſors denuded. This inſpection is competent during their *annus deliberandi*; and it was ſo found in favour of the apparent heir purſuing exhibition within the year, *Feb.* 26. 1633, *L. Swinton*, where the writs purſued for were likely to be the ground of a plea againſt the defender himſelf. This exhibition *ad deliberandum* is competent at any time before the heir enter, even after the *annus deliberandi*, which is granted to apparent heirs, that they be free of all actions on charges to enter heir, reductions, or declarators during that time, if they do not enter, or behave as heirs. But the apparent heir hath no intereſt to put parties to compt and reckon *ad deliberandum*, *June* 22. 1671, *Leſlies*. Albeit to compt was once ſuſtained *ad deliberandum*, *March* 16. 1637, *Home*; which was not followed, it being unreaſonable to cauſe a party compt, who thereby could not be exonered. In theſe exhibitions the relation, or propinquity of blood of the apparent heir, paſſeth without probation as *notorium*: ſo *that* if the defender be abſent, the decreet will not be null, for want of probation of the title. Yet a Scots woman's ſon, born of parents reſiding in Holland, was found to have no intereſt to purſue exhibition, as apparent heir to his mother's father, till he produced an authentick declaration and trial, by the Magiſtrates in that place, that he was the eldeſt lawful ſon of his mother, *Dec.* 17. 1627, *Donaldſon*.

II. Apparent

* By act 24. P. 1696, heirs have now the benefit of inventary.
[a] See below, IV. 33.

II. Apparent heirs may defend all rights competent to them, upon production of their predeceſſors infeftments, whether they be called, or compear for their intereſt, *Jan.* 19. 1627, *L. Roſline.* They may alſo continue their predeceſſors poſſeſſion [e], and purſue for mails and duties of their lands, finding caution, in caſe of doubtfulneſs, to make theſe forthcoming to any other having intereſt, *Spotiſ. heirs, Oliphant contra his tenants.* Yea, the rents of lands were ſo far found to belong to an apparent heir; that, though he died un-entered, the next heir not entering to him, was found obliged to pay the former apparent heir's aliment, in ſo far as he intromitted with the rents of the years, during which the former apparent heir lived, *Dec.* 20. 1662, *La. Tarſappie*; and conſequently the rents might be confirmed by his executors *, or arreſted for his debt. The like was found of moveable heirſhip, wherewith the *deceas'd* apparent heir was entertained by his mother, *June* 27. 1629, *Robertſon.* They may alſo purſue the liferenters of their eſtate for aliment, *Feb.* 12. 1635, *Hepburn.*

III. The aliment of heirs, out of their lands, being liferented, or in ward, is conſtitute by the Act of *Parl.* 1491, *cap.* 25. [f] bearing a reaſonable living to be given to the ſuſtentation of the heir, after the quantity of his heritage, if the ſaid heir have no blench or feu-farm to ſuſtain him, as well of ward-lands fallen in the King's hands, as in the hands of any Baron, ſpiritual or temporal, whereby it is clear; 1. That the quantity of the aliment is undeterminate, and therefore is modified by the Lords, according to the quality of the heir, and his eſtate. 2. It takes no place, if the heir have blench, or feu-lands, ſufficient to ſuſtain him; but if theſe be not ſufficient, the ſame will be made up by the liferenters and wardatars proportionally, *Had. March* 16. 1622, *Heir of Miltoun contra Calderwood.* Yea, where the minor had any other means ſufficient to entertain himſelf as the heir, being a writer, and thereby able to aliment himſelf, he was found to have no aliment from his mother's liferent, who brought 800 merks of tocher, and had but 10 chalders of victual in liferent, *July* 21. 1636, *L. Ramorney.* The like, where the heir was not minor, but deſigned himſelf preacher, and ſo having a calling, *Feb.* 11. 1636, *Sibbald.* Here the relict was infeft in no land, but had an annualrent of 400 merks, out of land, and the heir was not minor; whereas the Lords thought the Act of Parliament was not in favour of majors, who ought to do for themſelves; but all muſt be conſidered complexly in this deciſion, ſome heirs, by their quality, not being bound to follow callings; but (*here*) the liferent was a mean annualrent, no more than an aliment to the relict, the purſuer major, and having a calling; and certainly, where the liferent is but an aliment, the apparent heir muſt rather want, than the perſon provided for a cauſe onerous.

Though the act mention only ward-lands, yet it was extended to a minor having no ward-lands, againſt a liferenter of all his eſtate, being houſes, and annualrent of money, *Feb.* 22. 1631, *Finnie.* In this caſe it was not found ſufficient, that the liferenter offered to maintain the minor, her own child, upon her own charges, ſhe being married to a ſecond huſband: but the tutor obtained modification, *after* conſideration of the moveable heirſhip; the contrary was found, where the mother was married, yet her offer of entertainment was received, *July* 14. 1627, *Noble. But this was altered, and the action for aliment ſuſtained, Ibid.* Neither was the modification excluded, becauſe there were free lands at the defunct's death, ſeeing they *were* appriſed thereafter for the defunct's debt, *Hope, de hæred. Whiteford contra Calderwood.* The like, the debt being great, and the annualrent thereof equivalent to the rent of the lands not liferented, *Feb.* 13. 1662, *Birnie*; but aliment was not found due by a father, liferenter to his ſon, on this act, but

* The contrary was found, *Nov.* 22. 1683, *M'Brair of Netherwood contra Rome:* but, in a late caſe, after a hearing in preſence, it was eſtabliſhed, that the rents falling due, during the apparency of an heir dying un-entered, may be confirmed by his executors, and do not go to the next heir who enters, *Jan.* 28. 1756, *Stewart, Nicolſon, Shaw, contra Houſton of Johnſton.* See above, II. 1. 22. II. 3. 16. 4. II. 6. 17. 3.

[e] See below, IV. 28. 4. [f] See above, II. 4. 36. 5. II. 6. 5. Below, IV. 22. 10. *& ſeq.*

only *ſuper jure naturæ*, *July* 21. 1636, *L. Ramorney*; nor by a grandfather to his oye, who had diſponed his eſtate to his ſon, reſerving his liferent of a part, the reſt unſold by his ſon, being liferented by his wife, *July* 7. 1629, *Hamilton*; but where the heir's mother brought a great tocher, *which went to the grandfather*, and the grandfather fell to a plentiful eſtate by his brother, the heir was found to have aliment of his goodſire, though he diſponed the land to the heir's father, burdened with his *own* liferent, *June* 27. 1662, *Ruthven*. This behoved not to be from the ſtatute, but *ex debito naturali*. Aliment was found due by a liferenter to her daughter, the apparent heir, though ſhe renounced to be heir, *July* 16. 1667, *Hamilton*. But, where a father diſponed to his ſon a part of his eſtate, reſerving his liferent, and another *part* to his ſon and his wife in conjunct fee after the ſon's death, his apparent heir got no part of his aliment from his goodſire, but only from his mother, *Feb.* 26. 1675, *Whiteford*. Aliment was found due to the heir, by an aſſigny to a gift of ward, without neceſſity to prove that he intromitted with the ward-lands, unleſs he had been legally excluded, which was modified by the Lords: and it was not found ſufficient to entertain him in the aſſigny's family; but nothing was modified for that time that the minor's mother alimented him *gratis*, *Feb.* 19. 1679, *Sibbald*.

IV. Heirs alſo not entered have the benefit of ſuch obligements or proviſions conceived in favour of heirs, which, by their nature or meaning, require to be fulfilled before the heir's entry; as when a party was obliged to employ a ſum upon land, and to procure himſelf, and his umquhile ſpouſe, infeft therein in liferent, and the heirs procreate betwixt them in fee, the bairn of the marriage who would fall heir, was thereby found to have right to crave his father, to employ the money accordingly, tho' he never was, nor actually could be heir, his father being alive, *Dec.* 16. 1628, *L. Collington*. In this caſe, the Lords inclined ſo to decide, but decided not; but *Durie there* obſerves a like caſe decided, *July* 7. 1632, *Young*. The like was decided, *Feb.* 13. 1677, *Fraſer*. In which caſe a father, by his contract of marriage, being obliged to employ a certain ſum, upon ſecurity to him and his wife in conjunct fee, and to the heirs of the marriage, and likewiſe to take all conqueſt during the marriage, the one half to the wife in liferent, and *totally* to the heirs of the marriage in fee, after the wife's death, proceſs was ſuſtained at the inſtance of the apparent heir of the marriage againſt his father, who was decerned to employ the ſpecial ſum to himſelf, and after his deceaſe, to the heir apparent of the marriage; albeit thereby the father would remain fiar, and might diſpone or burden the ſum ſo employed for reaſonable conſiderations, but not by deeds meerly gratuitous to evacuate the obligement: and if he did deeds prejudicial, he would be obliged to purge the ſame, or reemploy *de novo*: but it was not ſo found, as to the conqueſt *during* the marriage, which might be altered during his life; for that only could be accounted conqueſt, that he had more at his death, than at his marriage. And ſo heirs of a marriage, in an obligement *to repay a ſum*, in caſe a wife deceas'd without ſurviving heirs of the marriage, thoſe were interpreted *heirs* of the marriage, who ſurvived their mother, but died before their father, and ſo could never be ſerved heir to him, *Jan.* 27. 1630, *Turnbul*. The like, where a father was obliged to infeft himſelf and his ſpouſe in conjunct fee, and the heirs procreate betwixt them, *&c.* The apparent heir was found to have intereſt to purſue the father for fulfilling thereof, and of the obligement adjoined, not to diſpone in their prejudice, *Hope, de hæredibus*, *Hamilton contra L. Silvertounhill* *. Tacks ſet to heirs require no ſervice, but being notour, to be the perſon who might be ſerved heir, they have right without ſervice, *July* 9. 1675, *Home*.

V. As to the benefit of heirs they have right, not only to obligements conceived in favour of the defunct and his heirs; but though there be no mention of heirs, unleſs, by the nature of the obligement, there be a ſpeciality, appropriating the

* In this caſe, as obſerved by *Hope*, proceſs was not found competent at the inſtance of the apparent heir.

the ſame to the perſon of the defunct only, as in commiſſions, truſts, *&c.* So heirs were found to have the benefit of a promiſe, made to their predeceſſors, for diſponing of lands to him acquired for his uſe, though it mentioned not heirs, *Had. Feb.* 22. 1610, *Heir of Robertſon contra Livingstone.* The like of a reverſion, not mentioning heirs, which was thought to be omitted by neglect, ſeeing it bore not redeemable to that party during his life, as is ordinarily adjected when that is meaned, *Jan.* 9. 1662, *E. Murray* [hh]. The like of an annualrent, though it bore only to be paid yearly, and not perpetually, or heritably, or to heirs, *Feb.* 2. 1667, *Pourie.* And a ſubſtitution, mentioning only *the* perſon ſubſtitute, without mention of *his* heirs, was found competent to that perſon's heirs, *Jan.* 5. 1670, *Innes.*

VI. Heirs have the benefit of heritable rights, not only whereupon infeftment hath followed, but which by deſtination are heritable, *as* requiring infeftment to their accompliſhment, as heritable bonds bearing clauſe of infeftment; for theſe bearing only clauſe of annualrent, are declared moveable, by and ſince the Act of Parliament 1641, *cap.* 57. revived *Parl.* 1661, *cap.* 32. of which in the laſt title, § 24. So alſo are reverſions, penſions, tacks, without neceſſity of being entered heir, *June* 17. 1671, *Boyd*; *July* 9. 1675, *Home*; and all rights having a tract or courſe of time after the defunct's death. In theſe caſes, where the defunct's right is temporary, and runneth out by a certain courſe of time, that time runneth, whether the defunct's heir be entered, or do poſſeſs or not, as tacks, penſions, or annual preſtations, during ſo many years, and therefore theſe require not ſervice or ſolemnity; but that perſon, who might be ſerved, may continue or recover the defunct's poſſeſſion, and his poſſeſſing makes him liable *paſſivè*, as repreſenting the defunct. Neither needs there any ſervice of children *nominatim*, ſubſtitute immediately to their parents; but if they be ſubſtitute in the ſecond place, a ſervice muſt be uſed to inſtruct, that the heirs appointed in the firſt place did fail [g], *July* 21. 1676, *Hay of Drumelzier* *. What rights are heritable, and what moveable, *vide* title *Real Rights*, (II. 1. 2. & 3. & 4.)

VII. Heirs have alſo right to moveable heirſhip, and to all obligements, tho' the matter be in moveable rights, if executors be expreſsly ſecluded; otherwiſe, if the matter be moveable, and heirs only be expreſſed, but not executors, yet executors will not be excluded, becauſe heir is a general term, comprehending executors, *Hope*, *Jucceſſion*, *Logan contra Cowan.*

VIII. The ſpecial intereſt of heirs are, according to their ſeveral kinds, *viz.* heirs of line, and of conqueſt, heirs-portioners, heirs-male, and heirs of tailzie and proviſion. The intereſt of heirs of line is, that they are heirs generally, not only becauſe they may be ſerved by a general ſervice, but chiefly becauſe they *do moſt* generally repreſent the defunct. So that, what cannot be claimed by a ſpecial title, either as being conqueſt, or ſpecially provided by the tenor of the infeftment, befalleth to the heirs of line: and therefore, in dubious caſes, what doth not appear to belong to other heirs, appertaineth to theſe, in reſpect of whom heirs-male, and of tailzie and proviſion, are accounted as ſtrangers, and may come againſt the defunct's deeds, in favour of the heirs of line; but the heirs of line cannot come againſt ſuch deeds in favour of others; becauſe, as heirs of line, they are reputed as one perſon with the defunct, and ſo are obliged to maintain and fulfil his deeds not done on deathbed: and it was ſo found in the caſe of an heir of tailzie againſt an heir of line, *Spotiſ. tailzies*, *Home of Coldingknows contra heirs of line of E. Home:* and as heirs of line have generally the benefit, ſo they have more effectually the burden of the defunct's debts, which ordinarily

* The diſtinction eſtabliſhed by this deciſion, is, "That, with regard to obligements in favour of heirs of "a marriage, performable before the father's death, as employing ſums, or taking lands, to the heirs of the mar"riage; heirs are to be underſtood, ſuch as might be heirs, who may therefore purſue without a ſervice: but "that, in other caſes, the heir of a marriage requires a ſervice, as other heirs do."—It was found, *Feb.* 4. 1680, *Robertſon*; that a *nominatim* ſubſtitute required no ſervice.

[hh] See above, II. 10. 7. [g] See below, § 25. & § 51. 2. *h. t.*

dinarily reach them in the firſt place, ſo that oft-times the heirs of line have little or nothing free. We ſhall not need to be ſpecial, what befalleth the heirs of line, being to ſhow particularly what befalleth to the other heirs; for what remaineth, belongeth to the heirs of line only. Heirſhip-moveables belong only to heirs of line, and not to heirs of tailzie, *Jan.* 27. 1666, Colonel *Montgomery* *.

IX. Heirſhip-moveables is the beſt of every kind of moveables belonging to the defunct, which the heirs of line may draw from the executors, whereof there is an ordinary liſt: the reaſon of this heirſhip-moveable is, becauſe, by our law, primogeniture excludeth the defunct's other neareſt of kin in heritage, whereas the neareſt of kin ſucceed alone in moveables; and as they have no ſhare with the heir in heritable rights, ſo moſt fitly the heir hath no ſhare with them in moveables, but hath only the beſt of every kind, which therefore is called heirſhip-moveable; in which the defunct cannot, in his teſtament, or any other deed done on deathbed, prejudge his heir, as was ſhown laſt title; but if the neareſt of kin be all females, they are both heirs and executors, or if but one male, he is both heir and executor, in which caſes there is no heirſhip-moveable drawn.

Heirſhip-moveable is eſtabliſhed by the Act of *Parl.* 1474, *cap.* 53. ordaining the heirs of Prelates, Barons and Burgeſſes, to have the beſt of every kind, according to the borough laws, and ſo was found not to belong to the heir of a defunct who had only heritable bonds, being neither Prelate, Baron, nor Burgeſs, *Hope, de hæred. Keith contra Menzies*; *and Todorig contra Purdie* **. But the heirs of Prelates was extended to other beneficed perſons, as was found in *the caſe of* the heirs of the Parſon of *Dingwal*, *Nov.* 28. 1623, *Rig*: and likewiſe the heirs of Barons was extended to any perſon's heirs dying in fee of lands, though not erected in a barony, *Hope*, *de hæred. Keith contra M'Kenzies*; *Todorig contra Purdie.* Heirſhip-moveable was found competent to the heir of a perſon, who died only infeft in an annualrent, *July* 19. 1664, *Scrimzeor.* But heirs of a Burgeſs was found not to extend to an honorary Burgeſs, who died not trading or working in the burgh, *Spotiſ. heirs*, *Leſlie contra Dunbar.*

Heirſhip-moveable is not always a ſingle thing, but goeth ſometimes by pairs, and ſometimes by dozens, as in ſpoons, *&c.*: ſo the heirſhip of oxen was found to be a yoke, and not a ſingle ox, *Nicol, de hæreditatis petitione*, *July* 20. 1610, *Black contra Kincaid.* And heirſhip taketh place only *in corporibus*, but not *in quantitatibus*; as in *victual*, money, cloth, mettal, *&c.* And ſo the ſhell of a ſalt-pan, which was out of uſe, was accounted but iron, and not to fall under heirſhip-moveable, *Had. Jan.* 19. 1611, *Reid contra Thomſon.*

X. Heirs of conqueſt, tho' they be alſo heirs of line, as befalling by the courſe of law, and not by the tenor of the infeftment; (therefore they were ſet down as lineal ſucceſſors in the preceeding title) yet becauſe heirs of conqueſt have only place where there is an elder and younger brother, or an elder and younger father's brother, *&c.* and their iſſue to ſucceed; in which caſe the law alloweth two heirs, the immediate elder ſucceedeth in conqueſt, and the immediate younger in heritage: therefore the one is ſpecially called the heir of conqueſt, and the other retaineth the common name of the heir of line. Conqueſt is *feudum novum*, whereunto the defunct did not ſucceed as heir to any perſon, or whereunto the defunct would not *have* ſucceeded as heir; for if that were diſponed to him by the defunct, whereunto he would have ſucceeded, it were but *præceptio hæreditatis*, and ſo *would* remain to be reputed as heritage to deſcend to the younger, and not to aſcend to the elder, as *Craig* obſerveth, *lib.* 2. *dieg.* 15. § 17. *** Such heritages are rare, and befal only by tailzie, or proviſion amongſt middle brethren;

* This deciſion only relates to the queſtion, Whether heirs apparent, or liferenters, are qualified to leave heirſhip-moveables to their heirs, which belong only to the heirs of Barons, Gentlemen, and Freeholders, P. 1474. *cap.* 53.

** Theſe deciſions do not mention the caſe of heritable bonds.

*** *Craig* diſtinguiſhes whether the *præceptio hæreditatis* proceeded from an aſcendent or a collateral. If from the firſt, it is heritage, if from the ſecond, it is conqueſt. The firſt only is *præceptio hæreditatis* in a proper ſenſe.

brethren; becauſe the eldeſt by primogeniture excludeth the reſt from being heirs of line; but it may befal in caſe of the heirs of line, when the neareſt ſucceſſor is the father's, or grandfather's brothers, or their iſſue, there being elder and younger brothers: but conqueſt is frequent, becauſe not only that which is acquired properly, by the means and induſtry of the defunct, but that which is by gift of the defunct's parents, or any other, or whatſoever the defunct could not ſucceed to, is conqueſt: yet if the heir of conqueſt ſucceed, that which was conqueſt becomes heritage, and deſcends, as if there were four brothers, and the third acquiring lands, died without iſſue, the ſecond would be his heir therein, who, if he died alſo infeft, the lands would fall downward to the youngeſt brother, and not upward to the eldeſt brother. The cuſtom of England is contrary; for thereby the eldeſt brother ſucceedeth (*in conqueſt*) to all his brothers, failing the iſſue *of each*; but with us, the immediate elder or younger doth always ſucceed, tho' of different marriages, none of them being brothers-german: and therefore, in the caſe propoſed by *Craig*, *lib.* 2. *deig.* 15. § 19. of a brother by a ſecond marriage, dying without iſſue, and having three brothers of a former marriage, no doubt, the youngeſt would ſucceed, according to the opinon of Oliphant and King, there related, albeit that Craig's opinion be, that the eldeſt would ſucceed; but it was decided contrary to Craig's opinion, *July* 20. 1664, *L. Clarkintoun.*

Heirs of conqueſt ſucceed, not only to lands conqueſt by their immediate predeceſſors, but in other heritable rights, paſſing by infeftment, as annualrents, or ſuch as are heritable by deſtination, and which are (*to be*) accompliſhed by infeftment, as diſpoſitions of lands or annualrents, appriſings, or adjudications, *&c.* * The like, where an annualrent was firſt diſponed, and a clauſe of requiſition and reverſion ſubjoined, *July* 7. 1675, *Robertſon*, and in reverſions, *Hope*, *de ſucceſſionibus*, *heirs of Pitcairn.* But in this caſe it is not cleared, whether the lands given in wadſet were heritage or conqueſt; but it ſeems, if the lands had been heritage *before* they were wadſet, the reverſion would alſo belong to the heir of line, as the lands whereto it was acceſſory would; yea, heirs of conqueſt ſucceed in heritable bonds, bearing *a* clauſe of annualrent, as was found amongſt the heirs of Dr. *Craig*, *June* 16. 1656. But the heirs of line, and not the heirs of conqueſt ſucceed in tacks acquired by the defunct, *Hope*, ſucceſſion, *E. Dumbar's heirs*; and *June* 23. 1663, *Fergusſon contra Fergusſon.* The heirs of line do alſo ſucceed in penſions, or any other right not requiring infeftment, as in thoſe which having a tract of time, after the defunct's death, do thereby exclude executors, aad do belong to the heir of line, and not of conqueſt, tho' they be acquired. The heir of line, and not the heir of conqueſt, falleth to be tutor, *as* neareſt agnate of the pupil, to whom the heir of line might ſucceed. The heir of line hath right to the heirſhip-moveables, and not the heir of conqueſt.

XI. Heirs-portioners are amongſt heirs of line; for when more women or their iſſue ſucceed, failing males of that degree, it is by the courſe of law that they ſucceed; and becauſe they ſucceed not *in ſolidum*, but in equal portions, they are called heirs-portioners; and tho' they ſucceed equally, yet rights indiviſible fall to the eldeſt alone, without any thing in lieu thereof to the reſt: as, 1. The dignity of Lord, Earl, *&c.* 2. The principal manſion, being tower, fortalice, *&c.* which doth not extend to houſes in burghs, nor to ordinary country-houſes, the former being diviſible, the latter fall under diviſion, as pertinents of the land whereupon they ſtand, and are not as *ſeparata jura*, or diſtinct rights. 3. Superiorities are accounted indiviſible, and befal only to the eldeſt daughter and her iſſue, and thereby all the caſualities of the ſuperiority, either preceeding or following the defunct's death, as ward, relief, marriage of the vaſſal's heirs, non-entry, liferent, eſcheat, *&c.* The reaſon is, becauſe the

* By *Quoniam Attach. c.* 88. & *c.* 97. and ſtatute 3. *Robert* III. lands or tenements only in which the defunct was infeft, ſeem to have been anciently comprehended under conqueſt.

vaſſals condition ought not to be worſted, and *they* made ſubject to many ſuperiors by ſuch ſucceſſions, *Craig, lib.* 2. *dieg.* 14. §. 7. excepteth the ſuperiority of feu-lands, the feu-duties *whereof he thinks* are diviſible amongſt all the heirs-portioners, yet the former reaſon of indiviſibility of the ſuperiority, in reſpect of the vaſſals intereſt, reacheth feu-ſuperiorities as well as others; and it is hardly conceivable how ſuperiorities ſhould belong to the eldeſt, and yet the feu-duties divide to the reſt, ſeeing the ſuperiority, as being *the dominium directum*, is the only title for poinding the ground, or purſuing the poſſeſſors or intromitters with the fruits thereof. It ſeems, for the reaſon adduced, the ſuperiority, and therewith the feu-duty befalleth to the eldeſt; yet ſo, becauſe the feu-duty is conſtant and liquid, and is not like the other caſualities of ſuperiority, which are illiquid and accidental; therefore the other heirs-portioners ought to have compenſation for their parts of the feu-duty, in or *out* of other proper lands: or if there were more ſuperiorities of feu-lands, ſo that ſome of the ſuperiorities might befal one heir, and others to other heirs, no particular ſuperiority being divided, or the vaſſal made vaſſal to many ſuperiors, I conceive it would be allowed; or otherwiſe the eldeſt co-heir would be decerned to infeft the reſt in annualrents out of the fee, correſpondent to their ſhare of the feu-duty. A vaſſal's heir, tho' the defunct had taken infeftment of more heirs-portioners, was not found obliged to take infeftment of ſome of them ſeverally, but either of all jointly, or *of* the eldeſt, *July* 30. 1678, *La. Luſs* *. How far heirs-portioners ſucceed *paſſivè*, and are liable for the defunct's debt, ſhall forthwith appear.

XII. Heirs-male, and of tailzie and proviſion, ſucceed not by law, but by the tenor of the infeftment and proviſion; and therefore have that benefit and no more, which is ſo provided to them, or which is acceſſary thereto; whereby any right or ſecurity, of lands or others, befalling to thele heirs, which is thereafter acquired by their predeceſſors, tho' the ſame be acquired to him and his heirs whatſoever, yet the ſame will befal with the principal right, to which it is acceſſory to the heir-male, or of tailzie or proviſion; as if a proprietor infeft himſelf, or his heirs-male, or of tailzie or proviſion, in lands or annualrents, and thereafter acquire reverſions, appriſings, tacks, or other further or better ſecurity of the ſame lands to himſelf, and his heirs whatſoever; theſe will accreſce to his heirs-male, or of tailzie or proviſion, whether the infeftment in favour (*of heirs general*) be anterior or poſterior, which is the more dubious caſe. For it cannot be thought that the defunct having before provided ſuch lands or annualrents to his ſpecial heirs, doth by acquiring new rights mean to ſet his heirs by the ears to debate upon their ſeveral rights: neither can his poſterior deeds be reputed an alteration of the former proviſion; which can only be done by reſignation, unleſs the defunct debarred expreſsly his former ſpecial heirs, and obtained his heirs whatſoever infeft. And tho' heirs whatſoever do ordinarily ſignify heirs of line, who are heirs general, and take place, when the right of no ſpecial heir appeareth; yet the adequate ſignification thereof is not heirs general, but heirs generally, whether of line, male, tailzie or proviſion; as is more clear *paſſivè* in the defunct's obligements; as if he obliged himſelf and his heirs whatſoever; by heirs whatſoever will be underſtood all kind of heirs in their order; yet in ſome caſes only his ſpecial heirs, *as* if the obligement relate to lands or others ſo provided, as will ſhortly appear: *b. ſides* [h], heirs-male, or of tailzie and proviſion, in reſpect of the heirs of line, are as ſtrangers, and may come againſt their predeceſſor's deeds in favour of his heirs of line; as if any perſon provide any lands or annualrents to his heirs-male, or of tailzie, and thereafter diſpone the ſame to his heirs apparent of line, his heirs-male, or of tailzie, will in ſeveral caſes not be obliged to fulfil that proviſion; and if ſuch expreſs proviſions be ineffectual to the heir of line, it ſeems (*that*) a general taking (*of*) a new

* The defunct vaſſal had not in this caſe taken infeftment of more heirs-portioners.

[h] F. and therefore.

new right in favour of heirs whatſoever ſhould be leſs effectual: but the difficulty is, how ſpecial heirs can be ſerved heirs in ſuch rights ſupervenient, conceived in favour of heirs whatſoever, which (*difficulty*) will be looſed, if the heirs ſpecial may be comprehended, and ſo ſerved under the common title of heirs whatſoever. How far heirs of tailzie or proviſion may alter the tailzie of the fee, or affect or burden the ſame, is largely conſidered, *lib.* 2. *tit.* 3. § 58. which therefore needs not here be repeated.

XIII. The common intereſt of heirs *paſſivè*, is, that they are liable for their predeceſſors debts, for they are reputed in law as one perſon with their predeceſſors, and ſo repreſent them, not only *activè* in their eſtates and goods, but alſo *paſſivè* in their debts and burdens, *Quem ſequuntur commoda eundem & incommoda ſequuntur* [i]; and this is common alſo to executors as being heirs in the moveables, but as the executors ſucceed only in moveable rights *activè*, ſo they ſucceed only in moveable debts *paſſivè*, yet the creditor hath his option to purſue either, or both of them, whether the debt be heritable or moveable, and the heir hath relief againſt the executor, in ſo far as he is diſtreſſed for moveable debts; ſo hath the executor relief againſt the heir of the heritable debts, *March* 7. 1629, *Falconer*; *Spotiſ. executors*, *L. Carnouſie contra Meldrum* [k]. But heirs and executors differ in this, that the executor is only liable *ſecundum vires inventarii*, according to the inventary of the confirmed teſtament, unleſs he diſorderly intromit with more; but the heirs are liable *in ſolidum*, though the debt far exceed the value of the eſtate *. Heirs are liable for their predeceſſors debts, which are preferable to the heirs proper debts, if they be decerned within three years after the defunct's death **; neither can the heir diſpone in their prejudice, within a year after the defunct's death, *Parl.* 1661, *cap.* 24. but not all the ſame way.

XIV. Firſt, Heirs-portioners, though jointly they be liable for their predeceſſors debts *in ſolidum*, without benefit of inventary; yet ſeverally, each heir-portioner is regularly liable but *pro rata parte*, though the proportion whereunto they ſucceed be more than the whole debt, *Feb.* 7. 1632, *Home*; *ibid. L. Lawers*; *Spotiſ. heirs*, *Duncan and the heirs of Ogilvy*. Yet one heir-portioner was found liable *in ſolidum*, as ſucceſſor *to her predeceſſor*, in his whole eſtate by diſpoſition *poſt contractum debitum*, though there were other two ſiſters, the one of whom being called, renounced, the purſuer condeſcending upon nothing, unto which ſhe could ſucceed; and the other having no means, but being called *paſſivè*, *Feb.* 15. 1634, *Orr*: Neither did it avail, that the other ſiſters had received portions of money near to the value of the eſtate, by the father in his life, but action of relief was reſerved againſt them, as accords, *March* 21. 1634, *inter eoſdem*: The reaſon thereof adduced, is, that the getting portions in money, could be no *præceptio hæreditatis*, and ſo could not make the receivers lucrative ſucceſſors, *poſt contractum debitum*, as the diſpoſition of the lands doth. Yea, an heir-portioner being conveened without the other, was found liable *in ſolidum*, becauſe the other was found not *ſolvendo*, and had diſponed all right to the defender, *Jan.* 24. 1642, *Scot*. But here the matter was but of ſmall moment, and this was a doubt in the firſt deciſion, *if*, *as in* this caſe, ſome of the heirs-portioners ſhould be *inſolvendo*, whether or not recourſe might be had againſt them that were *ſolvendo*, at the leaſt, to the value of their proportion, which, though it ſeems equitable, and is favoured by this laſt deciſion, yet it is not decided in the former, neither have I obſerved it decided ſince; but in the purſuit, *Dec.* 23. 1665, at the inſtance of Dame *Rachel Burnet*, now Lady *Preſton*, *contra* the ſiſters of her firſt huſband, the Lords only decerned againſt the heirs-portioners *pro rata*, but with reſervation to the purſuer to inſiſt and diſpute her right againſt any of them for more,

* By Act 24. P. 1695, heirs have now the benefit of inventary.

** If, after the three years, the predeceſſor's eſtate is carried off by the creditors of the apparent heir renouncing, the predeceſſor's creditors have action againſt the apparent heir to that extent, *Nov.* 3. 1682, *Blyth*, obſerved by *Falconer*.

[i] See above, I. 7. 13. [k] See below, III. 8. 65.

more, if any of them proved inſolvent: but it ſeems the portion of the inſolvent would not reach the ſolvent above the value of their ſucceſſion; becauſe the only ground they could be liable on, for more than their part, would be *in quantum lucrantur*. For, as heirs, they could not be liable *in ſolidum*, neither by our law, nor the civil law. And if the creditors taciturnity, whereby the other heirs became inſolvent, did appear, it would prejudge the ſilent creditor, and not the co-heir, who did not know the debt, and ſo could not prevent the other's dilapidation.

XV. There is a caſe occurreth oft-times amongſt heirs-portioners, when ſeveral obligations and proviſions are granted in their favour by the defunct, whereby, after his deceaſe, they become mutual debtors and creditors, and ſometimes theſe proviſions exceed the eſtate, *quid juris*, whether do theſe obligations evaniſh and become extinct *confuſione*, becauſe the ſame perſons become debtors and creditors? or whether *do* they all ſtand? and, in that caſe, whether the firſt in order will be preferred, or if they all will be abated proportionally to the value of the heritage? Thus *Maitland* obſerves, *Dec.* 20. 1550, that a father infeft himſelf, and the heirs of the firſt marriage, and thereafter reſigned and infeft himſelf, and the heirs-male of the ſecond marriage; which failing, his neareſt heirs whatſomever, theſe heirs-male of the ſecond marriage failed; and therefore, not the daughter of the firſt marriage only, but ſhe, and the daughters of a third marriage ſucceeded by the ſecond infeftment, as his heirs whatſomever, ſubſtitute to his heirs (*male*) of the ſecond marriage. *Craig* hath the ſame caſe, but otherwiſe obſerved, *lib.* 2. *dieg.* 14. § 11. where a perſon had provided his lands to the heirs of three ſeveral marriages, of each whereof there ſurvived a daughter: the queſtion was, which of the daughters ſhould ſucceed? Whether the firſt, as having the firſt proviſion, or the laſt having the laſt proviſion? The parties were three ſiſters, *Aikmans*. In which the Lords admitted all the three ſiſters as heirs-portioners, and ſo confounded the proviſions, being all equal and about the ſame thing, which muſt be the reaſon, and not that which is there rendered, *viz.* becauſe the defunct, notwithſtanding of theſe proviſions in favour of heirs, might have diſponed effectually to a ſtranger, and ſo likewiſe to his own children of another marriage; for that reaſon would have excluded the daughters of the firſt marriage, and preferred the daughter of the laſt marriage; and as hath been ſhown, tailzies *and* proviſions, upon an antecedent onerous obligation, ſuch as marriage is, hinder the fiar to diſpone, or provide the ſame to his heirs of line, repreſenting him ſimply, who muſt fulfil his obligement; albeit his diſpoſition to ſtrangers, not ſo repreſenting him, will be effectual: And therefore *Craig*, in the ſame place obſerveth, in the caſe of *Iſobel Baron*, who being heir to her father of his firſt marriage, by which it was provided, that the heirs of the marriage ſhould ſucceed to all lands conqueſt during the marriage: And thereafter, having a ſon of the ſecond marriage, who was his father's heir of line, to whom his father diſponed, or provided a tenement acquired, during the firſt marriage; yet the ſaid Iſobel, as heir of that marriage, recovered that tenement from her brother as heir of line [1].

But the main difficulty remaineth, when the obligements in favour of the heirs-portioners are unequal; for, when they are equal, whether they become extinct by confuſion, or not, it is alike. But if they be ſo extinct when they are unequal, there will not be an equal abatement; but the greateſt obligement will be extinct, as well as the leaſt: neither can ſuch obligations be wholly extinct by confuſion, but only *pro rata*. So that, if there be three heirs-portioners, for example, the obligement granted to every one of them can only be extinct for a third part, becauſe they are but heirs in a third part; and as to two third parts, each two of them are debtors to the third: and if the obligation exceed the value of the heritage, ſuch of them as find they *would be* loſers if they entered heirs,

[1] See below, § 19. *h. t.*

heirs, may abſtain and renounce, and they, or their aſſignies, may purſue any of the reſt that ſhall enter for fulfilling of the defunct's obligements; *and the aſſigny may procure adjudication of the renouncer's portion*; but if they be conſiderate, when all the obligations jointly exceed the value of the eſtate, they will all renounce and aſſign their obligements, and their aſſignies will be preferred, according to their diligence, without conſideration of the priority or poſteriority of the obligements; but if they happen to enter, or when their proviſions are not perſonal to themſelves, *nominatim*, but as they are heirs of proviſion, and therefore neceſſarily require, that they muſt be heirs, before they can obtain their proviſions, then the obligements or proviſions of each heir-portioner are extinct, as to their own proportion; but they have like action againſt the other heirs-portioners, for their proportion, as other creditors have: the point will be clear by example, if three ſiſters were provided by their father to unequal portions, the firſt to 15,000 merks, the ſecond to 12,000 merks, the third to 6000 merks, and the defunct's whole eſtate had only been worth 18,000 merks. All of them entering, the caſe would be thus: the eldeſt would ſucceed to 6000 merks of the heritage for her part, and the ſecond would be liable to her for 5000 merks, as the third of her proviſion, to whom ſhe would alſo be liable for 4000 merks, as the third of the ſecond's proviſion, which being compenſed, the ſecond would be liable to the firſt in 1000 merks *de claro*. In like manner, the firſt would be liable to the third in 2000 merks, and the third would be liable to the firſt in 5000 merks, which being balanced, the third would be debtor, *de claro*, to the firſt in 3000 merks: ſo the intereſt of the firſt would be 6000 merks, as her own portion; and one out of the ſecond, and three out of the third's portion, being in all 10,000 merks. The ſecond falleth 6000 as her ſhare, out of which ſhe is liable in 1000 merks to the eldeſt, and the youngeſt is due to her 4000 *merks, and ſhe to the youngeſt* 2000 *merks, which being balanced, the youngeſt is due to the ſecond* de claro 2000 merks, whereby her intereſt will be 7000 merks, the youngeſt's portion will be 6000 merks, out of which ſhe is due to the eldeſt 3000 merks, and to the ſecond 2000; ſo there will remain only free to her 1000 merks.

This may clear the caſe as to liquid ſums; but as to diſpoſitions, or proviſions of lands, or other obligements *in facto*, theſe, or the intereſt, or value, will be the ſame way effectual amongſt the heirs-portioners, as if they had been made to ſtrangers; except where the ſame diſpoſition or proviſion is made to divers of them: for then either being equally obliged to others, as repreſenting the defunct, the ſame became void and ineffectual *pro tanto*: as was found in the ſaid caſe of the ſiſters *Aikmans*; but ſince the act of parliament 1621, againſt fraudulent diſpoſitions, the firſt diſpoſition, or proviſion, conſtituting that party creditor, may give ground to reduce a poſterior diſpoſition of the ſame thing to another of the heirs-portioners, as being without a clauſe onerous, after contracting of the firſt debt; but that will not hold in bonds for ſums of money, all which will have their effect, as is before ſaid: neither will it hold, when the proviſion of lands provideth the party deſtinate to be heir, for thereby that party cannot quarrel that predeceſſor's deed: otherwiſe the firſt obligement, or diſpoſition to any of the heirs-portioners *nominatim*, may reduce any poſterior diſpoſition to others of the heirs-portioners.

Two daughters being ſerved both heirs-portioners to their father in ſome teinds, but one of them ſucceeding to her brother, who was infeft as heir to his father in lands, excluding the other ſiſter, who was not ſiſter-german to her brother by both bloods, and both being purſued for their father's debt, they were not found liable equally, but proportionally, according to the intereſt they ſucceeded to; the one being only immediate heir to her father, in a right of teinds, wherein her brother *uterine* was not ſerved and infeft, the other being equally and immediately heir to her father in theſe teinds, and mediately heir to her father, by being heir to her brother, who was heir to his father, being

infeft in the lands by precept of *clare conſtat*, without ſervice, *June* 10. 1673, *White*.

XVI. *Secondly*, Other heirs not being heirs-portioners, are liable for the defunct's debt *in ſolidum*, except heirs ſubſtitute in bonds, who are only liable *quoad valorem* in the ſums in theſe bonds, *July* 3. 1666, *Fleming* [m].

XVII. Heirs are not conveenable at the creditors option, as in the caſe of heirs and executors, but they have the benefit of an order of diſcuſſing. Thus, firſt, debts and obligements relating to any particular lands or rights, and no other, do, in the firſt place, affect the heirs, who may ſucceed in theſe lands or rights before the heir general *: ſo an obligement obliging the defunct's heirs of line or tailzie, ſo ſoon as they ſhould come to his eſtate, was found to affect the heir of tailzie who came to that eſtate, without diſcuſſing the heirs of line, *Hope, de hæredibus, Lyon contra Scot.* So an obligement obliging a debtor and his heirs-male, ſucceeding in ſuch an eſtate (which was provided to heirs-male,) and all other heirs *and* ſucceſſors; was found to burden the heir-male, before the heir of line or executors, *July* 22. 1662, *Anderſon.* So likewiſe an obligement to infeft a party in an annualrent out of lands deſigned, *was found* to affect the heir of proviſion in theſe lands, without diſcuſſing the heir of line, *Nicol, Edmeſton contra Edmeſton. This* was *alſo* the opinion of the Lords, tho' there was no deciſion in it, *Had. Feb.* 19. 1611, *L. Blair contra Fairly.* And in theſe caſes the heir of tailzie or proviſion will have no relief againſt the heir of line, or other nearer heirs of blood, who otherwiſe, and alſo executors, muſt be diſcuſſed before heirs of proviſion or tailzie. General obligements not relating to particular lands, do, 1. affect the heirs of line, who are heirs general. 2. The heirs of conqueſt, *July* 21. 1630, *Fairly.* 3. Heirs-male muſt be diſcuſſed before heirs of tailzie or proviſion, not being ſo near of blood, *Hope, de hæred. Dunbar contra Hay of Murkill.* The like muſt follow as to heirs of marriages, who are alſo heirs of blood, and muſt be diſcuſſed before other heirs of proviſion or tailzie, who therefore are only liable in the laſt place, the reſt being diſcuſſed, unleſs they be obliged to relieve the heir of line, *Nov.* 22. 1665, *Scot.*

XVIII. But an heir of tailzie was not found to repreſent the defunct in obligations contrary to the terms of the tailzie, as to which heirs of tailzie are as creditors and ſtrangers; as when the ſecurity of a ſum was by way of tailzie payable to the creditor, and the heirs of his body; which failing, to a perſon named, his heirs and aſſignies whatſoever, the creditor being obliged to do no deed hurtful to the tailzie, and the debtor obliged not to pay without the conſent of the perſon named, that perſon was found to have intereſt to obtain declarator that the ſum was unwarrantably paid by the debtor, without his conſent, or order of law, by conſigning it to be re-employed in the ſame terms; and therefore the debtor was ordained to make up the ſecurity again as at firſt, reſerving to creditors how far they could affect this ſum for the firſt fiar's debt; or whether the terms of the tailzie would exclude the fiar's debts or deeds for his neceſſary uſe, or only unneceſſary and voluntary deeds, *Feb.* 3. 1674, *Drummond* [n]. And in like manner, a father having granted two bonds of proviſion to his two daughters, payable to them and the heirs of their body; which failing, to return to the father and his heirs, the one of them having died without heirs of her body, but having aſſigned her bond to her ſiſter, the aſſignation was found ineffectual, as being done on deſign to diſappoint the tailzie made by the father of the return of the proviſion, in caſe the daughters had no heirs of their bodies, and ſo was done without any onerous cauſe or juſt conſideration, *Jan.* 31. 1679, *Drummond.*

XIX. Heirs of marriage are heirs of proviſion, and partly creditors, and therefore may quarrel deeds fraudulent, or meerly gratuitous, done by the defunct whom

* *Craig* II. 17. 19. mentions a deciſion which ſeems to contradict this general poſition.

[m] See below, § 51. 2. *h. t.* [n] See above, II. 3. 59. 3.

whom they repreſent, in prejudice of their proviſions, as was found in the forementioned caſe of *Baron* [nn], obſerved by *Craig*, who being heir of a marriage, to whom all lands conqueſt during the marriage were provided, the father having diſponed a tenement acquired during that marriage, to his eldeſt ſon by another marriage, yet that heir of the marriage did recover the ſame from that ſon, albeit the heir of the marriage did repreſent her father, yet not ſimply, but according to the proviſion by the contract of marriage; which being an onerous contract, *uberrimæ fidei*, the father, contracter, can do no deed contrary thereto, but upon an onerous cauſe or juſt conſideration; and therefore, if he ſell any thing falling within ſuch proviſions, the heir of proviſion cannot quarrel that ſtranger, but is obliged to fulfil to him; but might quarrel the ſame, if it were meerly gratuitous, much more might heirs of a marriage quarrel deeds prejudicial to their proviſion in favour of the children of other marriages, without which the great truſt of theſe contracts would be eluded, whereupon parties rely, and make matches and give tochers; and therefore take proviſions to the heirs of the marriage, either of definite ſums, or of all, or a part that the contracters have, or ſhall acquire during the marriage, by which the whole eſtates of citizens are ordinarily conveyed; or otherwiſe, contracts of marriage bear particular lands, or ſums to be provided to the heirs or bairns of the marriage, and alſo the conqueſt during the marriage; which clauſe of conqueſt will reach only to what the father had more at his death than the time of the contract, and is ordinary both in the contracts of citizens and others, which therefore ſhould not be eluſory, but effectual, according to the true meaning of the parties, which is not to bind up the father, that he cannot do deeds for cauſes onerous, or rational conſiderations, but that he can do no other deeds meerly gratuitous and arbitrary, in prejudice of ſuch proviſions; for tho' by ſuch proviſions, when fulfilled, he himſelf muſt become fiar, and ſo may diſpone, yet he is alſo debtor, and ſo cannot effectually diſpone againſt the import and meaning of the proviſion: and therefore a father by his contract of marriage having provided certain tenements to himſelf, and his future ſpouſe in conjunct fee, and to the bairns of the marriage, *&c.* and the wife having reſtricted herſelf *by the contract* to the half of the liferent of theſe tenements, *in caſe of children*, after which the father having infeft her of new in the *ſecond* half, the ſaid laſt infeftment was found reducible at the inſtance of the bairns, as heirs of the marriage, and that they were not obliged to fulfil their father's deed in favour of their mother, who was competently provided, in reſpect the ſame was contrary to the proviſion in the contract of marriage, *July* 10. 1677, *Carnagie*. Yea, a father by his contract of marriage having provided a definite ſum to the eldeſt heir-female of the marriage, and thereafter having diſponed his eſtate to her, ſhe marrying a perſon that would aſſume his name and arms, wherein if ſhe failzied, providing the ſame to his ſecond daughter upon the ſame terms, *&c.* the ſaid eldeſt daughter having married ſutably before ſhe knew that diſpoſition, and her huſband refuſing to take her name, ſhe was found to have right to take her to her portion by her mother's contract, and ſo the right of her father's eſtate was devolved to her ſecond ſiſter, upon the terms therein contained, who was found liable to pay the proviſion to her eldeſt ſiſter, contained in her mother's contract, *July* 26. 1677, *Stevinſon*. But theſe proviſions *of conqueſt* do not hinder juſt and rational deeds of the father, as providing a jointure for a poſterior wife, as was found in the caſe of *Mitchel contra the heirs of Littlejohn*, *June* 16. 1676. Nor will they hinder fathers to provide children of another marriage with competent proviſions according to his condition, tho' thereby the conqueſt during the marriage will be affected; yea, where in a contract of marriage the huſband's preſent means, and his wife's tocher, were provided to be employed for the man and wife in liferent; whilks failing, the one half to the man's heirs, and the other half to the woman's heirs: there being no bairns of the marriage, the huſband

[nn] See above, § 15. *h. t.*

huſband was not found liable to employ that ſum, and the conqueſt in favour of himſelf and the wife's heirs, but that he might employ the whole in favour of the child he had by a poſterior marriage, *Dec.* 21. 1680, *Anderſon* [o].

XX. The exception that all parties having intereſt are not called, will be ſufficient to ſiſt proceſs againſt ſuch heirs as have the benefit of diſcuſſion, without neceſſity to condeſcend or inſtruct any right the (*heir not called*) may ſucceed to, *Jan.* 24. 1672, *L. Luſs and Glendening*.

XXI. But the exception of the order of diſcuſſing will not be ſuſtained, (*if all parties are called*) unleſs the defender condeſcend on; and clear an heritage to which the anterior heir may ſucceed, which being a dilator, muſt be inſtantly verified, as where it is notour; and where that cannot be, ſometimes proceſs will be ſuſtained againſt both heirs of line and tailzie together, ſuperſeding execution againſt the heirs-male or of tailzie, till the heir of line were diſcuſſed, *July* 13. 1626, *Edgar*. And heirs of line and proviſion being purſued jointly, the heir of line renouncing, was aſſoilzied, and proteſtation admitted for adjudication againſt the heir of line, which the purſuer was ordained to aſſign to the heir of proviſion, and was not found obliged further to diſcuſs the heir of line, or to put him to his oath upon any other paſſive title, ſeeing the heir of proviſion required not the ſame *in initio litis*, when the heir of line renounced, nor ſhewed any viſible eſtate which might befal to the heir of line, *June* 22. 1678, *Crawfurd*. The queſtion is here, what is meaned by diſcuſſing, which is not underſtood by that heir's renouncing to be heir, *January* 26. 1622, *Cowan*; but in that caſe the renounced heritage muſt be adjudged. Diſcuſſing therefore is by horning, caption and appriſing, *March* 22. 1627, *Edgar*; or otherwiſe by adjudication, in caſe the heirs renounce; but the other heirs may exclude the renunciation, by alledging his behaving as heir, as was found in the foreſaid caſe, *January* 15. 1630, *Clegkorn*. This paſſive ſucceſſion of heirs in their predeceſſors debts and obligements, making them perſonally liable thereto, befalleth in three caſes: 1. When the heir is entered heir. 2. When he is not entered, but immixeth himſelf, by meddling himſelf as heir, or becoming lucrative ſucceſſor, after the debt contracted. 3. When the heir is lawfully charged to enter heir, tho' he hath neither entered nor meddled, if he do not renounce, he is perſonally obliged; and if he do renounce, his perſon and proper eſtate is free, and only the heritage is liable, and the creditor hath action *contra hæreditatem jacentem*. The firſt caſe is moſt ordinary and orderly, the ſecond inferreth the vitious paſſive titles, *geſtionem pro hærede*, or *præceptionem hæreditatis*: of which in the enſuing titles. Let us here conſider, firſt, the charge to enter heir, which is antecedent to the entry; and then the entry of heirs itſelf.

XXII. The charge to enter heir is founded upon the act of Parliament 1540, *cap.* 106. and it is of two kinds, a general charge, and a ſpecial charge: the general charge to enter heir proceedeth thus; the creditor, upon ſupplication, without citation, obtaineth from the Lords of courſe letters paſſing under the ſignet, to charge the party complained upon to enter heir to the complainer's defunct debtor, within forty days after the execution of the charge, with certification, if he enter not, ſuch proceſs will be granted againſt him as if he were actually entered heir: the reaſon of this charge with us is, becauſe heirs are not liable *paſſivè*, if they enter not, nor immix themſelves in the heritage; and therefore, that the creditor may not lie out beyond the year and day granted to heirs to deliberate, the law hath introduced this remeid, that the creditor may charge the debtor's apparent heir to enter, whereupon he hath perſonal action againſt him, if he renounce not, and thereupon may reach not only his heritage, but his own proper goods belonging to him *aliunde*; and if he renounce, he hath action *contra hæreditatem jacentem* [p].

The general charge to enter heir may be executed againſt the apparent heir, after the defunct's death, even within the *annus deliberandi*; but the ſummons thereupon

[o] See above, II. 3. 41. 3.

[p] See above, III. 2. 46.

thereupon muſt be after the year and day is expired, not only from the defunct's death, but from the heir's birth, if he be *poſthumus*, *Spotiſ.* heirs, *Livingstoun contra Fullertoun*; and therefore a ſummons executed after year and day expired upon a charge to enter heir within the year, was ſuſtained, *June* 19. 1628, *Maculloch*; *Had. July* 10. 1610, *Montgomery contra L. Langshaw* [pp]. There is an act of Sederunt in *anno* 1613, allowing general charges to enter heir within the year and day, *and the ſummons to be executed thereupon immediately after year and day*; *but tho' the charge be after year and day, the ſummons thereupon muſt not be executed till forty days expire from the execution of the charge* *; *and tho' the ſummons be within year and day*, or within the days of the charge, if the heir renounce and omit that defence, the decreet *cognitionis cauſa*, and adjudication thereupon, were found valid, and that alledgeance proponed by another creditor, was repelled; becauſe it was free to the heir as well to renounce when he pleaſed, as to enter when he pleaſed, *July* 14. 1631, *Blair*; but it is like the poſterior creditor hath been negligent, otherwiſe that *præmatura diligentia* of purſuing and renouncing within the year, would have been accounted colluſive and fraudulent, and ſo would not prejudge the other creditor doing diligence in the ordinary way. General charges to enter heir do evaniſh, as incompleat diligences, if the party charged die before litiſconteſtation or ſentence; and tho' the forty days be expired before the death of the party charged, yet the charge uſeth not to be transferred, or made uſe of againſt any ſubſequent heir apparent; *whence* it is conſequent, that if the charger die before litiſconteſtation or ſentence, that the ſame ſhould alſo become void, becauſe the charge doth not neceſſitate the party charged to enter or renounce in favour of the charger's heirs, but of himſelf. *Yet* it was found, that an aſſigny might inſiſt upon a charge at the cedent's inſtance, after the cedent's death, tho' nothing followed thereupon during his life, *June* 18. 1631, *Prior of Archattan*.

XXIII. A ſpecial charge to enter heir differeth from the general charge in this, that the general charge is in lieu of the general ſervice: for thereby the creditor reacheth the perſon of the apparent heir of his debtor, and his eſtate or goods eſtabliſhed in his perſon, unleſs he renounce: and ſo the general charge is the ground of a proceſs and decreet for payment: but thereby the creditor cannot reach the lands and annualrents, which are not as yet eſtabliſhed in the perſon of the apparent heir, he not being ſpecially ſerved thereunto, or infeft therein. And therefore, that the creditor may reach theſe, he muſt uſe a ſpecial charge, which ſupplieth the ſpecial ſervice and entry. This ſpecial charge, tho' it proceedeth upon ſupplication without citation, yet it muſt be upon production of a decreet at the creditor's inſtance, not *cognitionis cauſa*, but for performance. And it is competent in two caſes; Firſt, upon the proper debt of the party to be charged: for if the debtor be un-entered to ſome of his predeceſſors, and ſo their rights not eſtabliſhed in his perſon; in that caſe the creditor muſt charge his own debtor ſpecially to enter heir in the rights competent to him by that predeceſſor, with certification if he enter not, the creditor ſhall have ſuch proceſs and execution againſt that land and heritage to which he might enter, as if he were actually entered therein, whereupon appriſing doth proceed. In this caſe there is no neceſſity of an antecedent general charge, which only is uſed to the effect that the debt may be eſtabliſhed *againſt* the perſon of the debtor's apparent heir *paſſivè*, by a decreet upon the general charge. The other caſe is, when the debt is not the proper debt of the party charged, but of ſome predeceſſor to whom he may be heir; in which caſe the debt muſt firſt be eſtabliſhed againſt him *paſſivè*, and then followeth the ſpecial charge: in this caſe the ſpecial charge cannot be till after year and day, becauſe it preſuppoſeth not only the ſummons, but alſo the ſentence upon the general charge, both which

* Summonſes have been ſuſtained by the Court of Seſſion, tho' executed within the forty days, where the day of compearance was 21 and 6 days after the laſt of the forty days, *July* 17. 1702, *Biggar*.

[pp] See above, III. 4. 32.

muſt be after year and day *. *But it is more queſtionable* when the debt is the proper debt of the party charged, if the ſpecial charge may not be at any time, even within year and day, or if it muſt be after the *annus deliberandi*: this makes for the negative, that it needs not abide the year of deliberation, becauſe the intent of the deliberation is not ſo much whether the party charged will be heir, as whether he will perſonally ſubject himſelf to the ground of that charge: for albeit he renounce not, *that* will not make him liable to any of the defunct's debts, except it be by his fraud and colluſion with one creditor in prejudice of another. And therefore, ſeeing he cannot deliberate, whether he will be ſubject to his own debt, he ought not to have the benefit of year and day before the ſpecial charge be effectual. *Yet the affirmative is more conſonant to the tenor and terms of law, and alſo more expedient; becauſe, 1. all heirs having the benefit of the year to deliberate, and the ſpecial charge being to cauſe them enter, there is no exception in law againſt the heir his year of deliberation. 2. If the negative hold, there ſhould be no renunciation to enter heir competent, when the charge is upon the proper debt of the party charged; but the contrary was found, and a party being ſpecially charged to enter heir to ſome of his predeceſſors upon his own debt, was admitted to renounce, 23d March* 1627, *L. Carſe. 3. Tho' the charge to enter heir upon a defunct's debt, will only make the apparent heir not renouncing liable for that debt, the hazard is far greater to make him liable for other debts, when his predeceſſor's eſtate is appriſed for his own debt, at leaſt renunciation will not be admitted againſt another creditor charging, unleſs he firſt purge his predeceſſor's eſtate of all diſtreſs upon his own proper debt, ult. July* 1657, *Carmichael contra Lockhart; July* 5. 1658, *Mure contra Lindſay, Nov.* 3. 1682, *Blyth contra Lawſon, obſerved by Falconer*, No. 23. Yea, before the late act 24. *Parl.* 1661, preferring the diligence of the defunct's creditors to the heir's proper creditors, there was no reaſon to allow ſpecial charges for the apparent heir's own debt more ſummar execution than other charges, ſo to prefer the apparent heir's proper creditors to the *defunct's* creditors. This preference of the diligences of the defunct's creditors to the diligences of the heir's proper creditors, is only if the ſame be compleat in three years after the defunct's death, wherein the *annus deliberandi* is contained, but in that year the heir can make no valid voluntary diſpoſition [q]. The act of Parliament 1540, *cap.* 106. which is the ground of the charge to enter heir, and is only the riſe of the ſpecial charge, inſinuates an exception, if the heir be major: But the cuſtom of the Lords hath introduced the general charge to conſtitute the debt, and allows both charges againſt minors. There is no neceſſity either of a general or ſpecial charge, as to real actions, which may proceed againſt apparent heirs; as poinding of the ground, *Jan.* 2. 1667, *Oliphant* [qq]. Neither are they neceſſary in declarators or reductions, *Nov.* 12. 1672, *Brodie* [r].

XXIV. The remedy againſt both charges to be heir, is a renunciation to be heir, whereby the renouncer's perſon and his proper eſtate will not be liable for his predeceſſor's debt, but only his predeceſſor's heritage. This renunciation uſeth to be offered by way of exception in the proceſs upon the general charge: and if the defender be not abſent, it is not ordinarily admitted by ſuſpenſion, except in favour of minors, who, tho' being apparent heirs, they take a day to renounce and fail therein, yet they will be reſtored againſt the ſame by ſuſpenſion without reduction, *Jan.* 25. 1628, *Kennedy*; *Spotiſ. reſtitutio in integrum, Niſbet contra Niſbet* **. But if the minority were controverted, and not inſtantly verified, it muſt be by reduction, *Spotiſ.* minors, *Craig contra Cockburn.*

* A decreet on any other of the paſſive titles, as well as on a general charge, is a foundation for a ſpecial charge. See above the form of procedure to be followed, if the apparent heir renounce, III. 2. 46.

** In this caſe the heir was not minor, as appears by *Dury, January* 13. 1629, *inter eoſdem*, but the purſuer could not ſpecify any *damage* he had incurred by the heir's neglect, and his *expences* were allowed to him.

[q] See above, II. 12. 29. [qq] See above, II. 5. 10. [r] See above, II. 10. 19.

burn *. A renunciation to be heir was admitted *rebus integris*, tho' the decreet and charge were *ſixteen years* before, *July* 20. 1626, *Harvie*. Yea, it was admitted, tho' there was a *compriſing on* the decreet ſuſpended, which was declared to ſtand, and the apparent heir's perſon and proper eſtate were only freed, *Dec.* 11. 1657, *Oliphant contra Blackburn*. A renunciation to be heir was not admitted with this quality, excepting to the renouncer certain lands whereinto he was appointed to be infeft by his father's contract of marriage, and whereupon inhibition was uſed before contracting of the charger's debt, to the effect he might enter heir to thoſe lands, *Jan.* 23. 1627, *La. Ogilvie*. But in the like caſe, *Hope*, inhibition, *Thornton contra Bailie*, and *Adamſon contra Hamilton*, *ibid.* the apparent heir was ſuffered to renounce to be heir to his goodſire, except as to thoſe lands which his goodſire had diſponed to his father in his contract of marriage, *and became bound to infeft him therein*, whereupon inhibition was uſed: which the Lords found a ſingular title conſiſtent with a renunciation of the heritage *ex titulo univerſali*. The exception upon renunciation to be heir is elided, if the defunct's eſtate be burdened with the heir's proper debt: which is taken off by the duply of purging the ſame, *as* appears in the deciſions before adduced **. The ſaid exception is alſo elided by the reply *of* behaving as heir, albeit the ſame were libelled as a ſeveral paſſive title, *March* 18. 1631, *Bennet*.

XXV. The entry of heirs is either of heirs general or heirs ſpecial. The former requires only a general ſervice, which is neceſſary to all heirs, except heirs in tacks, penſions, and heirs *nominatim*, immediately ſubſtitute in bonds ††. But heirs of tailzie or proviſion muſt be ſerved, that it may appear that the heirs to whom they are ſubſtitute are failed; and therefore the only child of a marriage was found to have title to purſue implement of the contract of marriage, he ſerving heir of the marriage *cum proceſſu*, *July* 21. 1676, *Hay of Drumelzier*. The general entry of heirs proceedeth thus, a brieve is taken out of the Chancery of courſe, without citation or ſupplication, for ſerving ſuch a perſon neareſt and lawful heir to ſuch a defunct. It may be directed to any judge ordinary at the parties option, albeit the defunct nor the heir never lived within that juriſdiction, *March* 6. 1630, *L. Caſkiben* ſupplicant. The Lords may, in caſes where an ancient or important ſervice is required, chuſe the judge moſt fitting for the affair; and when brieves paſs of courſe, they are obtained to any judge deſired; but they are eaſily advocated, and remitted to the macers, with aſſeſſors in caſes of difficulty.

The tenor of the brieve, is by way of precept from the King to the Judge to inquire *pro probos et fideles homines patriæ*, that ſuch a perſon died at the faith and peace of our Sovereign Lord; and that the uſer of the brieve is the neareſt and lawful heir: So this brieve hath only theſe two heads; and thus not only heirs of line may be ſerved generally, but alſo heirs of conqueſt, being to ſucceed to reverſions, heritable bonds, or the like rights, not having an infeftment, nor requiring a ſpecial ſervice: *Hope*, ſucceſſion, *Earl of Dumbar's heirs*. And, no doubt, heirs-male may be ſerved generally, that they may ſucceed to the like rights which may be conceived in their favour, and whereunto they can have no other acceſs. And, for the ſame reaſon, heirs of a marriage may alſo be ſerved, and heirs of proviſion in bonds.

General ſervices uſe to be included in ſpecial ſervices, as members thereof; and a retour to an annualrent, bearing to be granted to heirs whatſoever, and that the perſon retoured, *was* heir in the ſaid annualrent, was found to inſtruct him general heir, though it did not bear *per expreſſum*, that he was heir generally, but only in that annualrent, *Feb.* 9. 1676, *Drummond*; the general ſervice of heirs being retoured, doth ſo eſtabliſh rights not having infeftment (as diſpoſitions,

* The minority does not ſeem to have been in this caſe denied; but it was thought, that a decreet could only be taken away by reduction. The deciſion was pronounced in 1583, and has not been followed in later caſes.

** See above, § 23. *h. t.* and *March* 1692, *Chaplain contra Orrock*, obſerved by Sir *Patrick Home*, N° 198.

†† See above, § 6. *h. t.*

ſitions, heritable bonds, reverſions, appriſings and adjudications) in the perſon of the heir ſerved, as that no poſterior heirs can have right thereto, unleſs they be ſerved heirs to the perſon laſt ſerved heir, though the right ſtood in the name of the firſt acquirer, and not of the laſt heir; as an heritable bond or reverſion remaining in the name of a father, to whom his eldeſt ſon was ſerved heir generally, who, dying without iſſue, the ſecond brother muſt be ſerved heir to his brother, and not to his father therein, as was thought by all the Lords after diſpute *in præſentia*, albeit the matter was agreed without deciſion, *Spotiſ.* heirs, *Captain Rollo contra Stewart of Gairntullie*; the reaſon is, becauſe the general ſervice is a compleat eſtabliſhing of the right in the perſon of the heir: and therefore, as in ſpecial ſervices, the heir is ſerved to him who died laſt veſt and ſeized as of fee, whereby that right is eſtabliſhed; ſo, in the general ſervice, the heir muſt be ſerved to him, in whoſe perſon the right ſtood laſt. And though, in ſpecial ſervices, the heir cannot be ſerved to him who is laſt ſerved ſpecial heir, unleſs he had been alſo infeft: *yet* the reaſon thereof is, becauſe the ſpecial ſervice, as an incompleat right, evaniſheth, and the next apparent heir muſt be ſerved again to the ſame defunct; but it is not ſo in general ſervices.

XXVI. The entry of heirs to lands or annualrents, the fee whereof is by infeftment, is either by conſent of the ſuperiors voluntarily, or by law. The former is by the ſuperior's precept, which, from the initial words thereof, *Quia mihi clare conſtat*, *&c.* is called a precept of *clare conſtat* [s], by which the ſuperior acknowledgeth, that the defunct died laſt veſt and ſeized in ſuch lands or annualrents, and that the ſame are holden of him by ſuch a tenor, and that the obtainer of the precept is neareſt and lawful heir to *the defunct* in the ſaid lands, *&c.* and that he is of lawful age for entering thereto; and therefore commands his bailiff to infeft him therein. Infeftment being paſt accordingly, giveth that party the real right of the lands or annualrents, if done by the right ſuperior. It doth alſo conſtitute the receiver thereof heir *paſſivè*, and makes him liable to his predeceſſor's debts: but it will not conſtitute or inſtruct him heir *activè*, or give him an active title to purſue as heir. Yea, it will not be a ſufficient title as to the real right of the ground againſt any other party, than thoſe who acknowledge the giver thereof to be ſuperior, and the receiver to be heir. For if, upon any other colourable title, they queſtion any of theſe, the infeftment and precept of *clare conſtat* will not be ſufficient alone, unleſs it have obtained the benefit of a poſſeſſory judgment or preſcription.

XXVII. Like unto this is the entry of heirs, within burgh-royal, by heſp and ſtaple [ss], according to the cuſtom of burgh, which is inſtructed by the inſtrument of ſeiſin only, without other adminicles, *Nov.* 13. 1623, *Merſhal*; *July penult.* 1629, *Wilſon.* In which caſe, though a ſeiſin by heſp and ſtaple was ſuſtained to inſtruct an heir *activè*; yet it was only becauſe this purſuer had been proved heir *paſſivè* thereby, at the inſtance of that defender.

XXVIII. The ſecureſt entry of heirs ſpecially, in lands or annualrents, is by law. The procedure whereof is in this manner: any perſon may ſummarily obtain a brieve out of the Chancellary, in the ſame manner as the general brieve, which is directed by way of precept from the King, or Lord of the regality, having Chapel and Chancellary; whereby the Judge, to whom it is directed, is ordained, by an inqueſt upon oath, to inquire, "who died laſt veſt and ſeized, "as of fee in ſuch lands or annualrents: and if, at the faith and peace of our "Sovereign Lord, and who is his neareſt and lawful heir therein, of whom it is "holden in chief, by what ſervice, and what the value of it is, now, and in "time of peace; and if the ſaid heir be of lawful age, in whoſe hands the ſame "now is, from what time, how, by what ſervice, by whom, and through what "cauſe." It is needleſs to be curious concerning the number of the heads of this brieve, ſome parts thereof not being diſtinct, but explicatory of the former.

XXIX. Theſe

[s] See above, II. 3. 14. 3.

[ss] See above, II. 3. 19. 2.

XXIX. Theſe brieves are accordingly directed to the Judges Ordinary, where the land, or annualrent lies, as to Sheriffs, *Stewarts*, Bailies of Regality, or Bailies of Burghs-royal. But if there be juſt exception againſt the Judge Ordinary of the place, or if the lands or annualrents lie in divers juriſdictions, and be ſo repreſented; warrant will be granted, upon ſupplication to the Lords, that the director of the Chancellary iſſue brieves to other perſons, and frequently, in the caſe of divers juriſdictions, they are directed to the Macers.

XXX. By virtue of this brieve, the Judge Ordinary, or delegate to whom they are directed, citeth perſons to be Members of Inqueſt, upon 15 days: and proclaimeth the brieves at the market-croſs, unleſs they be ſerved at the *Michaelmaſs* Court, when all the free-holders are obliged to be preſent, and then the brieve may be ſerved, without further delay, conform to the act of *Parl.* 1429, *cap.* 127. and *Parl.* 1503, *cap.* 94. where it is left arbitrary, to ſummon the Inqueſt on what days the Judge, ſerver of the brieve, pleaſeth; or preſently, if there be perſons of Inqueſt preſent in the tolbooth, unſummoned. But, in all caſes, the brieves muſt be proclaimed publickly, at the market-croſs, in plain market, where moſt confluence of people is gathered, ſo as it may come to the knowledge of all parties having intereſt *. And then, that the ſaid brieve be thrice cried, plainly together: which is by three ſeveral Oyeſſes, with a loud and audible voice, before the reading of the brieve, and the Sheriff's precept thereupon; and each oyes to be at as great diſtance from other, as the time required to give the ſaid oyes thrice; and that the officers of the Town be preſent. But if the brieve come to be ſerved ſo near *Whitſunday* or *Martinmaſs*, that there does not interveen a market-day, the brieves may be proclaimed upon any week-day, the officers and ſix others of the town being preſent: yet, either the day of compearance, or the day of citation is numbered, as one of the fifteen, *July* 27. 1626, *Mackulloch*. There is no neceſſity to ſummon any defender; in lieu whereof, is the publication of the brieve, by proclamation at the market-croſs. Yet, upon the ſupplication of the party intereſted, warrant was granted by the Lords to the director of the Chancellary, that no brieves ſhould be iſſued for ſerving heirs to ſuch a defunct, unleſs they contained a clauſe to cite the ſupplicant, who was donatar to the defunct's baſtardy, *Nicol, de hæreditariis actionibus, Mackulloch contra L. Myrton.*

XXXI. The Inqueſt being called, conſiſteth ordinarily of 15 perſons, againſt whom like exceptions are competent, as againſt witneſſes. And though *Craig*, *lib.* 2. *dieg.* 17. § 28. regreteth, that any perſon is admitted to be one of the Inqueſt, whoſe rent exceedeth not 40 *lib.* though they be not *pares curiæ*, nor convaſſals with the party to be ſerved, neither of the vicinity, or neighbourhood, contrary to the intent and antient cuſtom of theſe ſervices: yet he acknowledgeth, that it was ſo ordinarily, eſpecially in the ſervice of Noblemen, and cuſtom hath continued the ſame hitherto. But thoſe of the neighbourhood were fitteſt, becauſe, as *Craig* obſerveth in that place, Inqueſts are in the middle, betwixt Judges and witneſſes, partaking part of them both; for two or more of them, of their proper knowledge, will be ſufficient for witneſſes, in the matter of fact; and, upon their declaration, all the reſt will ſerve *affirmativè*, without any other teſtimony. And it is like they have been of old, ſole judges in brieves, the Judge Ordinary having no more power but to call and order them. And they are yet

* The Statutes of *Robert* III. *c.* 1. appoint brieves of Inqueſt to be ſerved by the Sheriff in full court, by the moſt ſufficient and worthy perſons within his juriſdiction, called upon 15 days warning. It does not appear, whether the proclamation of the brieves at the market-croſs, on 15 days, was introduced by ſtatute, or by cuſtom. That form is however mentioned, P. 1503, *c.* 94. as a matter known and eſtabliſhed. The act 127. P. 1429, appoints, that if the brieve be preſented to the Sheriff or Bailies in the head Court, "it ſhall be ſerved incontinent;" but, if preſented on another day, "it ſhall be cried on 15 days warning." It was a matter of doubt, whether, by this ſtatute, the preſenting the brieve at the head Court, was ſufficient to ſupply both the proclamation of the brieve, and the citation of the Inqueſt; tho' a ſufficient Inqueſt might thus be obtained, yet parties having intereſt, could be certiorated by proclamation alone. The ſtatute 94. P. 1503, eſtabliſhes this diſtinction; and tho' it allows the Inqueſt to be cited on any number of days, or to be immediately called, if preſent in Court; yet it directs the brieves to be always proclaimed on 15 days.

with the Judge Ordinary, or delegate as Judges; for they muſt ſerve, and do ſometimes ſeal the ſervice with him.

XXXII. The Inqueſt being ſettled, the heir apparent gives in his claim, craving to be ſerved heir to his predeceſſor, in ſuch lands or annualrents; and therewith the brieve and executions thereof, together with the inſtructions of the ſame.

XXXIII. The brieve and claim are as a libel, againſt which any party compearing, and found to have intereſt, may propone their exceptions, which are many more than thoſe contained in the ſaid laſt act of *Parl.* 1503, *cap.* 94. And firſt againſt the executions, as being blotted in the date, or other ſubſtantials, and ſo null, (which thereby may not be mended, as other executions) as the name and ſirname of the follower, and of the defender; the name of the land, and cauſe upon which the brieve was purchaſed. Which was found, not only to extend to the blotting of the brieve, but to the executions thereof, *July* 27. 1626, *Mackulloch* *. Or, as not proclaimed upon fifteen days, which alſo will be relevant, by way of reduction. Or, that the defunct was baſtard, and had no lawful iſſue. Or, that the purſuer of the brieve is baſtard, and ſo incapable of ſucceſſion: wherein, if the proponer be more ſpecial, and pregnant than the apparent heir, in his alledgeance of being neareſt and lawful heir, he will be preferred. Exceptions alſo are competent as to the point of right, by proponing and inſtructing, that the defunct was denuded of the fee (but exceptions upon parallel rights, *inferring*, that the defunct had not a good right, are not competent here.) And alſo exceptions upon the age of the apparent heir, or his being forfeited, or rebel, *&c.* are here competent: and likewiſe objections and debates, upon inſtructions and writs adduced, for proving of the claim and heads of the brieve. In which caſes, if there appear difficulty or intricacy; the Lords, upon ſupplication, will conſtitute aſſeſſors, or grant advocation of the ſervice: and, after diſcuſſing of the points *in jure*, will remit the ſame, either to the ſame, or to other Judges delegate. But no objection or exception will be admitted, unleſs it be inſtantly verified, becauſe this brieve is no brieve of plea, *Parl.* 1503, *cap.* 94. and therefore cannot admit of terms to prove exceptions.

XXXIV. The debates upon the brieve being diſcuſſed, the Purſuer thereof muſt prove, and inſtruct ſufficiently the heads of the ſame. As firſt, that the defunct died laſt veſt and ſeized, as of fee, at the faith and peace of our Sovereign Lord; which comprehends, firſt, the death of the defunct, which is ordinarily proved by the knowledge of the members *of Inqueſt*, notoriety, or common fame, without neceſſity to inſtruct the ſame, by ocular witneſſes who ſaw the defunct die, or buried. But, in caſe of the defunct's death out of the country, or if it be dubious or controverted; the teſtimony of witneſſes, or proper knowledge of two, at leaſt, of the Inqueſt, or teſtificates from abroad, eſpecially from the Magiſtrates of the place where the defunct died, or was buried, are requiſite; or common fame, as to perſons who periſh, or are killed. The ſecond point of this head is, that the defunct died laſt veſt and ſeized, as of fee; which muſt be inſtructed, by production of the infeftment, eſpecially the inſtrument of ſeiſin, and warrant thereof, or ground of the ſame: for though *in antiquis* the very precept cannot be ſhown; yet the charter or diſpoſition will be a ſufficient adminicle to corroborate this ſeiſin, that it be not accounted only as the aſſertion of a nottar: yea, there is no doubt, but ſince the act of preſcription, *P.* 1617, *c.* 12. conſequent ſeiſins having the courſe of forty years, may inſtruct this point, being ſufficient, even in the caſe of competition, which is much exacter than this [t]. And *Spotiſwood*, *tit. Brieves*, obſerveth upon retours, that, *in anno* 1547, a negative ſervice was reduced, upon production of *the Juſpender's precept of ſeiſin*,

* By act 113. P. 1529. it is declared a good exception againſt a brieve, "That it is razed or blotted in ſu"ſpect places, *viz.* in the name or ſirname of the purſuer and of the defender, the name of the land, or the "cauſe on which the brieve was purchaſed, and the date." This laſt was in this caſe found to extend to the date of the executions.

[t] See above, II. 12. 20.

ſin, and a tranſumpt of the defunct's ſeiſin, out of a protocol tranſumed before a Commiſſar, with a decreet againſt the ſuperior; bearing *him* to have confeſſed, that he had infeft the defunct. But here the inſtructing the defunct's being once infeft, will infer a preſumption, that he ſo continued, and ſo died infeft, unleſs the contrary be proved, that he was denuded. The third point in this head, That the defunct died at the faith and peace of our Sovereign Lord, is alſo preſumed, *quia quod ineſſe debet præſumitur*, and therefore needs no other probation, but layeth the burden of probation upon the alledger in the contrary, *viz.* That the defunct died rebel, or that he was forfeited, or his blood attainted; which may be elided by the replies of relaxation, diſpenſation, or reſtitution. But there uſeth no notice to be taken of rebellion upon civil debts; but only open rebellion of war, or upon treaſonable cauſes, whereupon the defunct was declared fugitive; which makes the defunct, as to this point, not to die at the faith of our Sovereign Lord, *Nov.* 21. 1626, *Seatoun of Meldrum* ſupplicant.

XXXV. The ſecond head of the brieve is, That the purſuer is neareſt and lawful heir to the defunct in theſe lands, which reſolveth in two points; firſt, That the fee was provided to ſuch heirs as are contained in the claim, whether they be heirs of line, or of conqueſt, heirs-portioners, heirs of marriage, heirs-male, or of tailzie and proviſion. And this can only be inſtructed by the defunct's infeftment, and other antient evidents, where, *in dubio*, the preſumption is always for the heir of line. So that, if it be not ſufficiently inſtructed, that the fee was provided to ſpecial heirs, it will belong to the heirs-general of line or conqueſt, according to law; as if it be inſtructed by three conſequent ſeiſins, which ordinarily do not expreſs the ſeveral kinds of heirs. The other point of this head is, That the purſuer of the brieve is neareſt lawful heir, which ſometimes alſo is inſtructed by the infeftment; as when the perſon to be ſerved is a member of tailzie nominate; as if the infeftment bear land, or annualrents to be granted to the fiar, and to the heirs of his body; which failing, to *George* his brother, *&c.* *George* purſuing a ſpecial ſervice, needs no further inſtruction; becauſe that he is *George*, the defunct's brother, paſſeth without probation as *notorium*. But ordinarily the propinquity of blood to the fiar who died laſt infeft, or to ſome member of tailzie ſubſtitute, muſt be known to the Inqueſt, or proved. For proving whereof, the relation muſt be particularly condeſcended on, according to the line of ſucceſſion, mentioned in the former title, as that the purſuer is the defunct's eldeſt ſon, or the eldeſt lawful ſon of that ſon, or that they are the daughters of that ſon, *&c.* or the lawful daughters of the defunct, *&c.* And it will not be ſufficient to inſtruct, or ſerve the purſuer neareſt lawful heir, without condeſcending. Here alſo the propinquity of blood being condeſcended on and proved; it is ſufficient, in whatſoever degree it can be proved, though it were beyond the tenth degree. Yea, any degree being *proved*, *is* preſumed to be the neareſt degree, unleſs a nearer degree be inſtructed; for it reſolves in this negative, that there is no other nearer degree, which, as other negatives, proves itſelf. And that the purſuer is not only neareſt heir, according to lineal ſucceſſion, by courſe of law; but that he, nor none of the intervenient blood, were baſtards, or unlawful children, which is inſtructed ſufficiently by common fame, or being ſo holden and reputed; *and*, in the intermediates, it will be ſufficient, that nothing is known to the Inqueſt on the contrary, unleſs baſtardy be on the other part alledged and inſtructed. This propinquity of blood is proved, either by writ, or by retours, infeftments, or deſignations, or acknowledgments of the fiar for the time, bearing ſuch a perſon to be of ſuch a degree, or relation to him. And, *in antiquis*, writs bearing ſuch deſignation and acknowledgment, even by others, of fame, will be ſufficient; for there is not equal evidence of fame required in all caſes. And therefore, when the fee is to fall caduciary, and to ceaſe from the fiar's proper blood, leſs probation will ſerve, than when the competition is betwixt divers perſons of the ſame blood, or, at leaſt, members of the ſame tailzie; amongſt whom the pregnanteſt probation will take place. So the ſervice and re-

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tour of the Earl of *Airth*, then deſigned Earl of *Strathern*, was reduced, becauſe the propinquity of blood was not ſufficiently inſtructed, which could not be known by the Inqueſt, or witneſſes, the progreſs thereof being far paſt memory of man, and hear-ſay, or common fame was not found ſufficient; neither were the writs produced ſufficient to prove the ſaid Earl's propinquity of blood to *David* Earl of *Strathern*, ſon to King *Robert* II. or to *Eupham*, only daughter to the ſaid *David*, and *Patrick Graham* her ſpouſe: which progreſs not being ſufficiently inſtructed, the right remained with the King, as the unqueſtionable deſcendent of King *Robert* III. and ſo heir of his brother, the ſaid *David* Earl of *Strathern*; ſo that no other lawful iſſue being proved of the ſaid *David*'s own body, nor of any other nearer brother; all his right remained with the King, as deſcending from King *Robert* III. who was brother to the ſaid *David* Earl of *Strathern*, *March* 22. 1633. *the King*. There is another exception againſt this head, that the purſuer hath ſlain his father, mother, goodſire, grandſire, &c. whereby he, and all his iſſue, are excluded from the heritage of the party ſlain, if he be convict thereof by an aſſize, and the next agnate may be ſerved, *Parl.* 1594. *cap.* 224. which was not ſuſtained, where the ſlayer was only declared fugitive, for not appearing to underly the law, in a dittay for ſlaying his mother, *Feb.* 3. 1674. *Oliphant*.

XXXVI. The third head of the brieve is, of whom the fee is holden in chief, or who is immediate lawful ſuperior thereof, and this muſt alſo be inſtructed by the infeftments; whereby the giver of the laſt infeftment will alſo be preſumed to continue ſuperior, and the Inqueſt will ſerve accordingly, unleſs another ſuperior be inſtructed, or acknowledged by the purſuer. Which acknowledgment, in reſpect of the purſuer's hazard of diſclamation, and that the ſubſequent ſuperior's rights are in his own hand, and he cannot be prejudged by the ſervice; therefore that point will be ſo ſerved *periculo petentis*.

XXXVII. The fourth head of the brieve is, by what ſervice the fee is holden, whether it be ward, blench, feu or burgage; which alſo muſt be inſtructed by the evidents. And if nothing elſe appear, the fee is preſumed to be ward, becauſe that only is the proper fee, and all others are improper, declining from the nature of fees, and therefore are not preſumed, but muſt be proved. And as *Craig* obſerves, *lib.* 2. *dieg.* 17. §. 33. It will not inſtruct the fee not to be ward, though it contain a particular *reddendo*, of a cane or duty; yea, though it bear *pro omni alio ſervitio et quæſtione ſeculari*; unleſs it expreſs the ſaid *reddendo* to be in name of blench-duty, or in name of feu-duty: ſo an infeftment, bearing a particular duty, payable at Whitſunday and Martinmaſs yearly, *cum ſervitiis in curiis noſtris et alibi debitis et conſuetis*, was found to be a ward-holding. *Hope, de feudi renovatione, Williamſon* [u]. And an infeftment bearing *ſex denarios nomine canæ*, with a taxed marriage, was found ward, *Had. Feb.* 7. 1610. As was reſolved by *Oliphant* the King's Advocate, in a conſultation with the Biſhop of *St. Andrews*, for entering the Lord *Lindſay* to the lands of *Struthers*.

XXXVIII. The fifth head is, the value of the fee now, and in time of peace. The reaſon of inſerting of this article, is, becauſe there is due to the ſuperior a year's rent of the fee, for the entry of the heir, which is called the relief, of which formerly, title, *Superiority*. And that *this* might be conſtant, and liquidate, there was a general valuation of the whole kingdom, which is called the old retour, or old extent; *and the rate and intrinſick value of the money, much altering by the courſe of time; whereby, that which was valued at firſt one merk-land, or, as it is antiently deſigned one merks worth of land, (whatſomever it were worth in kind, which, it may be, was more, than what it might pay now, yet all that was but worth one merk of money at that time,) became ſoon of much higher value; therefore there was* thereafter a ſecond retour, called the new retour, or extent; whereby the new retour of ſome ſhires was made the triple, and ſome the quadruple of the old; yea, different new retours were in the ſame ſhire, but there is no new retours

[u] See above, II. 3. 31.

retours in ſouthern ſhires upon the border, which were frequently waſted with war, and little addition in the northern ſhires. So the meaning of the article is, what the fee is worth now, that is, what the new retour, or extent thereof is, and what it was worth in the time of peace, or what is the old extent thereof. *Craig* (II. 17. 36.) declares, He could never find clear ſatisfaction in the reaſon of theſe expreſſions, eſpecially, why the old retour is called, that which was in the time of peace. And he conjectureth, that becauſe our forefathers are ſaid to reſt in peace; therefore, by the ſame peace, is meant the time of our predeceſſors: but I conceive the matter may be better cleared thus. The caſualities of the ſuperiority were, of old, the chief patrimony of the Crown of *Scotland*, and were further extended than of late: and therefore it ſeems, that the time of the making the new retour, and cauſe thereof, was the frequency of war, requiring an addition of the royal revenue. And though, through the alteration of the rate of money, neither of the retours be now conſiderable; yet doubtleſs they were very conſiderable in thoſe times. So that by *quid valet nunc*, is to be underſtood in the time of war, at which time the new retour was made; which is the more evident, by the oppoſite member, what was the value in the time of peace. So that the old retour, being that value which was before the neceſſity of heightning thereof, by the war, it is fitly ſaid to be that which was in time of peace; and the new retour, that which was made in time of war. And immediately after the conſtitution thereof, the brieve was made to expreſs it, by the then preſent time, *nunc*, which hath been always ſo continued, becauſe the ſtile of brieves is not to be altered. This is the more evident, that the bordering ſhires, which were frequently waſted by incurſions, were not altered in their extent, ſo that it hath been made in a time of war. The new extent is not only the rule of relief, but of non-entry, in lands holden ward and blench; for the new retour mail is only due till general declarator. But, in feu-lands, there is *ſmall* regard to the extent; for, during the non-entry thereof, at leaſt before general declarator, nothing is due but the feu-duty, and the duplication thereof for the relief. Annualrents had no difference, before or after declarator, and therefore were always retoured to the full value of the annualrent, and was thus expreſſed, *quod valet ſeipſum*, which is well altered by the Act 42. Seſſ. 2. *William* and *Mary*, that the whole annualrents ſhall only fall to the ſuperior by the ſpecial declarator.

XXXIX. The ſixth head is, Whether the purſuer be of lawful age, wherein we muſt diſtinguiſh betwixt ward-holdings and other holdings, blench, feu, or burgage; for in theſe any age is lawful age: but in ward-holdings, becauſe the ſuperior, by virtue of the ward, hath the profit of the land, during the heir's minority; therefore they cannot enter till their majority, at which time only the heir is of lawful age, which in men is twenty one years compleat, and in women fourteen years compleat, *Had. Jan.* 27. 1610, *L. Kilbirny contra Fairlie.* Yet if the King, or any other ſuperior, give diſpenſation of the age, the ſervice will proceed, but the benefit of the ward continueth with the ſuperior, by *the Reſervation in the* diſpenſation. The heir's age muſt alſo be inſtructed to the Inqueſt, either as being notour by inſpection of the perſons, for it would be ridiculous to prove a gray-headed heir to be major; but *in dubio* witneſſes, or other ſufficient adminicles, muſt be adhibited.

XL. The ſeventh head of the brieve is, In whoſe hand the fee is; that is, to whom the profit and benefit thereof doth now belong. For ordinarily the fee is retoured, to be in the hands of the ſuperior by reaſon of non-entry, but ſometimes it is retoured, to be in the hands of the ſuperior's ſuperior, when the ſuperior hath loſt the caſualities of the ſuperiority during his life; and ſometimes it is in the hands of the liferenters, by conjunct fee, or liferent holden of the ſuperior: which doth not hinder the entry of the heir to the fee, yet excludeth non-entry. The remanent articles of the brieve, "from what time, how, by "what ſervice, by whom, and through what cauſe," are but circumſtances rela-

tive to the laſt head, that thereby it may appear 1. How long the fee hath been in non-entry, or in the hands of the immediate ſuperior, or liferenter. 2. How it came to be in that condition; as if it became in non-entry by the vaſſal's death, and in the hands of the mediate ſuperior, by the contumacy of the immediate ſuperior, in not entering his vaſſal; and in the hands of the life-renter, by the infeftment of liferent, granted by the ſuperior. 3. The kind of ſervice which relateth to the fee's being in the hands of the liferenter, in reſpect that the liferent is oft-times a different holding from the fee, and is ordinarily blench; and therefore it is the ſuperior's intereſt to know what ſuch ſervice is, and alſo to know by whom, and through what cauſe, the fee is in the hands of ſuch a perſon. Theſe circumſtances, therefore, do not make diſtinct heads of the brieve, and are not always neceſſary to be retoured, as the former heads are.

XLI. The points aforeſaid being cleared, and inſtructed to the Inqueſt, the ſervice is the ſentence or decreet, which ought to be ſealed with their ſeals, and with the ſeal of the judge to whom the brieve is directed, and is *ſo* returned to the Chancery, whence it is called a retour, being regiſtrate there, and extracted; till which it is not compleat: neither doth the ſervice ordinarily inſtruct the active title but only the retour. The ſervice is kept in the Chancery, for warrant of the retour: yet it was found, that ſervices before the year 1550, were ſufficient to ſatisfy the production in improbations or reductions, without producing the retour itſelf; becauſe at that time the books of the Chancery were deſtroyed by war, *Feb.* 17. 1624, *Lo. Elphingston.*

XLII. Retours are eaſily annulled, or reduced, becauſe no defender is called thereto, and the probation in moſt part is by preſumption, as hath been ſhown; and by the proper knowledge of the Inqueſt, or witneſſes, whereof there ſeldom remaineth any teſtimony *in retentis.* The Lords would not, *however*, reduce a retour for want thereof, but ordained the whole Inqueſt to be examined upon oath, upon what evidence they ſerved, *Feb.* 24. 1665, *Mercer of Aldie.* A retour being found null on one head, was found null *in totum*, *Hope*, retour, *L. Lagton contra* A retour of a ſiſter as heir to her *father* was found null by exception, upon production of a brother's retour, tho' poſterior, who thereupon was preferred, albeit an excommunicated Papiſt *, *Feb.* 16. 1627, *L. Colvil.* And a retour of a ſecond brother ſerved heir to his father, where the elder brother was abſent, and reputed dead; but returning home again, and granting bond to a creditor, who charged him to enter heir, and appriſed and poſſeſſed; the retour of the ſecond brother was thereupon found null by exception, albeit twenty years after the date thereof: tho' by the act of *Parl.* 1617, *cap.* 13. retours are not quarrellable by reduction, or ſummons of error, unleſs the ſame be intented, executed, and purſued within 20 years after the ſervice and retour, in reſpect of the appriſing and poſſeſſion within theſe years, which imported an interruption, and that the ſecond brother's retour was null by exception, and needed no reduction, *Jan* 11. 1673, *Lamb.* A retour was alſo annulled by exception, by referring to the party's oath, that he had no contingency of blood with the defunct, *Feb.* 10. 1636, *Murray.* The like in the caſe of a woman retoured ſole heir; it being inſtantly verified, that there was another ſiſter, *Hope*, retour of idiotry, *Fairly contra Fairly.* The like was found by reply, referring it to the party's oath, that he was a baſtard, *Spotiſ.* brieves, *Murray contra Murray.*

XLIII. Retours are ordinarily annulled and reduced by a great Inqueſt, of forty five members, who do inquire, not only concerning the verity, and ſufficiency of the retour, but alſo concerning the ignorance and malice of the *members of the firſt Inqueſt, whereby they become criminally cenſurable as temere jurantes ſuper aſſiſam;*

* By act 3. P. 1609, excommunicated perſons were debarred from the poſſeſſion of their lands, rents and revenues, with which the Crown was authoriſed to intromit; but this right of the Crown was here found to be *jus tertii* to the ſiſter. By act 28. P. 1690, and act 10. *Annæ*, *c.* 6. all civil pains, forfeitures, and diſabilities following upon excommunication, are taken away.

aſſiſam; which is not always inferred when the retour is reduced; as if it be found, that the defunct died not laſt veſt and ſeized, as of fee, by inſtructing that he was denuded, *July* 7. 1663, *Mow*; or that he died not at the faith and peace of our Sovereign Lord, by inſtructing that he was forfeited; or that he was not neareſt and lawful heir, by inſtructing a nearer heir, is no error in the firſt Inqueſt, ſeeing theſe points were preſumed, and needed no probation. And in like manner, if by reduction, there be a more pregnant condeſcendence and probation for another party than for the heir ſerved, it will be no wilful error, unleſs competition had been at the time of the ſervice. But it muſt be an evident and groſs error in the poſitive probation, ſpecially concerning the death of the defunct, and his being once infeft; the ſpecial relation, and degree of blood of the heir, his age, and the extent of the fee, which tho' the point of leaſt moment, yet will annul the retour. But if there be a probable cauſe for the Inqueſt, as by production of writs containing wrong extents, they will be declared free of wilful error, *Spotiſ.* brieves, *Ker contra Scot of Hartwoodmires*. The manner of reducing of retours, is by a ſummons of error againſt the aſſizers before the King's Council, which is now the Lords of Council and Seſſion, *Parl.* 1471, *cap.* 47.

XLIV. Tho' it be the ordinary way to annul retours by a great Inqueſt, yet the Lords do ſometimes ſuſtain reductions thereof as erroneous by witneſſes before themſelves, without a great Inqueſt, *July* 7. 1663, *Mow*.

XLV. The reduction of retours being of ſuch hazard to the members of Inqueſt, it is ſtatute, *Parl.* 1494, *cap.* 57. that they ſhall not be reducible, but within three years after the date, ſo as to infer error againſt the Inqueſt; albeit they may be reduced, *ſo* as to render the retours null in themſelves at any time within twenty years after they were deduced, *Parl.* 1617, *cap.* 13. which act reacheth only retours after it, but not retours before, and actions againſt the ſame; which preſcribe by the general act of preſcription, *Parl.* 1617, *cap.* 12. as was found, *Nov.* 28. 1665, *Younger*.

XLVI. The heir being thus ſpecially ſerved and retoured, if the fee immediately hold of the King, he doth thereupon obtain precepts out of the Chancery of courſe, without citation, commanding the judge ordinary of the place where the fee lies, Sheriff or Baillie, to give ſeiſin to the perſon retoured *capiendo ſecuritatem*, taking ſecurity for the non-entry and relief due to the King; for which the judge ordinary is comptable in exchequer, unleſs the profits belong to himſelf as Bailie of Regality. If the judge ordinary do not grant ſeiſin accordingly, the Lords, upon ſupplication and inſtruments of his diſobedience, will grant warrant to the director of the Chancery to iſſue precepts to another perſon as Sheriff in that part, ſpecially conſtitute, without firſt uſing horning againſt the ordinary diſobeying, *Spotiſ. David Balfour* ſupplicant *. Theſe precepts, becauſe of the clauſe *capiendo ſecuritatem*, were found to make both the perſon of the heir, and the ground liable for the ſums due thereby, tho' infeftment was never taken, *Spotiſ.* Sheriff, *L. Stobbs contra Lowriſtoun* **. Theſe ſeiſins are appointed to be given by the ordinary clerk of the juriſdiction, *Parl.* 1540, *cap.* 77. *et* 79. *Parl.* 1567, *cap.* 27. *Parl.* 1587, *cap.* 64.

If the fee be holden by any other ſuperior than the King, if he do not willingly grant infeftment upon ſight of the retour, the heir will of courſe get precepts out of the Chancery to charge the ſuperior to enter and infeft the heir ſo retoured; with certification if he fail, he ſhall loſe the benefit of the ſuperiority during his life: containing alſo this clauſe in favour of the ſuperior, *faciendo vobis quod de jure facere debet*. And upon inſtruments of the ſuperior's refuſal or delay, being thrice required, *precepts are directed out of the Chancellary of courſe againſt his ſuperior, to ſupply his place, and if he ſhould refuſe, the like certification is competent againſt him: and ſo precepts are direct againſt the next immediate ſuperior, till it*

* This deciſion not found.

** This deciſion not found. See above, II. 4. 29. & *March* 12. 1628, *L. Lauriſton*, and act 74. P. 1587.

it come at laſt to the King as ſupreme ſuperior, who refuſes none, but thereupon precepts of ſeiſin are direct forth of the Chancellary to the judge ordinary of the place, to give ſeiſin. The ſuperior refuſing loſeth the non-entry during the life of that vaſſal, but loſeth no other caſuality of the ſuperiority, *Decemb.* 18. 1630, *Stark*; *March* 24. 1632, *Hay* [a].

XLVII. For preventing of the loſs of the ſuperiority during life, the ſuperior being charged, if he obey not, muſt ſuſpend the precepts; which is done moſt ordinarily upon this reaſon, that the heir hath not ſatisfied the relief and non-entry duties due to the ſuperior, conform to the clauſe of the precept *faciendo vobis, &c.* which *Craig, lib.* 2. *dieg.* 17. § 43. ſhows not to have been ſuſtained by the Lords, ſeeing the ſuperior had poinding of the ground competent therefor; yet the cuſtom ſince hath been contrary, *July* 29. 1624, *L. Capringtoun contra Keir:* in which caſe *Keir* being purſued to receive *Capringtoun* in place of *Capringtoun*'s immediate ſuperior, *Foulſheils*, who being charged to enter heir within forty days to the ſuperiority, that he might receive *Capringtoun* his vaſſal, obeyed not; and therefore *Keir*, *Foulſheils*'s ſuperior, ſupplying his place, was ordained to receive *Capringtoun*, he always paying the non-entry; neither was *Capringtoun* the ſub-vaſſal put to take out charges againſt *Keir*, as he had done againſt *Foulſheils*'s; but this action was ſummarily ſuſtained. The like *March* 12. 1630, *Somervel*, where the annualrenter craving entry, was not found liable to pay the full annualrent during the non-entry, but the blench-duty only. And tho', in the caſe of *Peebles contra Lo. Roſs, Jan.* 23. 1630; *Peebles*, as ſuperior, craving the non-entry duties for three terms ſubſequent to the ward, to be paid to him by the heir craving entry, not according to the new retour, but according to the full duties, as being ſubſequent to the ward, was ordained to enter the heir without payment of thoſe duties, without prejudice of his right thereto *prout de jure:* the reaſon is rendered, becauſe the duties were not liquid as the new retour is; neither was the caſe itſelf clear and unqueſtionable, and therefore was only reſerved. If the ſuperior himſelf be not entered, he may be charged to enter within forty days, with certification if he fail, to loſe the ſuperiority during his life, conform to the act of Parliament 1474, *cap.* 57. and if he fail, his ſuperior may be purſued *via actionis*, to ſupply his place, and receive the ſub-vaſſal with the ſame certification, without neceſſity of charging him with precepts out of the Chancery: as was found in the ſaid deciſion, *Capringtoun contra Keir*.

XLVIII. The certification of loſs of the ſuperiority during the ſuperior's life, tho' it would ſeem to extend to all the caſualities of the ſuperiority befalling after contumacy; yet it was found only to extend to the non-entry, which was purged by the *entry made by the* mediate ſuperior, who ſupplied the place of the immediate ſuperior: but that ſubſequent wards and liferent-eſcheats, did notwithſtanding belong to the immediate ſuperiors, *March* 24. 1632, *Hay*; in which caſe it was alſo found, that the feu and blench-duties contained in the *redd ndo*, did noways fall by the ſaid certification: which is clear, becauſe theſe are not caſualities of the ſuperiority. But whether theſe caſualities will not be loſt during the life of the contumacious ſuperior, as the certification would import, and will belong to the mediate ſuperior ſupplying his place, is not ſo clear; becauſe, if the negative hold, the certification which ſeems ſo great, ſignifies nothing *.

XLIX. The next reaſon of ſuſpenſion of theſe charges for entering of vaſſals, is, That the heir retoured doth not produce the ancient evidents, that the new precept of the ſuperior for obedience may be made conform thereto. This reaſon was repelled, *and the ſuperior found obliged to grant infeftment conform to the retour*, *Had. Decemb.* 13. 1609, *L. of Drum contra L. of Ley*. And tho' that might have been admitted, becauſe of old infeftments were ſimple; but

* See *Hope*'s Minor Practicks, edit. 1726. § 129.——148. edit. 1734. tit. 4. § 16,——33.

[a] See below, § 48. *h. t.*

but now ſince they are clogged with many proviſions which fall *not* under the ſervice of the brieve, there is reaſon that the ancient evidents ſhould be ſhown with the retour, and thoſe proviſions (*recited*) in the precept to offer the ſuperior, otherwiſe the ſaid proviſions may become ineffectual; becauſe theſe precepts and infeftments thereupon, will be ſufficient rights, without ſhewing any elder. And ſeeing it is the vaſſal's duty to ſhow his holdings to the ſuperior, there can be no time ſo fit as at the entry. A third reaſon of ſuſpenſion of theſe charges uſeth to be upon the ſuperior's right to the property by recognition, or upon improbation of the heir's retour; which, if decreet be not paſſed thereupon, will be repelled, and only reſerved as accords, *and ſuſpenſion* [b] will not be ſuſtained upon a reaſon of prejudiciality of a reduction at the ſuperior's inſtance, *Spotiſ.* Sheriff, *L. of Taich contra Hume* *. *Craig, lib.* 2. *dieg.* 17. § 42. moveth this queſtion, when one perſon is the fiar, and another liferenter of the ſuperiority by reſervation of his frank-tenement, or liferent; and the like is, when liferent is by conjunct-fee: of whom in that caſe ought the heir *to* crave to be entered? In which he relates, that the Lords, in favour of the vaſſal, found, in the caſe of *Cranſtoun*, brother to the L. *Cranſtoun*, that the heir might enter by any of them he pleaſed, being without detriment to either of them. As to the caſualities of the ſuperiority, how far ſuch caſualities belong to liferenters, *vid. tit. liferents.*

L. There is another weighty and ſubtile queſtion in the entry of heirs, Whether that perſon who falls to be neareſt heir at the time of the defunct's deceaſe, may not then be entered, tho' there be a nearer in poſſibility, or in hope? There is no queſtion, but when a nearer heir is really or probably in being, in the womb, tho' unborn, that the ſervice muſt be ſtopped till the birth. For in all things tending in favour of thoſe unborn, they are accounted as born: and that not only for preſuming that there is a living child, not a falſe conception, but preſuming that it is a male-child, not a female. And therefore daughters of a defunct cannot be ſerved heirs, if there be a probability of a poſthumous child, who is preſumed to be a ſon: whereby they will be excluded till the contrary appear. It was ſo amongſt the Romans, who therefore ſent the womb in poſſeſſion for the child. But with us, the fee of neceſſity muſt remain in non-entry: and the friends, or neareſt agnates of the birth, as pro-tutors, may continue the poſſeſſion. But the difficulty is, when the nearer heir is in poſſibility, but neither conceived nor born: and this occurs ſpecially in two caſes; Firſt, in the caſe of heirs aſcendent, as when the father ſucceeds to the ſon, having no iſſue, brother or ſiſter; for in that caſe, tho' at the defunct's death there be neither ſiſter nor brother gotten or born; yet the father may have them after. So that the queſtion will be, Whether the father may enter immediately upon the death of his ſon, having no children, brother nor ſiſter born, nor in the womb; or if he muſt attend the future poſſibility of a ſuperveening brother or ſiſter? The other caſe is in heirs of tailzie, whereof there was a notable inſtance, long debated in *anno* 1647 and 1648, on this occaſion. The L. of *Blackwood* married his natural daughter *Marion Weir*, having no other children, to Major *James Bannatine*; and in contemplation of the marriage, and for a ſum advanced by the Major for ſatisfying his debts, he diſponed his eſtate of *Blackwood* "to Major *Bannatine*, and the heir to be procreate betwixt "him and *Marion Weir*; which failing, to the heirs of the ſaid *Marion Weir* by "any other lawful huſband; which failing, to the heirs of *Bannatine*." The Major died without iſſue: ſo the queſtion was, Whether *Bannatine*'s heirs ſhould ſucceed, or if the ſucceſſion behoved to be pendent, till it appeared whether there would be any lawful heir of the body of the ſaid *Marion Weir*, who was no member of the tailzie herſelf, but only the heirs of her body. The whole queſtion reſulted in this point, Whether "whilks failing" was to be underſtood failing *de præſenti* at the time of the fiar's death, or failing ſimply, as being exiſtent at

* This deciſion not found.
[b] F. but.

no time. The matter was not decided, but tranſacted, whereby *Marion Weir* being married to *William Lowrie*, and having children during the dependence of the plea, the matter ended by tranſaction betwixt the L. of *Corehouſe*, who was Major *Bannatine*'s heir, and *William Lowrie* taking burden for his heirs with *Marion Weir*, thus; that the tailzied eſtate ſhould belong to *Marion Weir*'s heirs: that *William Lowrie* for them ſhould pay to *Corehouſe* 20,000 pound *Scots*, as the ſum which the Major his brother had contracted for payment of *Blackwood*'s debts, and had paid out upon contemplation of the marriage. This was a very equitable tranſaction to the ſame effect, as if the clauſe in the tailzie had been interpreted thus; that, failing heirs of *Marion Weir*, that is, ſo long as the heirs failed, the Major's heirs ſhould ſucceed to him in the tailzied eſtate. So that, where there became to exiſt heirs of *Marion Weir*, both that they ſhould ſucceed to Major *Bannatine*'s heir, to wit, *Corehouſe* who was ſerved heir of tailzie to his brother Major *Bannatine*, and ſhould exclude *Corehouſe* his heirs of line; whereby the fee ſhould never be *in pendente* at the death of the laſt fiar, but that perſon ſhould be entered as heir of tailzie; who, at the death of the defunct fiar, or at the time of the ſervice, was neareſt heir of the tailzie, whereby *Corehouſe* ſhould ſucceed as heir of tailzie to his brother; becauſe, at his death, neither of the two former branches of the tailzie were exiſtent, *viz.* the heirs betwixt the Major and her, and *Marion Weir*'s heirs by another huſband. And therefore a judicious and juſt Inqueſt, ſerving a brieve for the heirs of tailzie of Major *Bannatine*, could not but find that he died laſt veſt and ſeiſed as of fee, in a tailzied eſtate of *Blackwood*; and that the Major's heir of line, to wit, *Corehouſe*, his immediate elder brother, was the neareſt heir to the Major by the tailzie, there being no heir of *Marion Weir* then exiſtent, conceived or born, ſhe being unmarried: for, if ſhe had then had a lawful child, the Inqueſt behoved to have ſerved that heir, as nearer heir of tailzie to Major *Bannatine*, then his heir of line. Neither would that child be excluded, becauſe the child could not be heir to *Marion Weir*, while ſhe was on life; for heirs in that caſe were only meaned, ſuch as might be heirs if ſhe were dead. Suppoſe then there had been a ſon betwixt the Major and *Marion Weir*, who had been infeft as heir to his father, and died without iſſue; *Marion Weir* at her death having then a daughter by a ſecond huſband; that daughter would have ſucceeded as heir of tailzie, albeit a ſon of *Marion Weir* were in poſſibility, and in the neareſt hope, and to whom the title of her heir would be moſt proper, as being her heir of line, or heir *ſimpliciter*; yet the fee would not remain *in pendente*, and vacant till the event of that poſſibility, but the daughter would be ſerved as neareſt, at the laſt fiar's death. And therefore the Inqueſt could not juſtly ſwear, but that Major *Bannatine*'s heir of line, was his neareſt heir of tailzie the time of the ſervice. For if it ſhould be objected, that there were a nearer heir in poſſibility or hope, the Inqueſt could not demur thereon; becauſe an heir in poſſibility is not, but only may be. And therefore the Major's heir is the neareſt heir of tailzie, who needs not be ſerved heir of line to the Major. If the Major had an untailzied eſtate, his brother might renounce to be heir of line to him in that eſtate, and yet might be heir of tailzie to him in the tailzied eſtate, as being ſtill his heir of line demonſtrative; that is, the perſon who might be his heir of line. And therefore, after *Corehouſe* his death, if he had died infeft as heir of tailzie to his brother; if the queſtion again had ariſen betwixt *Corehouſe* his ſon as his heir of line, and *Marion Weir*'s ſon being then exiſtent, an Inqueſt could not juſtly ſerve *Corehouſe*'s *ſon* heir of tailzie to him in the eſtate of *Blackwood*; becauſe then *Marion Weir*'s ſon was a prior branch of the tailzie, and ſo behoved to exclude *Bannatine*'s heir of line, which was the poſterior branch. Therefore, in lieu of this temporary ſucceſſion of *Corehouſe*, reſolving in his liferent, as the branches of tailzies frequently do, he accepted 20,000 *lib.* which was his brother's true intereſt, and denuded himſelf in favour of *Marion Weir*'s ſon, the prior branch; ſo we are left in both to a rational debate, without deciſion. As to the firſt caſe, we have already ſhown, both

both by reaſon and practice; that failing the fiar's children, brother and ſiſters, his father and grandfather ſucceed, and exclude their collaterals. So thence it neceſſarily followeth, that theſe aſcendents may be ſerved without delay, otherwiſe they could never be ſerved, there being ever poſſibility of the iſſue of men. Yet, if they ſhould not be entered before the ſuperveniency, even though but in the womb, the ſame would take place; but, if the aſcendent be actually entered, the law affordeth no remedy, reverſion, or reſtitution. Neither can this difficulty be a reaſon againſt the ſucceſſion of aſcendents, becauſe the queſtion is only betwixt them and their own children, and nothing operates in favour of their brothers and ſiſters, or their deſcendents. As to the other caſe, in the inſtance propoſed, it ſeems the ſucceſſion ought to have depended, till the event of the lawful iſſue of *Marion Weir*. Firſt, Becauſe that had a determined time, by the courſe of nature, *viz.* The fiftieth or fifty-ſecond year of her age; at which time, the iſſue of women is reputed extinct, which is not ſo in the caſe of men. Secondly, In tailzies upon contracts, and for onerous cauſes, reſpect is to be had to the meaning and intereſt of the parties-contracters; and, *in dubio, pars mitior eſt ſequenda*. And that ſenſe is to be embraced, by which the proviſions can have ſome effect, and not that by which they can have none. Whereby it may ſeem, that it was *Blackwood*'s meaning, that the ſucceſſion of his own natural daughter ſhould be ſubſtitute, in the ſecond member, to the heirs betwixt the Major and her; and that, while theſe were poſſible, his heirs ſhould have no place, otherwiſe the ſecond member had been eluſory: For if, by failing of the heirs of the Major with the ſaid *Marion*, at the time of the ſaid Major's deceaſe, *Marion*'s heirs, by another lawful huſband, ſhould (*immediately*) take place, (*theſe*) her other heirs could never take place; for ſhe could not have another lawful huſband, at the time of the Major her firſt huſband's death.

Yet the reaſons on the contrary are no leſs pregnant; as well in this caſe, as in the caſe of heirs aſcendent, that the heirs neareſt at the time of the fiar's death, ſhould have right immediately to ſucceed; becauſe the fee neceſſarily muſt belong to ſome perſon, and it cannot hang in the air on a future poſſibility; which is a principle, whereof mention and uſe hath been made frequently before. Secondly, If that were the meaning, then at the time of the Major's death, the lands were truly *nullius*; and ſo as caduciary, behoved to fall to the KING, as *ultimus hæres*. But if it had been ſo expreſſed, that no place ſhould be to the Major's other heirs, till there were no poſſibility of heirs of *Marion Weir*; the difficulty ſeems the ſame, that the fee ſhould be pendent, and *nullius*. It may be anſwered, That even, in that other caſe, the Major's other heirs would ſucceed, notwithſtanding that proviſion, which doth but reſolve in a perſonal obligation to thoſe heirs to forbear, *and* yet they were heirs; and if contrary the proviſion, they ſhould enter, it would give intereſt to the heirs of *Marion Weir*, to compel the Major's heirs having entered, to denude themſelves in their favour; but there was no ſuch thing in this caſe. And as to the reaſons upon the contrary, though it may ſeem *Blackwood*'s intereſt, that the heirs of his natural daughter ſhould be in the ſecond place; yet *non fuit habilis modus*, to make the fee pendent and *nullius*. But to that which is the main reaſon, *viz.* otherwiſe the ſecond member behoved to be eluſory. It is anſwered, That it is not eluſory, becauſe the moſt ordinary and hoped caſe was, that there ſhould have been heirs betwixt the Major and *Marion*; who, if they had died without iſſue, the lands would have fallen to *Marion*'s heirs by another lawful huſband, and not to the Major's other heirs. So that the caſe which fell out, that there was no children procreate betwixt the Major and *Marion* was not feared, and ſo not provided for, as it oftimes fares in ſuch caſes. Therefore we conceive it more probable, that, in all caſes, that perſon, who, at the time of the defunct's death, is in being, born or unborn, may be heir, and immediately enter, ſo ſoon as by the birth it appears who may be ſerved.

There

There hath a later caſe occurred, and been determined on this occaſion. The late E. of *Leven* tailzied his eſtate and dignity to the heirs-male of his body; which failing, to the eldeſt heir-female, without diviſion; which failing, to the ſecond ſon of the E. *of Rothes*; which failing, to the ſecond ſon of the Lo. *Melvil*, who had married the E. of *Leven*'s ſiſter; which failing, to the ſecond ſon of the E. of *Wemyſs*, who had married his mother. The E. *of Leven* left three daughters after him, who died all unentered. The E. *of Rotheſs* having no ſecond ſon, *David Melvil*, ſecond ſon to the Lo. *Melvil*, took a brieve out of the Chancery, to ſerve himſelf heir of tailzie to the E. of *Leven*. The E. of *Rotheſs* took a gift of the non-entry, in the name of Sir *William Bruce*, who raiſed an advocation of the brieve, with a declarator, that while there was hope of a ſecond ſon of the E. of *Rotheſs*'s body, *David Melvil*, nor no ſon of ſubſequent branch, could be entered: or declaring, that the lands were in non-entry. Both members of the ſaid declarator the Lords did ſuſtain, and ſtopped the ſervice; albeit many inconveniencies were repreſented thence ariſing: as that there could be no active title for purſuing the rights of the family, or for receiving vaſſals; nor any acceſs to the eſtate *paſſivè* by creditors. But the Lords did reſerve to the ſpecial declarator, how far the non-entry would reach, whether to the retoured duties only, or to the full rents. But many of the Lords were of opinion, that *David Melvil* ſhould enter as heir of tailzie; yet ſo that if the *E. of Rotheſs, then* Chancellor, had a ſecond ſon, he or his iſſue would ſucceed as heir of tailzie to *David Melvil*, and neither his own heirs of line, nor the E. of *Wemyſs*'s ſecond ſon; becauſe, at the time of *David Melvil*'s death, the Chancellor's ſecond ſon would be a nearer heir of tailzie to *David* than his own ſon, as being of a prior branch of the tailzie, *Feb.* 22. 1677, *Bruce*. But the Lords found, that the non-entry by the ſpecial declarator could not reach to the full rents, but only to the retoured duty; ſeeing the apparent heir was neither in *culpa* nor *mora*, which doth only infer the full duties: and therefore found the donatar had only right to the retoured duties; and that the remainder continued *in hæreditate jacente*, to be managed by the Lo. *Melvil*, as curator *datus bonis* of the eſtate of *Leven* by the King, and having power to manage the affairs of that eſtate as a tutor, as if an heir had been entered, *July* 24. 1677, *inter eoſdem*.

LI. It cometh oft-times to paſs, that, through the unclear conception of clauſes of proviſion, it becomes dubious who is thereby conſtitute fiar, and who *heir and* liferenter; as is ordinary when ſums of money are lent, and the obligement to repay is conceived thus; "To be paid at ſuch a term to the lender, and "in caſe of his deceaſe, or failing him by deceaſe, or after his deceaſe, to ſuch "a perſon." Whence theſe queſtions reſult; Firſt, Whether the lender be fiar of the ſum, and the perſon ſubſtitute heir of proviſion; or if the perſon ſubſtitute be *fiar, and the lender liferenter*. 2*dly*, *If the perſon ſubſtitute be* heir, whether he may ſucceed at any time, or only if the lender die before the term of payment? As to the firſt queſtion, the perſon ſubſtitute is not fiar but heir, and the lender is not liferenter but fiar; and therefore may diſpoſe of the ſum at pleaſure, by aſſignation, legacy, or otherwiſe, as other fiars may do, *Feb.* 22. 1623, *Leich*; *July* 28. 1626, *L. Tulliallan*; where the clauſe did bear, to be paid to *Clackmannan* and his ſpouſe, the longeſt liver of them two; and in caſe of their deceaſe, to *Alexander Bruce* their ſon in fee, with an obligement to infeft the ſpouſe in liferent, and the ſon in fee, in an annualrent effeiring thereto; yet the father was found to have right to diſpoſe of the ſum; *but doubtleſs conſideration was herein had of his paternal power: for this clauſe in the caſe of other perſons would certainly have made the other perſon fiar*. The like was found, *Feb.* 20. 1629, *L. Drumkillbo*, where the father ſurviving the term of payment, tho' he freely, and without a cauſe onerous, diſcharged the ſum provided to be paid to him, and failing him to his ſon, tho' it bore a clauſe of infeftment to the father in liferent, and to the ſon in fee, but no infeftment followed. The like, tho' the father

father and the ſon ſubſtitute, were both infeft in one ſeiſin, *July* 23. 1675, *L. of Lamington.*

As to the ſecond queſtion, the more ancient deciſions have interpreted ſuch clauſes ſtrictly thus, that the ſum payable at ſuch a term to the firſt perſons, and failing them by deceaſe to a perſon ſubſtitute, ſhould only belong to the perſon ſubſtitute, if the firſt perſon died before the term of payment, ſo that it ſhould be payable at no term thereafter to the perſon ſubſtitute; but if the firſt perſon ſurvived the term of payment, tho' he did nothing to alter the ſubſtitution, the ſame ſhould not belong to the perſon ſubſtitute, but to the firſt perſon's heirs, *Hope*, ſucceſſion, *Spotiſ. contracts*, *Feb.* 22. 1623, *Leich contra L. Balnamoon*; where it was found, that ſuch ſums came under the firſt perſons ſurviving the term, their teſtament, and belonged to their executors. But more frequent deciſions, with better reaſon, have interpreted ſuch clauſes on the contrary, that the perſon ſubſtitute is heir of proviſion whenſoever the defunct dies, whether before or after the term; becauſe the conſtitution of heirs is ſimply, and not *ad diem:* but mainly becauſe the ordinary intent of ſuch clauſes is to appoint portions for the bairns named therein, who therefore are ſubſtitute heirs of proviſion to their father; ſo that if he do not expreſsly alter, or prejudge the ſubſtitution, his intent is, that they ſucceed him whenſoever, *Spotiſ. contracts*, *Currie contra Nimmo*; *relict of Thomſon contra Johnſon* *. The like in a legacy left to a perſon, and failing her by deceaſe to another; which was not found *a fideicommiſſum*, to be reſtored by the firſt perſon to the ſecond at her death; and therefore the aſſigny of the firſt perſon was preferred, *Spotiſ.* diſpoſition, *Reid contra Downy* **, *Jan.* 18. 1625, *Wat contra Doby*; *June* 26. 1634, *Keith contra Innes*. Therefore ſuch ſums bearing no clauſe of infeftment, yet fall *not* under teſtament, neither hath the relict a third thereof, *Hope*, ſucceſſions, *Thomſon contra Merkland*. In the ſubſtitutions, tho' the perſon ſubſtitute be as heir, yet he is not properly heir, and ſo needs not to be entered by any ſervice, becauſe he is nominate, and there is no other heir. But in tailzies, tho' ſome of the members of the tailzie be nominate, yet becauſe in lands, as is before ſaid, the perſon nominate is never the firſt heir; therefore there muſt be a ſervice, to inquire whether the firſt heir fails or not, which is unneceſſary where there is one perſon only nominate to be heir, concerning which there needs be no inquiry. Tho' the perſons ſubſtitute be as heirs, it followeth not that they muſt be liable as heirs of proviſion to the firſt perſon's debt, contracted before the ſubſtitution; becauſe they are not properly heirs, not requiring any ſervice; but they are *interpretivè* like to heirs; becauſe the nature and intent of ſuch clauſes is not to conſtitute the firſt perſon as a naked liferenter, but that they are underſtood as if they were thus expreſſed, "With "power to the firſt perſon to alter and diſpone at his pleaſure during his life." So thereafter only the heirs ſubſtitute take place, tho' in theſe reſpects as heirs, yet in reality as ſecundary, conditional, or ſubſtitute fiars: but the ſubſtitute is liable (other anterior heirs and executors being diſcuſſed) unleſs the perſon ſubſtitute abſtain; becauſe the ſubſtitution is a gratuitous deed in prejudice of creditors, *poſt contractum debitum*, and ſo annullable; and the ſubſtitute meddling is liable to repay *quoad valorem* only, but never by an univerſal paſſive title, *July* 3. 1666, *Fleming* [c].

The next difficulty is, who is fiar in poſſeſſions, or tailzies of ſums, annualrents, or lands in conjunct-fee; wherein theſe rules do ordinarily take place. 1. That the laſt termination of heirs whatſoever, inferreth that perſon of the conjunct fiars, whoſe heirs they are, to be fiars, and the other liferenters. 2. When that is not expreſſed *potior eſt conditio maſculi*, the heirs of the man are underſtood [d]. But theſe have their own limitations; as firſt, in moveable goods, and ſums provided to a man and his wife, and their heirs, without mentioning; which failing,

* See *July* 24. 3669, and *Jan.* 5. 1670. *Innes contra Innes*, obſerved by *Goſford*.
** This deciſion not found, and, as here ſtated, does not ſeem to apply to this place.
[c] See above, § 15. 3. *fin. h. t.* [d] See above, II. 3. 41. 2.

ing, to whoſe heirs the ſame ſhould be due, were found not to fall to the man's heirs, but to divide equally betwixt the man and wife's heirs, *Feb.* 2. 1632, *Bartilmo*; *Feb.* 18. 1637, *Mungle.* Yea, a clauſe in a reverſion redeemable by a man and his wife, and their heirs, was found to conſtitute the wife fiar of the reverſion, becauſe ſhe was fiar of the land-wadſet, *Hope, liferent, Kincaid contra Menzies of Pitfoddels.* But an aſſignation to a reverſion provided to a man and his wife, the longeſt liver of them two, and their heirs, was found to make the man only fiar, *Hope*, huſband and wife, *Colliſtoun contra L. Pitfoddels.* A clauſe in a charter providing lands to a man and his wife, the longeſt liver of them two, and the heirs betwixt them; which failing, to the heirs of the man's body; which failing, to the wife her heirs whatſoever: tho' the laſt termination was upon the wife, yet the huſband was found fiar, *Had. July* 24. 1622, *Ramſay contra L. Conheath.* The like in a clauſe providing a ſum, being a wife's tocher, to the man and wife, and the longeſt liver of them two in conjunct-fee, and to the heirs betwixt them; which failing, the wife's heirs; yet the huſband was found fiar: and therefore the creditor appriſing excluded the wife *as to the fee*, and her heirs, *Jan.* 29. 1639, *Graham.* And a bond providing a ſum to a man and his wife in conjunct-fee, and the bairns procreate betwixt them; which failing, to two bairns of a former marriage *nominatim*, containing a precept for infefting the ſpouſe and the two bairns named, whereupon all the four were infeft: yet the father was found fiar, and all the bairns of the *marriage*, male and female equally, were found heirs of proviſion; and the two bairns named were found heirs ſubſtitute, failing the bairns of the marriage, *Jan.* 14. 1663, *Beg.* And a bond bearing a ſum borrowed from, and payable to a man and his wife, the longeſt liver of them two in conjunct-fee, and to the heirs betwixt them, and their aſſignies; which failing, to the heirs and aſſignies of the laſt liver, found to conſtitute the huſband fiar, and the wife liferenter, albeit ſhe was laſt liver, and that her heirs of line were found heirs of proviſion to the huſband, *Jan.* 23. 1668, *Juſtice.* A tocher provided to the huſband and wife, the longeſt liver in conjunct-fee and liferent, and to their bairns in fee, was found to make the huſband fiar, and that he might alter the ſubſtitution, *Dec.* 12. 1665, *Pearſon* *. And generally in all infeftments in conjunct-fee betwixt man and wife, the huſband is always interpreted to be fiar, and the wife liferenter, albeit the laſt termination be upon the wife's heirs, who are heirs of proviſion to the huſband, unleſs the right flow from the wife originally: as if ſhe ſhould reſign her lands in favour of her huſband, and herſelf in conjunct-fee, and the heirs of the marriage; which failing, her heirs: or if the right did flow from the wife's father by a gratuitous deed. But by a contract of marriage a father obliged himſelf to infeft the huſband-contracter, and his daughter, in conjunct-fee and liferent, and the heirs betwixt them; which failing, the daughter's heirs and aſſignies whatſoever: and by the ſame contract the huſband was obliged to provide all lands that he ſhould acquire or ſucceed to, to himſelf and his wife, the longeſt liver of them two in conjunct-fee, and the heirs betwixt them; which failing, the one half to the huſband's heirs, and the other half to the wife's heirs, and their aſſignies: by both theſe clauſes the huſband was found to be fiar, and the wife liferenter; albeit the tenement diſponed by the father was not *nomine dotis*, yet there was no other tocher, *July* 12. 1671, *Gairns.* Yet a clauſe in a minute of a contract of marriage, "obliging the huſband to infeft his wife in "conjunct-fee and liferent in ſuch a barony named, and obliging him and his heirs "and aſſignies, that all and whatſoever lands, or ſums of money, ſhould be pur-"chaſed by him during the marriage, that ſecurity ſhould be made in liferent "thereof, as of the foreſaid barony, to his future ſpouſe, in caſe of no iſſue of "children, the one half of the ſaid conqueſt to be diſpoſed upon as the wife ſhall "think fit;" the conqueſt was found to be equally to the huſband and wife, and that ſhe was liferenter of the whole, and fiar of the half, in reſpect the minute

* The queſtion whether the huſband or wife had right to the fee was not determined in this caſe.

nute did not bear whoſe heirs ſhould ſucceed; and that the conqueſt was all to be expected by the wife's means, therefore ſhe being conjunct fiar, that the one half of the conqueſt ſhould be diſponed as ſhe pleaſed, ſhe was found fiar of that half, as not being a faculty, but a power of diſpoſal importing property, *June* 27. 1676, *E. Dumfermling* [e].

LII. There do many queſtions ariſe, as to the ſucceſſion of heirs of proviſion, by clauſes of conqueſt in contracts of marriage. The main queſtion is, What is accounted conqueſt; whether that which is acquired, and thereafter diſponed, be accounted conqueſt, either as to the wife, or to the heirs, or bairns of the marriage? As to which, it hath been ſhown before, that ſuch proviſions infer not only a ſucceſſion to the heirs, or bairns of the marriage, as heirs of proviſion; but thereby the wife or heir, and bairn of the marriage, have an intereſt as creditors; that the huſband or father cannot, *ad arbitrium*, do deeds prejudicial to that which is once acquired; but the huſband is not thereby bound up from diſponing to ſtrangers, for cauſes onerous, or to other wives or children, for competent proviſions. But he may not otherwiſe intervert the deſign of thoſe proviſions, by taking the rights to wives, or children of another marriage, unleſs he have not means *aliunde* to provide them [f]. And therefore the huſband being obliged, to take all ſums acquired during the marriage, to himſelf and his wife in conjunct-fee; having taken a ſum acquired during the marriage, in the name of his ſecond ſon; his relict was found to have right to *claim from the heir* the annualrent thereof, *July* 16. 1625, *Knox*. The like, where *ſome* bonds were taken in the name of the bairns, leaving out the wife, *who was provided to the liferent of the conqueſt*, *March* 14. 1628, *Graham*. But clauſes of conqueſt, of all lands acquired during the marriage, do not extend to lands acquired and diſponed during the marriage. Yea, conqueſt of lands was extended, where there was a diſpoſition without infeftment, *but* with *the* burden of *the annualrent of* a part of the price *due to* the diſponer, *Jan.* 24. 1629, *La. Rentoun*; *July* 3. 1627, *Counteſs of Dumfermling*. And, where the clauſe of conqueſt bore lands or annualrents, the ſame were extended to bonds bearing annualrent, though without clauſe of infeftment, *Feb.* 20. 1629, *Douglas*. And theſe clauſes are interpreted ſtrictly according to the tenor thereof; for ſometimes they only bear lands conqueſt, ſometimes lands or annualrents, ſometimes lands annualrents or ſums of money, and ſometimes alſo goods or gear; in which caſe the executors will be obliged to employ moveable goods and ſums, for the wife in liferent, and for the bairns and heir of the marriage in fee. Theſe clauſes of conqueſt do never extend to any thing, whereunto the huſband ſucceeds as heir or executor, unleſs ſucceſſion be expreſſed, *Jan.* 29. 1678, *Stewart*. A clauſe of conqueſt, obliging the huſband to take all lands, annualrents and ſums, conqueſt, during the marriage, "to himſelf, and the heirs *or* bairns of the marriage, one or more;" found to conſtitute all the bairns of the marriage, male and female, heirs-portioners; and that it was not alternative, that the huſband might either take the conqueſt to himſelf, and the heirs of the marriage, or to himſelf, and bairns of the marriage, at his option. And therefore, having taken a conſiderable ſum in favour of himſelf, and the heir of the marriage, who was his only ſon; yet, after his death, his four daughters of that marriage obtained decreet againſt their brother, to denude himſelf of their ſhares, *Jan.* 29. 1678, *Stuart*. But conqueſt is only underſtood, of what the huſband acquired more after his contract of marriage, than what he had before. And therefore, if he acquired lands, annualrents, ſums or goods; if he inſtruct that he had as much, or a part thereof, before, as he ſold, the ſuperplus will only be counted conqueſt. And though he have not diſponed on any thing he had before, yet if he contract debt for purchaſing the conqueſt, it will be burdened with the annualrent of the debt, as was found in the

[e] See above, II. 6. 10.

[f] See above, II. 3. 41. *fin.* II. 6. 3.

the former caſes *. And the like, *Dec.* 20. 1665, *La. Kilbocho*; *June* 27. 1676, *E. Dumfermling*. The like was found in a proviſion of conqueſt, of all the huſband's goods and gear acquired during the marriage, to the wife for her liferent-uſe, which was found to be with the burden of the huſband's debt contracted before, or after, and ſo to import only liferent of the free gear, *Dec.* 23. 1668, *Smith*. And, where a huſband was obliged to employ a definite ſum for himſelf, his wife and bairns of the marriage, and alſo his conqueſt; and having acquired a tenement during the marriage, to himſelf and his heirs whatſoever, that tenement was applied to the definite ſum, *primo loco*, and the ſuperplus as a conqueſt, *Jan.* 4. 1672, *Beaty*.

So much for the being and intereſt of heirs. As for the proving and inſtructing who are heirs, the moſt ordinary way is by retour, or infeftment as heirs, or by a ſervice though not retoured; but thoſe inſtructions muſt be repeated in every ſeveral proceſs; for, *inter alios acta, aliis non nocent*; ſo an heir *activè*, was found not to be inſtructed, by a decreet *againſt him*, as heir, *at the inſtance of* the ſame defender, and in the ſame matter, without re-production of the inſtructions, *Feb.* 11. 1629, *Stuart:* neither was it inſtructed *paſſivè* by a decreet of the Commiſſars, *bearing the* production of the defender's ſeiſin without re-production thereof. Neither was it inſtructed *paſſivè*, by the King's gratuitous reſtitution of the apparent heir, of a forfeited perſon, which made him capable of his father's rights, but not heir nor ſucceſſor to him, *Hope, univerſal ſucceſſor, Halyburton contra Lo. Balmerino*. Neither by a bond, wherein the party deſigned himſelf, heir or at leaſt apparent heir, which relateth nothing to the benefit of ſucceſſion, *Jan.* 24. 1627, *L. Glenkindie*. Neither by an award of a town-court, recognoſcing a burgeſs, heir to his predeceſſor, *Spotiſ. heirs, Gudelet contra Adamſon*.

TITLE VI.

Behaving as Heir, where, of *Geſtio pro Hærede*, and the Exceptions againſt this paſſive Title.

I. Geſtio pro hærede *deſcribed, and its effects.*
II. *This paſſive title by whom introduced.*
III. *The reaſons of introducing it.*
IV. *The latitude uſed in judging of this paſſive title.*
V. *This title not competent after the intromitter's death, or where there was any colourable title.*
VI. *Behaving as heirs by intromiſſion with heirſhip, only competent againſt heirs of line.*
VII. *Intromiſſion of tutors or curators infers not* geſtionem *againſt the pupils or minors.*
VIII. *Caſes inferring geſtion by intromiſſion with the heirſhip-moveables.*
IX. 1. *Exception againſt this title, that the defunct was neither baron, prelate, nor burgeſs.*
X. 2. *Defence that the defunct died rebel.*
XI. 3. *Defence, that the apparent heir intromitted, by a gift to himſelf or to his behoof.*
XII. 4. *When moveables belonging to a defunct remain in his houſe, whereunto his apparent heir hath right by infeftment, and are inventaried.*
XIII. *Geſtion by intromitting with lands, teinds, or tacks, wherein the intromitter might be heir.*
XIV. *Defences againſt this member.*
XV. *Geſtion,* 1. *By intromitting with the defunct's charter-cheſt.*
XVI. 2. *By intromiſſion with ſums due to the*

* By the deciſions here referred to, 24th *Jan*, 1629, *La. Renton*; and 3d *July* 1627, *C. of Dumfermling*, the court ſeems to have thought, that where the huſband had borrowed money, and applied it to the purchaſe of land, the wife having right to the liferent of that land by a clauſe of conqueſt, was not to be burdened with the annualrent of that debt, but that ſhe was to be burdened with the annualrent, where the huſband granted bond to the ſeller, expreſsly declaring it to be granted for part of the price. The poſterior deciſions here quoted, have juſtly found, that the conqueſt was in all caſes to be underſtood as burdened with the debts.

the defunct, or doing any deed that may transmit the defunct's right.—Cases which do not infer geſtion.
XVII. *This paſſive excluded, unleſs eſtabliſhed in the behaver's lifetime.*
XVIII. *How far heirs-portioners, behaving as heirs, are liable.*
XIX. *Whether behaving as heir excludes the benefit of diſcuſſion*, &c.

GESTIO PRO HÆREDE, is the apparent heir's diſorderly entry, and immixing himſelf with the heritage, without order of law; and therefore it gives him no right nor active title as heir, but makes him only heir *paſſivè*, whereby he repreſents the defunct in all his debts and burdens, and is liable for them all.

II. This paſſive title, as *Spotiſ.* obſerves, was but introduced by the Lords of Seſſion, and was not before the inſtitution of the College of Juſtice, the apparent heir being only liable for reſtitution of the ſingle value formerly; as was found in the caſe of an heir's intromiſſion with the heirſhip-moveables, *Nov.* 14. 1546, *Seatoun La. Dirleton contra Dumbar* *.

III. The reaſon of introducing this paſſive title, is in favour of creditors [g], that they be not un-ſatisfied, or ſhifted by the heirs of the defunct debtors; who, if they might continue poſſeſſion of their predeceſſors means and eſtate, and be but comptable; would rarely enter, and hudle up their intromiſſion, and with time aſcribe it to ſingular titles, abſtracting their predeceſſors rights. And therefore it was an expedient cuſtom, that they ſhould either enter legally, and for good and all, or that they ſhould wholly abſtain; eſpecially ſeeing the law allows them a year, to inquire into the condition of the defunct's heritage, whether it will afford them loſs or gain, during which time they may deliberate; and if they abſtain, can be troubled by none. So that, though it may ſeem rigorous, for a ſmall intromiſſion to make the intromitter liable for all the defunct's debts, how great ſoever; yet it being ſo eaſy to abſtain, and the hazard known; the expediency and favour of the creditor, preponderateth the wilful diſadvantage of the debtor's heir.

IV. In this *paſſive* title the Lords have always taken great latitude, and ſometimes have found ſmall intromiſſion not relevant, to infer this title, in odious caſes, *Nov.* 6. 1622, *L. Dundaſs.* Where a decreet of ſpulzie of teinds being obtained againſt *Peill*'s goodſire; and never inſiſted in, till, in his time, he was conveened as heir to his father, who had behaved himſelf as heir to the goodſire, in ſo far as he had entered and dwelt in the houſe of *Peill*: and there being in the houſe, the goodſire's beſt board, ſtanding bed, and brewing caldron; he uſed the ſame, by eating at the board, lying in the bed, and brewing in the caldron; and delivered the goodſire's beef-pot to a fleſher, for fleſh furniſhed to the defender's father; the *goodſire's wife* having kept poſſeſſion of theſe heirſhip-goods for five years *after her huſband's death.* Yet this condeſcendence was not found relevant in this caſe, where the paſſive title was not eſtabliſhed before the defender's father's death.

V. And the Lords lately found, that theſe paſſive titles, *quæ ſapiunt delictum*, ſhould not be competent after the intromitter's death [h]. It was alſo thought by the whole Lords after diſpute in *præſentia* upon this title; that it takes only place, where the apparent heirs *animus immiſcendi, et adeundi hæreditatem* did appear, and not where he hath any probable or colourable title, *Spotiſ. Heirs, Corſer contra Durie.* Yet, in favourable caſes, a ſmall intromiſſion *will be* ſuſtained, as making uſe of the defunct's chief bed and board, though ſtanding in the defunct's houſe, ſeeing the heir entered the houſe, before he obtained inventary of the moveables made by authority of a judge, though the houſe belonged to himſelf *proprio jure*, *Had. March* 8. 1610, *Bailzie contra Home.* Or by intromiſſion

* This deciſion not found.
[g] See above, III. 7. 1. [h] See below, III. 9. 14.

with a Mazer-cup of the defunct's, and drinking therein; entering in to the houſe where he died; lying in his bed, and bed-cloaths ſtanding there; and wearing his ſilk ſtockings, though all theſe were undiſpoſed upon; and that the defunct's mother, who had given them to her ſon, had meddled therewith, who died in a chamber belonging to his mother, and *her* name was upon the Mazer, *Jan.* 15. 1630, *Cleghorn*.

VI. There are two caſes of behaving as heir, *viz.* 1*ſt*, Intromiſſion with the moveable heirſhip; and, 2*dly*, Intromiſſion with the lands, teinds, tacks, or other rights which might have belonged to the intromitter as heir. In both which caſes the intromiſſion will not infer this paſſive title, unleſs the intromitter might ſucceed in the ſame particulars. And therefore the apparent heir of line, and no other, can be liable by intromiſſion with heirſhip-moveables, becauſe the ſame can only belong to the heir of line. So the intromiſſion with rents of lands, tiends or tack, will not infer *geſtionem*, unleſs by the apparent heir, who would ſucceed therein, according as they are provided to heirs of line of conqueſt, heirs-male, or of tailzie or proviſion [i]. Neither will any other intromiſſion be relevant, but what is immediate, or by expreſs warrant, command, or ratihabition.

VII. A tutor or curator's intromiſſion will not infer *geſtionem* upon his pupil, unleſs he accept the ſame from the tutor in his accompts, nor the intromiſſion of one having a general commiſſion, as factor, *&c.* It was ſo found in the caſe of a tutor's intromiſſion with the rents of the pupil's predeceſſor's lands, for the reſtitution whereof, he was only found liable, *Nov.* 30. 1665, *Boyd*.

VIII. Behaving as heir by intromiſſion with the moveable-heirſhip, is moſt unqueſtionable, when the ſaid moveable is choſen, drawn, and ſeparated by the heir from the remanent moveables; in which caſe the apparent heir will not be admitted to alledge, that the defunct could not have an heir or heirſhip-moveables when he formerly drew the ſame, *July* 13. 1631, *L. of Gadgirth*. But it ſeems very hard, where the apparent heir's choice of ſuch particulars as the beſt of every kind for heirſhip, doth not evidently appear; for that muſt be accounted the beſt, which is ſuch in the opinion of the apparent heir: and yet, in favourable caſes, intromiſſion with any kind of moveables, out of which heirſhip may be drawn, will be found ſufficient, and reputed as the heir's choice. As the apparent heirs making uſe of his father's board, lying in his bed, though he diſpoſed not thereof; and though the ſame were ſtanding in a houſe diſponed to him by his father, before contracting of the debt purſued on, ſeeing he continued two years in poſſeſſion, and got no warrant from the Lords, or made any inventary thereof, *July* 14. 1626, *Johnſtoun* and *Maſſon* his ſpouſe. The like, by making uſe of the defunct's baſon, ſilver ſpoons, timber beds and boards, without alienation thereof; though the beginning of the intromiſſion was, when the intromitter was not apparent heir himſelf, but was tutor to another who was idiot, ſeeing he continued five years after the idiot's death, himſelf being then apparent heir, *Jan.* 17. 1627, *Fraſer*. Yet the contrary was found, where the intromiſſion began before the intromitter was apparent heir, there being a nearer apparent heir, though it continued after that nearer apparent heir's death, when the intromitter was apparent heir, *July* 2. 1629, *Cuninghame*. Yea, behaving as heir, was ſuſtained by intromiſſion with certain goods of the defunct which might have been heirſhip, though they were confirmed promiſcuouſly by an executor, and bought from him by the apparent heir. But this executor was his own domeſtick ſervant, and confirmed to his own behoof, *Dec.* 16. 1630, *Relict of Ker*. The like, where the heirſhip-goods were ſold to the apparent heir by a ſtranger, ſeeing they were not delivered to that ſtranger, but poſſeſſed by the defunct till his deceaſe, and his poſſeſſion continued by the apparent heir, *Nicol. Feb.* 9. 1621, *Melvil*. But the contrary was found, the goods being diſponed by the defunct to the apparent heir, albeit not delivered before his death, otherwiſe than

[i] See below, § 13. *h. t.*

than that the defunct being un-married, *reſided in the* houſe *with his ſon*, and lived with him till his death, *Jan.* 30. 1630, *Calderwood.* Neither was the ſame inferred by *delivery made by* the defunct to his apparent heir of certain moveables, *the heir having granted a diſcharge* in ſatisfaction of his heirſhip-moveables whereunto he might ſucceed, *Feb.* 24. 1636, *L. Meidhope.*

IX. The ordinary objections and exceptions againſt behaving as heir by intromiſſion with the heirſhip-moveables, are, firſt, That the defunct was neither prelate, baron, nor burgeſs, to whoſe heirs only heirſhip-moveable is competent by the act of Parliament, the *meaning and* extent whereof is ſhown in the former title. And therefore the purſuer muſt condeſcend, and inſtruct that the defunct was either baron, prelate, or burgeſs, which would be ſufficiently inſtructed by the defunct's infeftments of lands or annualrents at any time; for thence it would be preſumed, that he continued undenuded till his death, for *ſemel baro ſemper baro præſumptivè.* And this will be elided by this exception, that the defunct was denuded before his death. For, though ſome have been of opinion, that *ſemel baro ſemper baro* is meant, that though a perſon once infeft were denuded, yet his heir would have heirſhip as a baron. For which I find neither reaſon nor deciſion, but it is moſt reaſonable that he who is once proved to be a baron, ſhould be preſumed ſo to continue, unleſs the contrary were proved, that he was denuded. It was ſo found, *Jan.* 27. 1636, *Straiton.* But if the legal was not expired at the defunct's death, he is not eſteemed denuded; and therefore his heir hath heirſhip, *Feb.* 26. 1663, *Cuthbert of Draikies*; *July* 8. 1628, *Dumbar.* Neither will it be ſufficient that the defunct was once burgeſs, but it muſt be proved, that, when he died, he was acting as a burgeſs. So that, neither the heirs of honorary burgeſſes, nor they who once were trafficking burgeſſes, and take themſelves to a country-life, their heirs, will have heirſhip-moveables. And therefore *ſemel civis ſemper civis* is not preſumed; neither *ſemel prælatus ſemper prælatus:* for, if a beneficed perſon were deprived or demitted before his death, his heir would have no heirſhip-moveables.

X. The ſecond defence againſt intromiſſion with heirſhip-moveables, and which is alſo competent againſt vitious intromiſſion, is, That the defunct died rebel, and his eſcheat was gifted and declared before intenting of the creditors purſuit, *June* 10. 1663, *Gordon of Liſmoir*; *June* 10. 1674, *La. Spenſerfield*; *Dec.* 22. 1674, *heirs of Seaton of Blair.* And it is not neceſſary to alledge, that the apparent heir had any right or tolerance from the donatar; for the exception is equiparate to executors confirmed againſt vitious intromiſſion; whereby vitious intromiſſion is excluded, albeit the intromiſſion was before another was confirmed executor, if the confirmation was before intenting of the creditors cauſe. But it is no relevant defence that defunct died rebel, and ſo had no moveables, but that they were confiſcated. Neither was it ſufficient that the eſcheat was gifted, not being alſo declared before the creditors purſuit: as was found in the ſaid two firſt caſes.

XI. The third defence is, That the apparent heir intromitted by a gift to himſelf, or to his behoof; or by a right or tolerance from a donatar. Theſe being prior to the creditors purſuit, altho' poſterior to his intromiſſion, albeit not declared, are relevant; becauſe the donatar thereby is in poſſeſſion, and needs no declarator, *Feb.* 10. 1676, *Grant*; *July* 4. 1665, *Innes*; *Feb.* 26. 1663, *Cuthbert of Draikies*; *July* 10. 1663, *Gordon of Liſmoir*; *June* 10. 1674, *La. Spenſerfield* *.

XII. The fourth exception is, When moveables belonging to a defunct remain in his houſe, whereunto his apparent heir hath right by infeftment, wherein the defunct had his liferent or tolerance: if the heir enter in poſſeſſion of the houſe, if at his entry he repreſent to any competent judge, that there are moveables in or about the houſe belonging to the defunct, which he deſires to be inventaried, or that ſuch as cannot be preſerved may be ſold, that the price may be made

* The three laſt deciſions here quoted do not directly prove the doctrine of this paragraph.

made forthcoming to all parties having intereſt. If inventary or ſale be made by warrant of that judge, the continuing of theſe moveables in the houſe, or the ſale of thoſe which cannot be preſerved, will not infer behaving as heir. Yet the making uſe of the things in the inventary, or the ſale of that which is not warranted, yea, the omiſſion out of the inventary, of moveables of any conſiderable value, was found to infer behaviour, *Jan.* 25. 1632, *Scarlet.*

XIII. The other ordinary member of behaving as heir, is by intromiſſion with the rents of lands, or teinds, whereunto the defunct had right by infeftment, or entering in poſſeſſion of theſe lands and teinds, *or tacks* unto which the apparent heir would ſucceed, which is the moſt direct behaviour as heir, and is only competent againſt ſuch perſons as might be heirs, in that whereunto they immix themſelves. And ſo an heir of line poſſeſſing or intromitting with the rents of lands provided to heirs-male, or to heirs of tailzie or proviſion; or the intromiſſion of theſe with the profits of lands or teinds befalling to heirs of line, will only infer reſtitution or reparation, but will not infer a general paſſive title, making the party liable to all the defunct's debts [k].

XIV. There are many defences which uſe to be proponed againſt this ſpecies of behaviour: as firſt, It was an ordinary cuſtom to ſhun this paſſive title, that the apparent heir granted a bond of purpoſe to adjudge the defunct's right, upon the apparent heir's renunciation and then take right to the adjudication, till the Lords, by an act of ſederunt, *Feb.* 28. 1662, did declare, that if apparent heirs ſhould, in time coming, take right to any appriſing or adjudication of their predeceſſors rights for their own debt, and did poſſeſs thereby, whether before or after expiring of the legal, they ſhould be liable as behaving as heirs [l]: and therefore no defence for ſuch rights will be ſuſtained, albeit it were a true debt of the apparent heir's, and not a ſimulate bond granted of deſign to adjudge or appriſe. This is only if the apparent heir take right to the appriſing or adjudication led upon his own debt, real or ſimulate, within the legal; for then the acquirer being both debtor and creditor, the debt becomes extinct by confuſion: but there is then no ground to conclude, that, after the lands appriſed becomes irredeemable, the apparent heir, or the heir entered, may not buy that land as well as any other; for tho' the act 62. *Parl.* 1661, makes all appriſings coming in the perſon of apparent heirs, led againſt their predeceſſors, to be redeemable for the ſums they paid therefor, it doth not extend to appriſings led againſt the apparent heir themſelves *.

Neither is it a relevant defence, that the lands or teinds were appriſed, or adjudged from the defunct, albeit infeftment had followed thereupon, if the heir apparent intromit without right, or warrant from the appriſer or adjudger, within the legal, *Feb.* 21. 1663, *Hamilton.* But it is a relevant exception, that the apparent heir's intromiſſion or poſſeſſion was by right from an appriſer or adjudger, tho' the legal was not expired, unleſs the ſum were fully ſatisfied by intromiſſion or otherwiſe, *Jan.* 10. 1662, *Barclay.* The like, tho' the apparent heir continued to poſſeſs for ſome time after the appriſing was ſatisfied by intromiſſion, *Feb.* 26. 1663, *Cuthbert of Draikies.* Yea, intromiſſion with the rents of the defunct's land by his apparent heir, was elided by a tolerance from a donatar of recognition, albeit not declared till after his intromiſſion, the apparent heir paying the ſingle value of his intromiſſion, *July* 17. 1666, *Ogilvie.* But a tolerance from appriſers after the intromiſſion, was not found relevant, *July* 11. 1671, *Maxwell.* Yet the apparent heir's intromiſſion was elided, becauſe the defunct's rights were improved, tho' after the intromiſſion, *March* 22. 1628, *Farquhar.* And an apparent heir's intromiſſion was elided by a colourable title, tho' not valid, whereby the heir of a marriage being entered and infeft as heir to her mother, yet her infeftment

* By act 24. P. 1695, it is declared, "That if any apparent heir ſhall poſſeſs his predeceſſor's eſtate, or ſhall "purchaſe by himſelf, or any other to his behoof, any right thereto, or to any legal diligence, or other right af- "fecting the ſame, otherwiſe than as higheſt offerer at a publick roup, ſuch *poſſeſſion* or *purchaſe* ſhall be reputed "a behaviour as heir, and an univerſal paſſive title."

[k] See above, § 6. *h. t.* [l] See above, I. 18. 9.

feſtment being reduced, and her father being found fiar in a dubious proviſion of conjunct-fee, the heir ſo ſerved was not found liable, as behaving as heir to her father; but only *quoad valorem* of her intromiſſion, *July* 12. 1671, *Gairns*. But it was not elided, becauſe the apparent heir paſſed by his father, and was infeft as heir to his good-fire, tho' his father was infeft, that colourable title was not ſuſtained, the apparent heir being *in mala fide*, having the evidents in his hands, *Nov.* 23. 1671, *Roriſon*. Yet behaving as heir was not inferred by the heir apparent's intromitting with the rents of lands which his predeceſſor had diſponed in truſt to a third party, for the behoof of the apparent heir, and whereupon the intruſted was infeft, *Jan.* 14. 1662, *Nicol Harper*. But intromiſſion by the apparent heir was elided by a diſpoſition by a defunct to the apparent heir's ſon, his oye, tho' without infeftment; or by a tack to the apparent heir's huſband, tho' expired before the defunct's death, as being continued *per tacitam relocationem*, *Jan.* 16. 1667, *Reid*. Behaving as heir was inferred by the apparent heir's entering in poſſeſſion of a coal-heugh, whereof the defunct had tacks for terms to run, albeit the apparent heir took a new tack, *Had. June* 26. 1610, *Aitchiſon contra L. Cockpen*. The like tho' the apparent heir took a gift of the defunct's eſcheat, who had an unexpired tack of the lands, and pretended to poſſeſs as donatar to the ſingle eſcheat, *Had. June* 28. 1610, *Gosford contra L. Cockpen*.

XV. Behaving as heir was alſo inferred by the apparent heir's giving a receipt of the defunct's charter-cheſt, and keeping it two years without proteſtation or inventary, *June* 28. 1670, *Ellis of Southſide*. But it was not proponed, that the perſon behaving was dead, which purgeth vitious paſſive titles.

XVI. Behaving as heir will alſo be inferred by uplifting or diſcharging ſums, principal or annual, which would befal to the party as apparent heir; or by doing any deed that might tranſmit the defunct's right. But it was not found inferred by the apparent heirs renouncing to be heirs, in favour of the heir-male, to whom their father had diſponed, ſeeing they gave no right thereby hurtful to creditors, tho' they got a ſum for their kindneſs and willing renunciation, *July* 5. 1666, *Scot*. Neither by the apparent heirs getting benefit by a tranſaction with a party having right from the defunct, granted on death-bed, *tho' the apparent heir became* obliged to acquire the defunct's debts, and appriſe thereon, and to communicate the benefit of the appriſing, unleſs a deed had been done communicating any right of the defunct, *July* 19. 1676, *Nevoy*. But behaviour was not inferred by the apparent heirs taking out of brieves, ſeeing the ſame were not ſerved, *June* 28. 1670, *Ellis*. Neither *is a general paſſive title* inferred by proponing payment of the defunct's debts, and ſuccumbing, which is only effectual as to that proceſs, *Jan.* 21 1675, *Tailzifer*. Neither was it inferred by the apparent heirs voluntary payment of their predeceſſors debt, *Jan.* 26. 1628, *Commiſſar of Dunkel*. Neither by taking a day to renounce and failing, which, hath only effect as to that proceſs, *July* 16. 1629, *Murray*.

XVII. There is the ſame ground for excluding this paſſive title, unleſs it were eſtabliſhed againſt the apparent heir in his own life, as to exclude vitious intromiſſion; which hath frequently been repelled when not eſtabliſhed in the intromitter's life [m].

XVIII. It remains now to conſider, whether behaving as heir, being a vitious paſſive title, will import more than if the apparent heir had been actually entered, which may occur in two caſes; 1, Where heirs-portioners behave themſelves as heirs whether they will be liable *in ſolidum*, or only *pro rata*? 2. Whether thoſe who behave themſelves as heirs, will have the ſame benefit of the order of diſcuſſing and relief, as if they were actually entered? As to the firſt caſe, The behaviour of heirs portioners cannot oblige them *in ſolidum*, but in ſo far only as if they were actually entered heirs; which is always *pro rata parte*, accord-

[m] See above, § 5. *h. t.* and below, III. 9. 14.

ing to the number of the heirs-portioners, *non per capita, ſed per ſtirpes*: but as it hath been yet undetermined, whether heirs-portioners may be liable for more than their ſhare of the debt, not exceeding their ſhare of the benefit to which they have ſucceeded, there is no queſtion but if heirs-portioners behave as heirs, they would be made liable *quoad valorem* of their intromiſſion, if it did exceed their ſhare.

XIX. As to the other caſe, behaving as heir being a vitious paſſive title, they will not have the benefit of diſcuſſing; which is only competent to heirs lawfully entered. Yea, they will not have relief from the heirs who are liable before them; becauſe they have in their perſon no active title. Yet it is *in arbitrio judicis* to ordain the creditor, on ſatisfaction, to aſſign his right, by which the heir behaving may indirectly attain relief, as aſſigny by the creditor. This favour will not be refuſed, unleſs the manner of behaviour be very odious; as when it is fraudulent, by concealing the immixtion; or that the creditor himſelf having another intereſt, may be prejudged by his aſſignation: and therefore heirs behaving, if diſtreſſed for moveable debts, they have no direct recourſe againſt executors. And if the executry be mean, ſo that there be ſmall proviſions for the wife and children, the creditor will not be ordained to aſſign; and it may ſo fall out in other caſe, that the ſame reaſon may occur, where heirs of conqueſt, or heirs-male of tailzie or proviſion, behave, if the prior heirs, who are nearer of blood, have little benefit *.

TITLE VII.

Lucrative Succeſſors, how this paſſive Title is extended, and how limited by our Practice.

I. *The riſe of this paſſive title.*
II. *It takes place tho' the diſpoſition bear a cauſe onerous. Againſt whom it has no place.*
III. *It is extended to diſpoſitions in favour of the apparent heir in his contract of marriage.*
IV. *Lucrative diſpoſitions of any part of the heritage infer this paſſive title.*
V. *This paſſive title is inferred by diſpoſitions made to oyes, but not to brothers.*
VI. *Who are anterior creditors with reſpect to this paſſive title.*
VII. *This title takes no place where the diſponee was not* alioqui ſucceſſurus.

THERE is no nation hath been more favourable to creditors, or more ſtudious of their ſatisfactions than this [n]; which hath anticipated all conveyances, devices and frauds prejudicial to creditors, either in favour of ſingular ſucceſſors by ſimulate aſſignations or diſpoſitions, without equivalent onerous cauſes, or in favour of apparent heirs, that they might in no way enjoy their predeceſſors eſtates without ſatisfying their debt; which hath given the riſe to this paſſive title, whereby apparent heirs, accepting diſpoſitions from their predeceſſors of their heritage, wherein they would have ſucceeded, or any part thereof, are made liable to all their predeceſſors debts, contracted before ſuch diſpoſition or right. And the acceptance thereof is accounted *præceptio hæreditatis*, and as an immixtion with the inheritance, makes the apparent heir to repreſent the defunct *paſſivè*; yet

* By act 24. P. 1695, apparent heirs are allowed the benefit of entering to their predeceſſors eſtate by inventary, by which they can avoid the incurring a general paſſive title, and become only liable *ſecundum vires inventarii*.

[n] See above, III. 6. 3.

yet with this temperament, that he ſhall be liable only to the debt contracted before the diſpoſition or right made to him by the defunct, in which right he might have ſucceeded; wherein apparent heirs are moſt expediently differenced from the other ſingular ſucceſſors without onerous cauſes, that theſe are not perſonally liable, except in ſo far as they have diſpoſed of ſuch rights as were fraudulently diſponed to them in truſt, and in which they were interpoſed perſons to the behoof of the diſponer or his children; but theſe rights are always reducible at the inſtance of anterior creditors. But becauſe ſuch fraud is more incident to apparent heirs, therefore theſe are perſonally liable for the whole anterior debts, and the right granted by them may alſo be reduced upon the ſtatute 1621; yet the perſonal obligement doth remain, and both are compatible, *Hope*, univerſal ſucceſſors, *Gray contra*

II. This paſſive title is not only extended to diſpoſitions of lands bearing expreſsly a lucrative title, as "for love and favour, *&c.*" but though the narrative thereof bears expreſsly a cauſe onerous, which being betwixt the diſponer and his apparent heir, proves not; and therefore the cauſe onerous muſt be proved *aliunde*. *Vid. title, Reparation,* § 15. *fin.* where the narrative of writs amongſt conjunct and confident perſons, proves not the cauſe to be onerous. And though there be a cauſe onerous inſtructed, it will not be ſufficient, unleſs it be equivalent to the worth of the lands, to ſuſtain it againſt reduction: but if the cauſe onerous be conſiderable, the heir will not be liable ſimply, or perſonally, but the right may be reduced, in ſo far only as concerns the anterior debt reducing, and the heir may be liable *in quantum eſt lucratus.* And therefore an apparent heir having accepted the benefit of a diſpoſition and infeftment, granted by his predeceſſor to a third party, but to the apparent heir's behoof; the Lords, before anſwer, ordained the cauſe onerous of the diſpoſition to be inſtructed, reſerving to their conſideration how far the apparent heir ſhould be liable perſonally thereby, *Jan.* 14. 1662, *Harper.* The like of a diſpoſition of lands by a mother to her apparent heir, though it did bear a ſum of money, which did not prove betwixt mother and ſon, *Feb.* 15. 1676, *Haaden.* The like was found of a diſpoſition by a father to his ſon and apparent heir, though the ſon offered to prove it was for equivalent onerous cauſes, ſeeing the diſpoſition itſelf did bear, "for love and "favour and other good conſiderations," *and was redeemable by the father for* 40 *ſhillings Scots, Nov.* 22. 1671, *Beaty.* But bonds of proviſion by parents to children, infer no paſſive title, though the children be heirs apparent, as when the bonds are granted to the eldeſt ſon, or bonds of proviſion to younger ſons, or a tocher to daughters, when there are no ſons, though in that caſe the daughters might be eſteemed heirs apparent, although truly they be not; for a man is ever underſtood to be capable of having a ſon, and therefore daughters are little more heirs apparent than *(younger)* brothers; yet bonds of proviſion or tochers are reducible by anterior creditors, if the defunct had not a viſible eſtate ſufficient for theſe portions, and his whole anterior debts. And therefore accepting a tocher did not make a daughter liable as lucrative ſucceſſor, though there was no ſon, 21ſt *March* 1634, *Watſon:* yet the daughter and her huſband were found liable to the father's anterior creditors, for what was above a competent tocher ſuitable to the parties, *Dec.* 23. 1665, *Burnet* *. Neither will the taking bonds in the name of the daughters, or aſſigning bonds to them, make them liable as lucrative ſucceſſors; and yet the accepting of aſſignations to heritable bonds by a father to his eldeſt ſon, in which the ſon would ſucceed as heir, may infer this paſſive title, *Dec.* 2. 1665, *Edgar.* But, where the father in his contract of marriage, provided his ſon to ſeveral bonds, which, before any creditor purſued, were paid and cancelled; and it did not appear by the contract, whether they were heritable or moveable; the Lords did not ſuſtain the paſſive title, but found the ſon liable *in quantum lucratus,* and did preſume the bonds to be heritable, unleſs they were

* See above, I. 9. 15. 6.

were proved to be moveable, *Feb.* 7. 1679, *Hamilton.* But a diſpoſition of lands to the eldeſt ſon, was found to make him lucrative ſucceſſor, although by his father's contract of marriage with his mother, his ſecond wife, the father was obliged to infeft the eldeſt ſon of the marriage in the ſaid lands, which did import a ſucceſſion, ſeeing the obligement contained no determinate time, and ſo might be performed by the father any time in his life, *Nov.* 29. 1678, *Higens.* The like was found in a diſpoſition of lands and annualrents to the eldeſt ſon of the marriage, ſeeing theſe were provided to the heir of the marriage, *Feb.* 22. 1681, *More.* The diſponer's bairns portions are not a cauſe onerous, being granted after the creditors debts, albeit undertaken and ſecured by the apparent heir, *bona fide*, before any diligence at the creditor's inſtance, not being paid before the purſuit; becauſe the heir may ſuſpend upon double poinding, and will not be made to pay both the bairns and creditors.

III. This title is extended to diſpoſitions granted in apparent heirs contracts of marriage, which, in many reſpects, is accounted a cauſe onerous, *July* 8. 1625, *Gray.* Where the ſon, *tho' minor*, was not liberated, though he offered to renounce the lands he had by *the* contract. And it was found, that lands being diſponed and reſigned by the father in favour of the ſon, by his contract of marriage, though they were for the preſent wadſet and diſponed with that burden, and thereafter redeemed by the ſon by his own means, ſo that there remained nothing in the father, but the ſuperiority and the reverſion, *to be carried by the father's reſignation*; yet the contract of marriage was found onerous as to the wife's liferent: and, in reſpect the ſon was minor, and preſently revoked the *acceptance*, and renounced all other rights, except that of the wadſet which he had redeemed; he was liberate of the paſſive title, and the lands declared redeemable by any creditor anterior to the contract, *Jan.* 14. 1637, *Courty.* In the like caſe, where lands were diſponed by a father to the ſon in his contract of marriage, for a tocher paid to the father, for ſome debts and bairns portions, far within the worth of the land; the ſon was not found liable *in ſolidum* as lucrative ſucceſſor, nor yet the purſuer put to a reduction; but the ſon was in *hoc proceſſu* put to compt, and pay the ſuperplus of the true price of the land, *June* 17. 1664, *Lyon.* Yet the common rule is, that contracts of marriage are only gratuitous, when they exceed the juſt proportion for ſuch parties.

IV. This title takes place, not only in univerſal diſpoſitions of the predeceſſor's whole eſtate, but a diſpoſition of any part thereof, is ſufficient; ſeeing the leaſt, as well as the moſt, is *præceptio hæreditatis.*

V. This title is extended alſo not only to diſpoſitions made to, and accepted by the immediate apparent heir, but alſo to the mediate apparent heir, ſo that he be *alioqui ſucceſſurus*, by the courſe of law neceſſarily, as what is granted to the eldeſt ſon of the apparent heir, becauſe the ground of this title being to prevent deeds in favour of the diſponer's ſucceſſors, prejudicial to the diſponer's creditors, whoſe debts are anterior, the reaſon holds as much where he diſpones to his oye, who, by the courſe of law, is to ſucceed to him, as to his ſon. 2. It is *præceptio hæreditatis* in the oye as well as in the ſon. And therefore the rule in this title is not, that the accepter be that perſon who would ſucceed at the time of the diſpoſition, and ſo may ſeem to be immediate apparent heir *pro tempore:* for ſo a diſpoſition by one brother to another, or to a brother's ſon, the diſponer for the time having no children, will not infer this title, *Nov.* 22. 1665, *Scot*; *Dec.* 22. 1674, *Heirs of Seatoun of Blair.* The like, though the diſponer was an old man, the time of the diſpoſition, and had little hope of iſſue, *Dec.* 17. 1672, *La. Spenſerfield.* The reaſon is, becauſe the brother or brother's ſon is not *alioqui ſucceſſurus* by the courſe of law, while the brother's children are in *ſpe*, and therefore ſuch are never called apparent heirs; neither is there preſumption in them, that the defunct would, in prejudice of his creditors, adventure ſimply to diſpone to ſuch, while he had hope of iſſue, but all this holds in oyes. And it was ſo decided, *Jan.* 29. 1639, *La. Smeatoun*; where an infeftment was granted by the goo.fire

goodſire to the oye, reſerving his ſon's liferent. And, in the like caſe, the father who was but liferenter, and his oye fiar by the grandfather's diſpoſition, were both found lucrative ſucceſſors, *Feb.* 23. 1637, *Lightoun*; but this deciſion was ſtopped to be further heard.

VI. But here occurreth the queſtion, if the diſpoſition be anterior to the debt contracted, but the infeftment poſterior to the ſaid debt, *quid juris?* The ground of doubt is, 1. That though the defender had a prior diſpoſition, yet, by the infeftment only, he was ſucceſſor, ſeeing lands paſs not by diſpoſitions, but by infeftments; and therefore he was clearly ſucceſſor *poſt contractum debitum*, and alſo *ex cauſa lucrativa*. 2. If this were not the meaning, the intent of the law would be fruſtrate: for it were eaſy to make diſpoſitions and to keep them up, and in the mean time to contract debts, when the creditors could not know the debtor's condition, and ſo contracted *bona fide*. This caſe was decided *negativè*, that the infeftment *upon a prior diſpoſition*, though poſterior to the debt, did not infer this title, being upon a diſpoſition anterior to the debt, *Feb.* 23. 1637, *Lightoun*. The like was found, where there was an obligement in a contract of marriage, to diſpone lands, prior to the debt contracted, albeit both the diſpoſition and infeftment were poſterior to the debt, and did not bear expreſsly "in im-"plement of the contract," which was preſumed, ſeeing no other cauſe was ſhown, *July* 23. 1678, *Ferguſon*. For anſwer to the contrary reaſons; the firſt is, upon miſapplication of the words, *poſt contractum debitum*, which are not to be referred to ſucceſſor, thus, *ſucceſſor poſt contractum debitum ex cauſa lucrativa*; but *ſucceſſor ex titulo lucrativo, qui titulus eſt poſt contractum debitum.* So that, if the lucrative title be not after the debt, this title takes no place. As to the other reaſon, the ſame inconveniency will be of diſpoſitions to ſtrangers, which, being kept up, creditors may contract *bona fide*. And yet inhibition before infeftment will not be effectual, unleſs it preceed the infeftment and the diſpoſition, which will alſo be effectual againſt the apparent heir. But if there be fraud in keeping up ſuch diſpoſitions, which will be eaſier preſumed in the perſon of the apparent heir, than a ſtranger, it will be ſufficient upon the common reaſon of fraud, to reduce the infeftment, though the general paſſive title be not inferred.

VII. This title can take no place, firſt, where the party to whom the right is granted is not *alioqui ſucceſſurus* in that ſame right, becauſe it cannot be *præceptio hæreditatis*, where there can be no *hæreditas*. And ſo a diſpoſition to an heir of tailzie, of lands not provided to that heir of tailzie, cannot infer this title, though it may be reducible, as without a cauſe onerous. Neither will a diſpoſition of tailzied lands to an heir of line, infer this title; for, in that caſe, it cannot be *præceptio hæreditatis*, albeit the diſpoſition will be reducible, as without a cauſe onerous. But there is more reaſon, that rights acquired originally by predeceſſors, in name of their apparent heirs, cannot infer this title, becauſe the predeceſſor himſelf never being fiar in that right, the apparent heir could not be his heir therein. Neither can ſuch rights be reducible by the act of Parliament 1621, *directly*, becauſe the falling thereof will not make the fee return to the predeceſſor who never had it; but the ſame can only be reached by a declarator, that it was acquired by that predeceſſor's means, after the debt contracted, and therefore ought to be affectable, as if it were in the perſon of the debtor, or his heir; which hath frequently been found relevant, and ſuſtained.

TITLE VIII.

Executory, where, of Teſtaments, Codicils, Legacies, Relict's part, Bairns part, Dead's part, Confirmations, and Office of Executory.

I. *The Romans carefulneſs to preſerve the freedom of teſting.*
II. *The antient form of teſting amongſt the Romans.*
III. *The form of Roman ſolemn teſtaments.*
IV. *Their nuncupative teſtaments.*
V. *Their military teſtaments.*
VI. *Reſtrictions upon the liberty of teſting.*
VII. *How far ſons* in familia *could teſt.*
VIII. *Perſons who could not teſt.*
IX. *Perſons who could not be inſtitute, or ſubſtitute.*
X. *Reſtriction of the freedom of teſting in favour of children.*
XI. *The legitimes of children.*
XII. *The Falcidian portion.*
XIII. *The difference of the legitime and the* Falcidia.
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THERE remains now the other branch of succession, *viz.* in moveables, which is of two kinds; the one of executors, which is the only lawful succession in moveables, and therefore is both an active and passive title, the other illegal and vitious, and is therefore called vitious intromission, and is only a passive title. Of the former in this title, and of the latter in the next. The whole interest of the moveable goods and rights of defuncts, is comprehended under the term of executry, wherein, not only that which is proper to the executor by his office, or succession, is contained; but also that which befalleth to the defunct's relict, children, and neariest of kin, and to his legatars and creditors. We shall not

not here repeat what hath been ſaid of ſucceſſion in general, of which at large in its proper place, *ſupra*, *lib.* 3. *tit.* 4. Where the riſe and rule of ſucceſſion, both according to equity and the law of nature, and according to the poſitive law, and cuſtom of this and other nations, is held forth. This much only in general, that the will of the owner is effectual in equity to diſpoſe upon his rights, either to take effect during his life, or after his death; the former being compleat, conſtitutes a preſent right, irrevocable by the diſponer; the latter is ambulatory, and dependent upon the owner's will, and hath always implied in it the condition of his death; and therefore may be altered, abrogate, and derogate by a poſterior will. And thence it is called the latter-will of the defunct, becauſe the latter-will is always effectual, and preferable to the former will. It is alſo more favourably interpreted and extended, than contracts or diſpoſitions amongſt the living. And if there were no poſitive law, the expreſs or preſumed will of the defunct would be the adequate rule of his whole ſucceſſion; but ſucceſſion being of great conſequence, whereby all the rights of men are at leaſt once, and many times oftner, tranſmitted in every generation; therefore poſitive law for utility's ſake, hath juſtly and fitly preſcribed the forms and ſolemnities thereof, that it may be clear and ſure, and hath applied remedies to make it effectual, and hath reſtrained the power of the defunct's will in ſome caſes, eſpecially in favour of the defunct's wife and children, whom, by the law of nature, he is obliged to provide; and hath alſo declared the degrees of ſucceſſion, meaning, and preſumption of the will of defuncts.

I. The Romans, of all nations, were moſt ſolicitous in this matter, and accounted it a publick intereſt, *reipublicæ intereſt, voluntates defunctorum effectum ſortiri*: and therefore they did exactly guard the power of teſting, not only againſt violence and fraud, by ſevere puniſhments, and excluſion from all benefit of ſucceſſion, but alſo they rejected and annulled all pactions, reſtraining the power of teſting, as *pactum Corvinum de hæreditate viventis*; which was not only extended to pactions made by perſons, diſpoſing of the heritage of perſons to whom they might ſucceed, but even to pactions in relation to their own heritage. They did alſo clearly determine what perſons had not the power of teſting, and in whoſe favour teſtaments might not be made; and the manner of all kinds of teſtaments, inſtitutions, and ſubſtitutions of heirs, legacies, *fideicommiſſes*, and the ſenſe of moſt ordinary clauſes in all theſe; and alſo the ſucceſſion of the inteſtate: which hath made the matter of ſucceſſion ſwell into a mighty bulk, and to make the chief integral of the civil law; wherein to inſiſt here, would neither be neceſſary nor profitable for our purpoſe: but, as in other caſes [p], a ſhort ſum, without ampliations or citations, may ſuffice.

II. Succeſſion amongſt the Romans was either by teſtament, or from the inteſtate. The ancient way of teſting amongſt the Romans was either in peace and ſolemn, which was done in preſence of the people, being convocated *collatis comitiis*, or otherwiſe by a ſimulate ſale, *per æs et libram*; wherein the teſtator, in preſence of five wineſſes Romans, did hold a balance, and weighed money therein, and under that form, as it were, ſold his inheritance for the money, and aſked witneſſes. Or otherwiſe teſtaments were made *in procinctu*, when they were ſtanding in battle before the fight, without other ſolemnity than three or four witneſſes. This was the ancient form of teſting. The matter and power of teſting was very abſolute, according to equity: concerning which this was the law of the twelve tables, *uti quiſque rei ſuæ legaſſet ita jus eſto*. But the after-courſe of the civil law changed both this ancient manner and power of teſting, and redacted teſtaments into three kinds, ſolemn, nuncupative and military.

III. Solemn teſtaments were ſo called, becauſe they required the moſt ſolemnities; as, Firſt, That the teſtaments were in writ, the name of the heir at leaſt being written by the teſtator, or one of the witneſſes. Secondly, There behoved to be

[p] See above, III. 4. 15.—19.

be ſeven witneſſes, being Romans, ſpecially required, all preſent, and ſubſcribing by themſelves or another, and ſealing the teſtament at the foot thereof; none of which might be women, pupils, ſervants, prodigals, or furious perſons; neither the heir himſelf, nor any of his domeſticks: each ſubſcription bearing, "I *Titi-* "*us*, *&c.* being called and required to be a witneſs to this teſtament, which is contain- "ed in this ſchedule, have ſubſcribed it with my hand, and ſealed with it ſuch a "ſeal." Thirdly, The teſtator alſo behoved to ſubſcribe thus, "I *Mevius*, *&c.* declare "this ſchedule to be my teſtament, and I have teſted as is contained therein;" or by another if he could not write, who ſtood as the eighth witneſs. Fourthly, The teſtament behoved to be made by one continued act, without intervention of any extraneous act, leſt by extraneous acts the mind might be diverted, or inconſiderate in ſo ſolemn an act. So the teſtament was cloſed up and ſealed; and if the teſtator opened the teſtament, it was preſumed he changed his mind: but after his death, the witneſſes were called together, to acknowledge their ſeals and ſubſcriptions, at the opening thereof. Or otherwiſe, it was opened by the authority of a judge, before other honeſt witneſſes. And if any of the witneſſes acknowledged not their ſubſcriptions, the teſtament was held ſuſpect.

IV. A nuncupative teſtament is that which was by word only, before ſeven witneſſes qualified as aforeſaid; yet two witneſſes were ſufficient in a father's teſtament amongſt his children; and a woman might be witneſs therein. Or in a teſtament for pious uſes five witneſſes did ſuffice, where there was any penury of witneſſes.

V. A military teſtament was that which was made by the ſoldiers in war; wherein they had theſe privileges; Firſt, When they were *in procinctu*, ready to join battle, any declaration of their mind, by word or writ, tho' it were written in the ſand, was ſufficient. It was alſo valid, if made during the expedition, with ſuch ſolemnities as can be had for the time; yet ſo, *that* if the teſtator lived a year, in which he might *have made* it more ſolemn, it became void. Secondly, Military teſtaments have this further privilege, that the teſtator may inſtitute for a time, and may inſtitute in a part, and ſo die partly teſtate and partly inteſtate; which is againſt a principle of their common law.

VI. The ancient abſolute power of teſting was, by the ſubſequent courſe of law, cleared and reſtrained, not only by the declaratory laws, finding teſting and other acts invalid, as done by furious perſons out of their lucid intervals, and by idiots, and by pupils, who have not the uſe of reaſon; or thoſe made by fraud, or error in the ſubſtantials, or by extortion: but more particularly it is limited in theſe particulars.

VII. Firſt, *Filii familias*, perſons in the power and family of their fathers could not teſt upon their goods, whether profectitious from their father, or adventitious *aliunde*, even tho' their father conſented; but only on their *bona caſtrenſia*, acquired in war, or *quaſi caſtrenſia*, as in *militia togata*.

VIII. Secondly, Captives with publick enemies, or perſons given in pledge to them, or perſons condemned to capital puniſhment, whoſe goods were confiſcated, or thoſe condemned of infamy, could not teſt.

IX. Thirdly, By teſtament ſome perſons can neither be inſtitute nor ſubſtitute heirs, ſuch as the ſpurious children of the defunct, to put a reſtraint upon ſuch unlawful procreations. But children begotten on concubines, while thoſe were tolerated, could not be inſtitute or ſubſtitute, there being lawful children, in more than a ſixth part of the heritage. Only there could be left to ſpurious children legacies for their neceſſary aliment. Neither could perſons guilty of, or condemned for treaſon, be inſtitute or ſubſtitute heirs.

X. Fourthly, The power of teſting is reſtrained in thoſe who have lawful children, who were neceſſitated, either to inſtitute their children their heirs, or expreſsly to exheredate or diſheiriſh them, expreſſing the cauſe of ſo doing. For if theſe inſtituted others, and paſſed over their children in ſilence, the teſtament was void. And if they unjuſtly exheredated them, they had *quærelam inoffi-*

cioſi teſtamenti, to annul the teſtament, as done againſt the natural duty of fathers, without a juſt cauſe.

XI. Fifthly, The power of teſting was reſtrained in favour of lawful children, that the teſtator could not by legacy, or *fideicommiſſum*, abate from the children their portions natural, due to them by the law of nature, obliging parents to entertain their children; which their law defined to be the fourth part of the inheritance, debts deduced, when there were fewer than four children; a third part when four; and a half when more. If there be no children, this *legitima* is due to the parents, grandfather and grandmother; but not to brethren, unleſs a baſe perſon be inſtitute; which portion natural the teſtator could not prohibit the children to withdraw from the heritage.

XII. Sixthly, The Falcidian law did reſtrain legacies, that they might not exceed three fourth parts of the inheritance; ſo that there behoved to remain one fourth part to the heir; which therefore was called *portio falcidia*. And therefore, if the legacies did exceed three quarters of the free inheritance, debts being deduced, they were abated proportionally, that the *falcidia* might remain to the heir.

XIII. This *portio falcidia* differs from the natural portion in this, that the teſtator could not prohibit the heir to take the benefit of the portion natural; but he could effectually prohibit the heir to take his *falcidia*. The reaſon whereof was; becauſe the *falcidia* was introduced, to the effect that the wills of defuncts might be executed, which could not be if the legacies left nothing to the heir conſiderable, but trouble, as oft-times it falls out: ſo that this being a remedy in favour of the teſtator, to make his will effectual, he might prohibit it; and could not be preſumed ſo irrational as to prohibit it, if he had not good ground to know, that his heirs would enter without it. Or indirectly, if the teſtator prohibited the alienation of the heritage, the law eſteemed it as a prohibition of the *falcidia*. But the *falcidia* had no place in military teſtaments, or in legacies left to pious uſes, or left to the relict of the teſtator, *nomine dotis*; the reaſon of theſe exceptions being in favour of ſoldiers, pious uſes, and tochers. And if the heir omitted to make inventary, he loſt the benefit of his *falcidia*.

XIV. When the fiduciary ſucceſſion became in uſe, whereby heirs were inſtitute or ſubſtitute to the uſe and behoof of others, to whom they were to reſtore the inheritance, or ſome part thereof, or thing therein, which therefore was called *fideicommiſſum*, as being committed to the truſt and faithfulneſs of the heir. The *ſenatusconſultum trebellianum* did introduce the reſervation of a fourth part to the heir, inſtitute or ſubſtitute, *not to be abated* by theſe *fideicommiſſes*, in the ſame way that the *falcidia* was a reſervation from legacies; and therefore this fourth part was called *trebellianica:* which therefore hath the ſame exceptions with the *falcidia*; of which in the former paragraph. And this further, if the heir were forced by law to enter, or if within a year thereafter he do not fulfil the will of the defunct, he loſt the benefit of his *trebellianica*. And if he had either legacy or portion of the inheritance, it was reckoned to him as a part of his *trebellianica*.

XV. The uſe of theſe fideicommiſſary truſts was, when the teſtator deſigned his inheritance, or ſome of his goods, either for perſons that were not capable to be heirs, or not fit to manage, as through pupilarity, prodigality, or ſome other defect, then he inſtitute other heirs fit for the preſent management; and deſired, or required them by his teſtament, to reſtore the inheritance, or ſome part of it, to ſuch perſons; and that either ſimply to a day, or conditionally: and oft-times the day of reſtitution was after the heir's own death, whereby he had his liferent or uſufruct thereof. At firſt this was wholly left to the truſt and faithfulneſs of the heir, without any legal remedy or compulſion; which afterward were adhibited, with the reſervation of the *trebellianica*, as hath been ſhown. But where the perſons in whoſe favour the truſt was, were ſuch as could not be heirs,

heirs, or ſucceed, as ſpurious perſons, *&c.* then thoſe heirs were not compelled to reſtore.

The eſſential and chief point of a teſtament *was* the nomination of an heir, either by inſtitution or ſubſtitution, without which it was not allowed the name of a teſtament, but only a legacy, or, at beſt, the name of codicils; which is called by ſome an imperfect teſtament.

XVI. Codicils might be made before five witneſſes, either in writ or nuncupative; and they were ordinarily additions to teſtaments: yea becauſe, if teſtaments, through want of ſolemnity, became void, the legacies failed; therefore there uſed to be adjoined this clauſe, "If this be not valid as a teſtament, let it "be valid as a codicil;" which thence is called *clauſula codicillaris*.

XVII. The form of inſtitution of heirs was, in plain and ſhort terms, thus, *Titius hæres eſto*. Theſe were either inſtitute ſolely or jointly, and that either equally or indefinitely, which is underſtood equally; or otherwiſe by certain portions. No inſtitution can be conditional, or to a day; or if it be, it is preſently effectual; becauſe the heritage cannot hang in the air, and belong to none, elſe it would prove caduciary. Yet in military teſtaments this privilege is indulged, as hath been ſaid.

XVIII. Subſtitution is the nomination of ſubſtitute heirs, who take place failing the inſtitute. There may be as many ſubordinate members of ſubſtitution as the teſtator pleaſeth. The inſtitute, or prior ſubſtitute, is *ſaid* to fail, when either he cannot, or will not enter; but if once he enter, the ſubſtitution for ever evaniſheth. And if he or his ſhould be extinct who was inſtitute, the heritage becomes his patrimony, and no more the firſt defunct's heritage; and ſo falls not to the ſubſtitute, who is heir of the firſt defunct, but to the heirs of the inſtitute. It is otherwiſe with us in tailzies, or other ſubſtitutions, as hereafter will appear.

XIX. Subſtitution was of two kinds, vulgar and pupillar. Pupillar is that, whereby fathers were allowed in their teſtament, having named their children, being pupils, to be their heirs, to ſubſtitute heirs to them; which ſubſtitutes had not only the father's heritage, but the ſon's, dying in pupillarity; under which is comprehended that which is called *ſubſtitutio exemplaris*, whereby parents having inſtitute their children, being idiots, their heirs, did ſubſtitute other heirs to them, if they entered not, and died idiots or furious. And in military teſtaments the pupillar ſubſtitution is not only effectual, if the teſtator make his own will, and inſtitute his children: but tho' he only ſubſtitute, and tho' the children ſurvive their pupillarity, yet if they enter not, the ſubſtitution is valid. All other ſubſtitutions are ordinary, or vulgar, when the teſtator inſtitutes heirs, and ſubſtitutes others; but hath only effect as to the teſtator's own goods, if thoſe inſtitute enter not, but not as to the goods of the heirs inſtitute.

XX. The matter of next moment to the inſtitution, or ſubſtitution of heirs, is the leaving of legacies, which may be left in teſtaments, or codicils, and without either in ſome caſes. Any thing may be legated, which is in the defunct's goods, alienable, except in ſo far as is reſtrained in the *legitima*, *falcidia*, *et trebellianica*; of which formerly. Yea, tho' the thing legated be not the teſtator's, the heir is obliged to purchaſe it to the legatar, or the value of it, if the teſtator knew it was another's; for then his mind is followed, to make it effectual, at leaſt by the value. But if the teſtator legate any thing, thinking it to be his own, which is not his own, the legacy is ineffectual. For legacies being donations, they are underſtood to be given only in ſo far as the giver hath right: and therefore there is no warrandice of them as to the teſtator's right. But if the heir deliver any thing not ſpecially legated, in ſatisfaction of the legacy, if that be evicted upon defect of the heir's right, he is liable for warrandice; as if an heir were appointed to give in legacy a horſe worth ſuch a price, not being in the heritage, but delivered by the heir to ſatisfy the legacy;

if

if the horſe be evicted, the legatar hath warrandice againſt the heir, becauſe it is not the defunct's right, but the heir's right that fails. Legacies, and particular fideicommiſſes, not being for reſtitution of the whole heritage, or any ſpecial part, or quota thereof, are equiparate; as fideicommiſſes of the heritage, or a quota thereof are equivalent to the inſtitution, or ſubſtitution of heirs. And either legacies, or fideicommiſſes may be general, whereby a quantity is left; or ſpecial, whereby an individual body is left, as ſuch an horſe, *&c.* ſo may they either be left purely, or conditionally, or to a day.

XXI. This is common to all legacies, that, if the legatar die before the teſtator, the legacy becomes void, and is not tranſmitted to the heirs and ſucceſſors of the legatar. Neither doth the legacy belong to the legatar ordinarily, if the teſtament wherein it is left be void, for want of the requiſite ſolemnities, of which formerly [q], unleſs it have the codicillar clauſe, or if the heir do not enter, or if the codicils in which it is left, or the teſtament, having the codicillar clauſe, want the ſolemnities requiſite to codicills.

XXII. If the legacy, or fideicommiſſes be conditional, the legatar dying before the exiſtence of the condition, loſeth the legacy, and doth not tranſmit it to his heir, if it be a caſual condition, or if left to an uncertain day, which is equivalent to a caſual condition; *or* [r] if it be a poteſtative condition depending upon the power of the legatar, and not upon accident without his power; if ſo the condition be in the legatar's power, unleſs he did all diligence to ſatisfy the ſame, he loſeth the legacy. But if the condition fail not through his fault, as being offered and not accepted, or being impeded by any third party; the legacy is thereby tranſmitted to the legatar's heirs, who are only liable for the intereſt of the condition. Legacies pure, or to a certain day, are tranſmitted by the death of the teſtator; eſpecially if the heir be entered, though the day be not come; *quia ceſſit dies, ſed non venit.*

XXIII. In the ſeveral caſes, by which legacies are eſtabliſhed, and tranſmiſſible, the property thereof is in the perſon of the legatar, if it be a ſpecial legacy; but the poſſeſſion thereof remains in the heir, againſt whom the legatar hath not only a perſonal action, for payment or delivery of the legacy; but hath alſo a real action of vindication againſt him, and all other havers thereof, for delivery of the ſame. So fideicommiſſes, which are not conditional, are not alienable by the heir, but are recoverable from every ſingular ſucceſſor.

XXIV. Conditions adjected to legacies, or fideicommiſſes, are of divers kinds, of which ſhortly obſerve; 1. That when conditions are copulative, they muſt all be jointly performed; or, when divers conditions are ſeverally ſet down in ſeveral places of the teſtament. But if they be disjunctive, the performance of any of them is ſufficient. 2. If the condition be diviſible and performable by more perſons, each performing his part, hath acceſs to his legacy. But if it be impoſed upon one perſon, the performance of a part thereof, doth not give acceſs to a proportionable part of the legacy; but the condition muſt be wholly performed, otherwiſe there is no part of the legacy due. 3. Conditions impoſſible *in facto*, or *in jure*, as not being lawful, regularly are void, and as not adjected. Amongſt which that is accounted one, if marriage be abſolutely prohibited, which the authenticks reſtricted only to maids, and found it lawful in the caſe of widows to adject ſuch a condition. *The law alſo did approve of this condition, ſi Titio nubat*; and therefore, if the legatar married not to that perſon, the legacy was not due. In legacies and fideicommiſſes, a falſe narrative vitiates not, as when the efficient cauſe, mentioned therein, was not true. For example, if a legacy be left, bearing to have been *given* for ſervices done, generally or particularly; albeit theſe were not done, it is valid. But the expreſſion of the final cauſe implies a condition; and if it be not performed, the legacies ceaſeth, *cauſa non ſecuta*; as when legacies are left for ſuch uſes, ſervices, or deeds to be done. Legacies being gratuitous, are of the nature of donations; and therefore are revoked

[q] See above, § 16. *h. t.* [r] F. but.

voked by ingratitude, *ipso facto*, not only reaching the defunct, as if enmity rose betwixt him and the legatar; but even after his death; as if he curse him, or endeavour to make him infamous; yea, those things against the heir will be sufficient to take away the legacy. So much may serve for a summary of the Roman law, in the matter of testaments. As for the succession of the intestate, it being one, without distinction of heritable and moveable rights, we have spoken thereof before, title, *succession*. We shall therefore only touch on these points which are common, in all successions, by the Roman law, *viz.* of the inventary, collation of goods, and right of accrescence, or *collatio bonorum*, and *jus accrescendi*.

XXV. The inventary of heritage, was a repertory of every particular contained therein, and was contrary to the rules of the Roman law, *l.* 33. *ff. soluto matrimonio*, by which there was neither a duty nor benefit to the heir by an inventary. But the use thereof was introduced by *Justinian* in favour mainly of heirs, and in some cases of creditors and legatars. Of heirs, that they might not be liable for the defunct's debts *in solidum*, but *secundum vires inventarii*, according to the value of the inheritance; and this much in favour of the creditors and legatars, that the inheritance might not be embezzled. And therefore the making of the inventary was appointed to be with great solemnity before a judge, upon citation of the creditors and legatars, so far as they were certain, and publick proclamation for the rest, and before famous witnesses. And, in place of the absent legatars and creditors, three persons were to be present, besides the witnesses, of good fame and means. The inventary behoved also to be *begun* within thirty days, after the heir knew and could enter to the heritage, and behoved to be compleat within sixty days after the beginning thereof. The inventary not being thus made, the heir was liable to the creditors for their whole debts, and to the legatars for their legacies, without deduction of his *falcidia*. Neither could the testator dispense with, or prohibit the making of the inventary, in prejudice of the creditors; but he might in prejudice of the legatars, so as the *falcidia* would be due, in that case, though the inventary were not made.

XXVI. Collation is the obligation of the neareſt heirs descending, to communicate what the defunct parent bestowed upon them by donation, or tocher, unto the inheritance, that an equal proportion or division might be of the whole amongst the co-heirs. The reason of this collation was, the equality of interest and affection of parents to their children of the same degree, and thence their presumed will, that these should enjoy equal benefit by their parents. And therefore, if it appeared not to have been the parents will, collation had no place; as if the thing were bestowed, with express exemption, or prohibition of collation, or if it were left as a legacy, or donation, *mortis causa*; for thereby the parents purpose appeared, to prefer that child to the rest, even after the parents death. Collation was competent amongst no other heirs, than descendents in the same degree, and not amongst extraneous heirs, institute, or substitute, or amongst ascendents, or collateral heirs; but only when the co-heirs were by testament, or from the intestate, who are in the same degree, as being all children, or all oyes, *&c.* But if children, or grandchildren were institute or substitute together, there was no collation. Amongst things bestowed upon children by their parents, their peculiar provisions and tochers were comprehended, but not their entertainment or expence of their education. And therefore, though one child were elder, or longer entertained than the rest, *or* though more sumptuously; or though educated with more noble accomplishments, and at a greater rate, as being bred at schools, travels, exercises, *&c.* neither the instruments requisite for these, as books, cloaths, or the like, came under collation, or was there any estimate or consideration thereof. The reason is, because entertainment and education is presumed to be according to the fitness and capacity of the persons, whereunto a proportion is observed in all societies and communions. And therefore the parents are presumed to have expended upon their children proportionally, according to the

capacity and excellency of their ſpirits, and to render them fit *for* the ſervices of their generation; which, as they have a benefit, ſo they have with them a large burden, and oft-times hazard. Neither do donations to children for any ſpecial ſervice done to their parents, come under collation; becauſe theſe are not properly donations, but remunerations.

XXVII. The right of accreſcence, is that whereby the portion of an heir, legatar, or fidei-commiſſar befalleth to another; not by a new and ſeveral ſucceſſion, but by the firſt ſucceſſion, and as a part thereof. We have little uſe of this; and therefore I ſhall be the ſhorter, in the many and ſubtile debates agitated amongſt the Doctors thereupon. For taking clearly up this right, we muſt take notice, that co-heirs by teſtament, or legatars, or fidei-commiſſars, are either appointed conjunct by the words of the teſtator, or by the matter, or conjunct as to the words, but disjunct as to the matter, or wholly ſeveral, both as to words and matter. As if the teſtator ſay, "*Titius* and *Mævius* ſhall be my heirs," there the copulative conjunction joins them in the ſame ſentence, and they are joint in the ſame inheritance, without expreſſing their diſtinct portions, in which the law interprets them equally inſtitute. The like is, if he leave a legacy, or *fideicommiſſum*, in the like terms. But where the proportion is expreſs, equal, or unequal, thus; "Let *Titius* and *Mævius* be my heirs equally;" or, "let *Titius* be "heir in one half, and *Mævius* and *Caius* in another half;" here *Caius* and *Mævius* are conjunct in words and matter; but they are ſeveral from *Titius* both as to words and matter. Or, in the firſt caſe, *Titius* and *Mævius* are joined in one ſentence, but ſeparate as to the matter, becauſe their portions are ſevered and expreſſed. But if the teſtator ſay thus; "I leave *Titius* my dwelling-houſe," and ſay after, "I leave *Mævius* the ſame dwelling-houſe," there is no conjunction of words, *but they are conjoined as to the matter*, becauſe to both ſeverally the ſame thing is left. In all theſe caſes there may be ſubſtitutions; we ſhall then ſet down the right of accreſcence in the ſeveral caſes thereof.

Firſt, In the inſtitution or ſubſtitution of heirs directly; there is place for accreſcence, whether the co-heirs be conjunct or disjunct. The reaſon is, becauſe of that principle of the civil law, that no man can die partly teſtate, and partly inteſtate, except in military teſtaments. And therefore, if any of the co-heirs will not, or cannot enter, the inheritance accreſceth neceſſarily unto the other co-heir, with its own burden, whatever it be. Neither can the heir reject that portion for the ſame reaſon: and if he enter before the other heir be excluded, he hath no remedy, and can neither reject the whole, nor a part; becauſe he might, and ſhould have ſeen to the other's entry with him, or elſe he enters on his peril. This takes no place in legacies, or fideicommiſſes; becauſe, in theſe, the ground of law proceeds not. And therefore, if any heritage be ordered to be reſtored to ſuch perſons, ſeverally in diſtinct portions, if one of them will not, or cannot accept, that portion accreſceth not to the other, but returns to the heir, and ſo in legacies. If there be a ſubſtitution to any of the heirs, the portion accreſceth not, becauſe there is place for the ſubſtitute, who becomes co-heir with the other inſtitute. This accreſcence is ſo neceſſary, that the teſtator cannot prohibit it, becauſe he cannot die teſtate, *pro parte*; and therefore *proviſio hominis*, *non tollit proviſionem legis*, being as to the neceſſary requiſites, eſſentials, and ſolemnities of law. Secondly, In the inſtitution or ſubſtitution of heirs, or in legacies, and fideicommiſſes, if there be more perſons, and ſome of them joint as to both matter and words; the rights of thoſe ſo conjunct do accreſce (if any of the perſons ſo conjunct, do not, nor cannot accept) to the reſt of the conjunct, and not to thoſe that are disjunct in the matter, though they be conjunct in the words. As if the teſtator ſay, "Let *Titius* be my heir," and thereafter ſay, "Let "*Seius* and *Mævius* be my heirs;" if *Seius* or *Mævius* cannot, or will not enter, their portion accreſceth to the other, and not to *Titius*. And therefore this conjunction is called a tacit ſubſtitution, becauſe the law preſumes, that the teſtator did

did not inconſiderately, or in vain, join *Seius* and *Mævius* in one ſentence, and put *Titius* in another by himſelf; and ſo conſtrueth that theſe two ſhould be more conjunct, and their portions accreſce to one another, and not to *Titius*. Thirdly, This proceedeth where the conjunction is only in words, if there be any disjunct both in matter and words: for then the conjunction makes the portions of the conjuncts to accreſce each to other, and not to thoſe who are whole disjunct. As if the teſtator ſay, "Let *Titius* be my heir in the half, and let *Seius* and *Mævius* be my heirs equally in the other half." Here *Seius* and *Mævius* are conjunct in words, and not in the matter, becauſe their portions are ſevered, and yet their portions accreſce *each* to other, and not to *Titius*, who is wholly disjunct; and that from the *ſame* preſumed will of the defunct, as having conſiderately put them in one ſentence for that purpoſe. But this takes place only in inſtitution and ſubſtitution of heirs, that the teſtator die not partly teſtate, but not in legacies and fideicommiſſes; for in theſe the portion of the conjuncts only in words not being accepted doth accreſce to none, but returneth to the heir. Fourthly, In all caſes where there is conjunction in the matter, and not in words, there is place *for* accreſcence: as if the teſtator ſay, "I leave my dwelling-houſe to *Titius*, I deſire my heir to reſtore the ſame dwelling-houſe to *Mævius*;" the portion of either party not accepting accreſceth to the other, and returneth *not* to the heir. But if the teſtator ſay, "I leave my houſe to *Titius*, I leave the "ſame houſe to *Seius* and *Mævius*," either indefinitely, or expreſſing their portions; *Seius* and *Mævius* their portions accreſce each to other, and not to *Titius*; becauſe if they and *Titius* be conjoined in matter only, yet they are alſo conjoined in word; and ſo the more conjunctions prevail by the preſumed will of the defunct. This kind of accreſcence, *inter re conjunctos non verbis*, is called by the Doctors *jus non derceſcendi*; becauſe each party being provided to the whole, which cannot be effectual, therefore *concurſu partes faciunt*, and the deed is made effectual to them in part, equally; if the will of the defunct appear by the *poſterior* proviſion, not to take away the former wholly, as in many caſes it falleth out. And therefore in this accreſcence, if any burden be adjected *to either party*, if that party accept not, his portion accreſceth to the other without that burden; becauſe the other enjoys his own right, which was total, and becomes now effectual as to the whole, the impediment that retenched it being wholly taken off. But in all other conjunctions the portion accreſceth with its burden: and therefore the accreſcing portion, as being *ſeveral*, may be rejected in legacies and fideicommiſſes; but it cannot be rejected in inſtitutions or ſubſtitutions, leſt the teſtator ſhould be inteſtate in part, but *in jure non decreſcendi*, when portions accreſce amongſt thoſe that are conjoined in the matter only, the accreſcence is neceſſary, and the portion accreſcing cannot be rejected; becauſe it befalleth by one integral right, which either muſt be accepted wholly, or rejected wholly; and therein *approbans non reprobat*, no man can both approve and diſprove of the ſame individual thing.

XXVIII. The law and cuſtoms of Scotland have reduced the matter of teſtaments, and ſucceſſion in moveables, much nearer to natural equity, and made it much ſhorter and plainer than the Roman law. For firſt, the civil law did lay the greateſt weight upon the free power of teſting; which our law hath ſo far abridged, that all contracts, pactions and proviſions, in relation to the heritage of perſons living, are valid and ordinary in contracts of marriage, *&c.* And even *pactum Corvinum*, in the worſe ſenſe, is valid; as when one being provided by contract of marriage to be a bairn in the houſe, ſells that proportion in the lifetime of the contracter; which was ſuſtained *July* 6. 1630, *Aikenhead*. So an obligement to leave a legacy was found valid, and to ſtand as an irrevocable legacy; yet only to be taken out of the defunct's part of his free goods, *Jan.* 13. 1631, *Houſtoun*.

XXIX. Secondly, Not only may the power of teſting be reſtricted by paction, but it is actually reſtricted by law, to extend to no immoveable or heritable right,

right, which cannot be alienated, or affected upon death-bed, or, which is equiparate, by teſtament, tho' the teſtator were in his *liegè pouſtie*, or perfect health, and that on good conſiderations; becauſe perſons are ordinarily, and ſtill preſumed to be weak when affected with ſickneſs, and ſo not fit to alienate, or affect things of their greateſt concernment, as their lands, heritage, *&c.* And becauſe it is the great intereſt of perſons to be free of all importunities when they come to their death-bed, at which time they are only capable of their dead's part, which is ſeldom conſiderable; and ſo they cannot affect their lands, nor can they further diſpoſe of their goods upon the ſollicitation of churchmen, which is very powerful in the popiſh church, where indulgences and prayers for the dead, to bring them out of purgatory, are believed, and cannot but be forcible upon dying men, who then are more concerned for the ſafety of their ſouls than preſervation of their eſtates. And every where the preſſing deſires of wives for themſelves, or for ſuch of their children as they moſt affect, or of children relations and friends, may have great impreſſion upon the ſick, for preſerving their peace and quiet: ſo there remains nothing teſtable with us but moveable rights. What rights are moveable, and what heritable, ſee in the beginning of the title *rights real*, which ſhall not be here repeated. Thence it is, that there is a total ſeparation of the ſucceſſion in heritable rights, which are only competent to heirs, and in moveable rights; as to which, becauſe they were intruſted to prelates, and their officials, (as being preſumed moſt careful of widows and orphans, and that the will of defuncts ſhould be effectual,) who did appoint perſons to execute defuncts wills, the perſons ſo appointed were called executors; and the whole moveable rights of defuncts, whether teſted on, or from the inteſted, are comprehended in executry.

XXX. The whole intereſt of executry with us, is in the office of the executor, the diviſion of the communion of goods betwixt man and wife, (whereby the relict hath her part) the ſucceſſion of children *or* neareſt of kin, *and* legacies. There is with us, properly, no inſtitution or ſubſtitution of heirs (*in moveables*): for albeit the nomination of executors be in the defunct's power, in the firſt place, and doth reſemble the inſtitution of heirs, and may receive ſubſtitutions in the ſame way, yet it is not properly a ſucceſſion, but rather an office, which therefore hath a part of the goods *conſequent thereto, for execution of the office.* Executors are heirs in moveables, and when heirs only are expreſſed, executors are comprehended *quoad mobilia.* If there be a nomination of executors, with an *univerſal* legacy to another, it is fideicommiſſary ſucceſſion, to be reſtored to the univerſal legatar. And executors-dative have alſo a fideicommiſſary ſucceſſion, which they muſt reſtore to the wife, and neareſt of kin of the defunct. So muſt executors nominate, not being alſo univerſal legatars, and being ſtrangers, retaining only a third of dead's part to themſelves, for executing their office. *But the effect of the inſtitution of heirs is rather by the univerſal legacy, when the executors are alſo conſtitute univerſal legatars*; ſo that the greateſt power of defuncts, either by teſtament or otherwiſe, is the power of legating by particular or univerſal legacies. The intereſt of the wife is not ſo much a ſucceſſion as a diviſion of that communion of moveable rights, which the law ſtateth betwixt the huſband and her *ſtante matrimonio*, and which is diſſolved by the diſſolution of marriage; and ſo ſhe taketh her ſhare of the free goods by way of diviſion.

XXXI. The ſucceſſion in moveables from the inteſtate belongeth to the neareſt of kin [z], who are the defunct's whole agnates, male or female, being the kinſmen of the defunct's father's ſide, of the neareſt degree, without primogeniture, or right of repreſentation; wherein thoſe joined to the defunct by both bloods, do exclude the agnates by one blood.

XXXII. The line of ſucceſſion in moveables is, firſt, the neareſt deſcendents, male or female, in the ſame degree, equally, whether ſons or daughters, without right of repreſentation. So that if the defunct, the time of his deceaſe, had two daughters,

[z] See above, III. 4. 24. 3.

daughters, tho' he had an oye by a ſon, the daughters will exclude the oye, albeit the defunct had nothing but moveables. The next degree of the neareſt of kin is brothers and ſiſters german; and failing theſe, brothers or ſiſters by the father's ſide only, or their neareſt deſcendents of the ſame degree, without right of repreſentation. As to the third degree of ſucceſſion in moveables, failing deſcendents, and brothers and ſiſters, and their deſcendents, the queſtion is, Whether the father ſurviving will exclude his own brother, or if there be any place for aſcendents in the ſucceſſion of moveables? Such caſes occur rarely: and I have not obſerved it debated or decided. It is but of late ſince the like caſe hath fallen in the ſucceſſion of heirs, and heritable rights; wherein our cuſtom hath, according to the courſe of the law of nature, found the father to be heir to his ſon, and not the father-brother, or any of his deſcendents; and in that we have differed from the cuſtom of England [a]. And there is no reaſon why, if the queſtion ſhould occur, that the like ſhould not be done in moveables. The next degree is of the father's brethren and ſiſters-german; which failing, the father's brethren and ſiſters by the ſame grandfather, and their deſcendents in the next degree; in all which both bloods exclude one blood: and if there be no agnate or kinsfolk found, who can inſtruct their propinquity of blood, the goods become caduciary, and confiſcate, and belong to the King as *ultimus hæres*, who, and his donatar, have the ſame intereſt that the neareſt of kin would have had; *Vide* title *confiſcation*, Section *ultimus hæres*. Children *in familia* have not only the common right, as neareſt of kin to dead's part, but have their legitime portion, called the bairns part; in which their father cannot, by teſtament, legacy, or donation *mortis cauſa*, prejudge them; or by any other deed on deathbed [b]. So by the premiſes it appears, that the whole power of defuncts, as to the ſucceſſion in their moveables, is to nominate executors, and give legacies.

XXXIII. The nomination of executors is properly called a teſtament. Additions thereto, or alterations thereof, are called codicils. Legacies may be left whether there be teſtaments or not, and either in the teſtament, codicils, or apart; but all is ambulatory during the defunct's life, and may be taken away expreſsly or implicitly, by poſterior or derogatory deeds, unleſs the defunct be obliged by contract *inter vivos*, not to alter the ſame; in which caſe contract and paction doth ſo far over-rule the power of teſting, that poſterior deeds, whether expreſsly or implicitly altering, would be ineffectual, like to that obligement to leave a legacy, which was found an effectual legacy without further ſolemnity, *Jan.* 13. 1631, *Houſtoun* [c].

XXXIV. The effect of teſtaments being ſo ſmall, the ſolemnities thereof are no other than what are requiſite to accompliſh any other writ; for two witneſſes ſuffice, and if the teſtament be holograph, it is valid; or if the teſtator cannot, or be not able through ſickneſs to write, a teſtament will be ſufficient by a notar and two witneſſes, notwithſtanding of the act 80. *Parl.* 1579, requiring to writs of importance two notars and four witneſſes, which holds not in teſtaments, tho' containing matter of great importance. For Miniſters are authoriſed as notars in the caſe of teſtaments, *Parl.* 1584, *cap.* 133. The reaſon hereof is, becauſe Miniſters are ordinarily with ſick perſons the time of their death. Nuncupative teſtaments are not of force in Scotland: for tho' legacies left within an hundred pounds may be nuncupative without writ, [d], yet the nomination will not ſo ſubſiſt, nor be reſpected by the Commiſſaries. And therefore a verbal teſtament, taking away a formal legacy, was not ſuſtained, tho' made at ſea, and ſo in a caſe of neceſſity; and not admitted to be proved by witneſſes in the ſhip, *Feb.* 18. 1631, *Houſtoun*.

[a] See above, III. 4. 35. *et* 22. *fin.*
[b] See above, III. 4. 24. 2.
[c] See above, § 28. *h. t.*
[d] See below, § 36. *h. t.*

XXXV. The effect of teſtaments is no greater, tho' made in England, the teſtator reſiding there, and ſo extends not to an heritable ſum due in Scotland, left in legacy by the teſtator, being a Scotſman, *July* 3. 1634, *Melvil*; *Hope*, teſtaments, *Purves contra Chiſholm*; *executors of Colonel Henriſon*, *ibid.* For albeit the cuſtom of the place may ſupply the ſolemnity of any writs or evidents, for inſtructing a right, as writs made abroad by notars, or tabellions, are valid, tho' not done according to the law of Scotland, which requires two nottars and four witneſſes in writs of importance; yet the cuſtom of thoſe places cannot conſtitute any right of ſucceſſion, not allowed by the law of Scotland. Neither do nuncupative teſtaments of Scotſmen, tho' reſiding *animo remanendi* abroad, and dying there, have any effect with us, albeit nuncupative teſtaments be valid according to the law and cuſtom of that place. And therefore *William Schaw*, factor and reſidenter in London, having lived and died there, in the houſe of one *Mary Lewins*, who had confirmed in England a nuncupative teſtament, whereby he had deſigned her as executrix and legatrix; and the neareſt of kin of the ſaid *William* having confirmed themſelves executors to him in Scotland, and the competition being betwixt them, the Lords preferred the executors confirmed in Scotland, and had no reſpect to the nuncupative teſtament, as having no effect by the law of Scotland, *Jan.* 19. 1665, *Schaw* [e].

XXXVI. The like ſolemnities will be ſufficient for codicils and legacies. Yet a nuncupative legacy within an hundred pounds is probable by witneſſes, *Had. Nov.* 24. 1909, *Ruſſel contra* ———; *July* 7. 1629, *Wallace contra Mure*; where a greater legacy, left by word, reſtricted to an hundred pounds, was found ſo probable.

XXXVII. The power of teſting is competent to all perſons who have the uſe of reaſon, tho' minors *and* having curators not conſenting [f]; wives cled with huſbands, without their conſent; perſons interdicted, without conſent of the interdictors: but not to pupils, idiots, furious perſons in their furioſity: neither to baſtards, not having lawful iſſue, or *teſtamenti factionem*, by the King's gift; as in the former caſe, *Wallace contra Mure*; *Vide* tit. *confiſcation*, § *baſtardy*.

XXXVIII. Legacies are either particular or univerſal, general or ſpecial. Univerſal legacies are when the whole moveables, in ſo far as is in the defunct's diſpoſal and not left by particular legacies, is legate, and ſo it is *legatum per univerſitatem*, and like to the ſucceſſion of an heir. Special legacies are where ſome individual is left, as ſuch a horſe, cloaths, *&c.* or ſuch a ſum due by ſuch a perſon, whereby the property is ſtated in the legatar, and, at moſt, but the poſſeſſion in cuſtody of the executor [g]; and therefore the legatar may purſue for delivery, or payment of the ſpecial legacy, againſt the havers or debtors: but he muſt call the executor, that his intereſt may be preſerved, leſt the debts exhauſt even the ſpecial legacy. Upon which conſideration the Lords ſuſtained not a purſuit upon a ſpecial legacy, leaving a ſum due by ſuch a perſon in ſuch a bond, purſued againſt the debtor, the executor not being called, *March* 10. 1627, *Forreſter*. And *in a former caſe*, the purſuit againſt the debtor, at the legatar's inſtance, was ſimply repelled, not being againſt the executor, *Feb.* 4. 1623, *L. Balnamoon*. Yea, a proceſs was ſuſtained at the inſtance of the univerſal legatar againſt the debtor, the executor being alſo called, *Feb.* 20. 1627, *Biſſet*. Here there was malverſation betwixt the executor and the debtors. But ordinarily legatars have no immediate action againſt the debtors of the defunct, but only againſt his executor, *Hope*, legacy, *Bannatine contra Eliot* *. Legacies may be left, not only in teſtaments or codicils, but where there is none, or where there is, in contracts, letters, or tickets apart; tho' the legacies were not in the confirmation, *Dec.* 1. 1629, *executors of Scot*.

XXXIX.

* This deciſion not found.

[e] See above, I. 1. 16. pr. Below, § 55. *h. t.* [f] See above, I. 6. 34. [g] See above, III. 4. 24.

XXXIX. Legacies and donations in contemplation of death, or done on deathbed, albeit as *inter vivos*, yet being of moveables, as bonds, aſſignations, or gifts of money, or goods on death-bed, have the like effect, and are only effectual as to the defunct's free goods at his diſpoſal, which is called the dead's part [h]. And if the whole legacies exceed *the* dead's part of the free gear, regularly, they are abated proportionally; wherein there is no preference nor privilege granted to legacies left *ad pias cauſas:* as for building of a kirk, which ſuffered proportionable defalcation with the ordinary legacies, *July* 6. 1630, *Dr. Monro.* But if the defunct expreſs his will, to leave a legacy without defalcation, it will not be defalked with the other legacies.

XL. Whether a ſpecial legacy, without ſuch expreſs will of the defunct, will be abated proportionally with other legacies, I have not obſerved it oft decided; but I conceive it will not bear a proportional deduction, becauſe, tho' not the expreſs, yet the tacit and preſumed will of the defunct ſeems to be ſo, elſe why ſhould he leave that legacy more ſpecially than the reſt? which is more clear in things left in legacy; as when a horſe, ſword, cloaths, *&c.* are left, and the other legacies are not ſpecial, there ſeems no reaſon, upon failing of the other legacies, to burden the ſpecial legacies, and abated they cannot be directly, not being quantities but bodies. The ſame reaſon is in ſums ſpecially legated; for tho' it may appear, that the defunct's reaſon may be to leave ſuch a ſpecial debt to ſuch a legatar, not as a favour, but becauſe the debtor is leſs *ſolvendo*, yet with that hazard, the other advantage is conſequent, that as he will get no benefit with the other legatars, ſo he ſhould bear no abatement with them; and it was ſo decided, *July* 21. 1665, *Spruel*; where the queſtion was between a ſpecial legacy left, not with other particular legacies, but with a general legacy.

XLI. *Quæritur*, Whether, as in the civil law [i], ſo with us, if the teſtator leave a ſpecial legacy of that which he knows is not his own, it will be valid *quoad valorem?* It was found, that a ſpecial legacy left of an heritable bond, which fell not in the executry, was valid to affect the dead's part of the moveables *pro tanto*, *Jan.* 22. 1624, *Drummond.* A legacy by a wife, ordaining an executor to diſcharge a bond to the legatar, was found valid, and to be made up by the wife's executors, albeit the half of the bond belonged to the huſband *jure mariti*, as being *legatum rei alienæ ſcienter legatæ*, and the wife was preſumed to know that common principle in law, and not to be ignorant thereof, *June* 16. 1664, *Murray* [k]. It was alſo ſo decided of a bond left in legacy, which bond had been aſſigned by the defunct to another ſhortly before his death, whereof he was preſumed not to be ignorant, *June* 24. 1664, *Falconar.* The like was found of a legacy left by a defunct, of a ſum he had upon ſuch lands, which ſum he could not but know was heritable, and could not be legated; where the executor, who was alſo heir, was decerned to make good the legacy, *Dec.* 2. 1674, *Cranſtoun.* Yet a legacy being ſpecial, bearing ſuch a bond to be confirmed, and communicate to the legatar, was not found due, or to be made up, in reſpect that, after the legacy, the defunct made that bond heritable, by a ſuperveening ſecurity, which did import the revocation of the legacy, *July* 3. 1673, *Edmondſtoun.* But where the teſtator gives a ſpecial legacy, of that which he ſuppoſeth to be his own, he giveth it only as he hath it, without any warrandice, being meerly gratuitous, and the executor is not obliged to make it good; as if he legate a ſum which he ſuppoſeth moveable, and yet is truly heritable, *Feb.* 21. 1663, *Wardlaw.*

XLII. Legacies are ſometimes left together in one writ, and ſometimes by poſterior writs, which do not derogate to the prior legacies; but all come in together. If they exceed the defunct's part, they ſuffer all proportional abatement, except ſuch as are ſpecial legacies. For if one thing, or ſum, be ſpecially legated to one perſon, and by a poſterior writ be legated to another, the poſterior legacy takes

[h] See above, III. 4. 24. 2. [i] See § 4. *inſt. de legat.* [k] See above, II. 3. 46. 3.

takes place, and is a revocation of the former; and they do not come in together, *concurſu partes facere*; as they would do, if left in one writ, by the Roman law, and each legatar would have but a half; but we have no ſuch cuſtom, or ſtile, to legate the ſame thing intirely to different perſons, in the ſame writ. And if that ſhould happen, it is like that the poſterior legacy, though in the ſame writ, would exclude the prior, as an alteration of the teſtator's mind, while his teſtament was a framing; for it is ordinary in the ſame writ, to alter prior clauſes by poſterior bonds of the tenor, as *between* debtor and creditor *inter vivos*, *granted on deathbed*, or aſſignations to moveable bonds, *tho'* they only affect dead's part, and neither the heir, the wife, nor the bairns, yet they are preferable to legacies; ſo bonds of proviſion to children on deathbed, though they have but the effect of legacies; yet they do not come in with prior legacies, to ſuffer a proportional abatement, but are preferred thereto, *Dec.* 14. 1676, *Mitchel.* And a defunct having, on deathbed, given aſſignation to one of his children to ſome of his bonds, and thereafter by his teſtament, nominate that child, and another his executors, and univerſal legatars; the univerſal legacy was not found to take away the prior aſſignation, though the ſame was not delivered, nor did contain a clauſe, diſpenſing with delivery; but that child had both the aſſignation, and the half of the remainder of dead's part, *Jan.* 29. 1679, *Aikman.* A legacy by a huſband to his wife, was found not to be underſtood, to be in ſatisfaction of her third, but to be wholly out of the defunct's third, *Jan.* 12. 1681, *Troter.* And a legacy left for building a bridge, being a definite ſum, the executor having builded the bridge with leſs expence, the ſuperplus was applied to build another bridge in the ſame ſhire, *June* 18. 1678, *Commiſſioners of Berwick-ſhire.*

XLIII. Legacies, donations in contemplation of death, or deeds on deathbed, may affect the defunct's whole free moveables, debts being deduced, except only as to the relict's part, and bairns part [1], which were found not to be prejudged by an aſſignation to a moveable ſum made by the defunct on deathbed, *July* 10. 1628, *Cant.* The reaſon of this limitation of legacies will eaſily appear, when the nature of the relict's part, and bairns part ſhall be conſidered. The relict's part of her huſband's executry, or moveables, hath its riſe from that communion of goods, betwixt man and wife *ſtante matrimonio*, of which, title, *conjugal obligations*, § 17. The communion of goods, betwixt huſband and wife, is competent *ipſo jure*, without contract, as a part of that individual ſociety, wherein marriage conſiſts *; and therefore, by the diſſolution of the marriage, the communion is diſſolved: ſo that, if the huſband die firſt, the wife hath her ſhare of his executry; and if the wife die firſt, her executors, legatars, and neareſt of kin, have a ſhare of the free moveables, the huſband hath, the time of her death; in which the children of that wife, though of other marriages, will have part of her ſhare, with the children procreate betwixt the preſent huſband and the wife, both being in a like propinquity to her.

XLIV. The bairns part is their *legitima*, or portion natural, ſo called, becauſe it flows from that natural obligation of parents to provide for their children, which is not extended, to reſtain the parent to diſpoſe of any part of his means; but only ſo, as to leave a portion thereof to his children; which, becauſe the law orders, and determines *it*, it is called the legitime. The bairns part is only competent as to the father's means, and is not extended to the mother, or grand-father; nor is it extended to any, but lawful children. Neither is it extended to all lawful children, but only to thoſe who are not forisfamiliated; and it carries a third of the defunct's free moveables, debts being deduced, if his wife ſurvived, and a half, if there was no relict.

XLV. But

* As to the huſband's power *in liege pouſtie* over the goods in communion during the marriage. See I. 4. 9. med.

[1] See above, III. 4. 24. 2. & § 39. *h. t.*

XLV. But here the queſtion ariſeth, What is foriſfamiliation, whether being actually out of the family be ſufficient, as if the child exerciſe a trade a-part, or be married, without the father's conſent, at leaſt without a portion or tocher from the father? Or whether it be ſufficient *to foriſfamiliation*, that the child be provided by the father, albeit the ſaid proviſion be not accepted expreſsly "in "ſatisfaction of the portion natural, and bairns part?" Or whether none be accounted foriſfamiliated, to exclude them from the bairns part, unleſs they diſcharge the ſame, or accept a proviſion "in ſatisfaction thereof?" There be probable reaſons for all the three parts; but the main doubt is, upon the laſt two, Whether proviſion be ſufficient, as being preſumed, to be given and accepted, "in ſatiſ-"faction of the portion natural." So much the rather, that, in contracts of marriage, fathers oft-times uſe to adject a clauſe; that the child contracted ſhall be "a bairn in the houſe;" which would be ſuperfluous, if the child would be a bairn of the houſe, unleſs the bairns part were expreſsly diſcharged: and therefore tochers and proviſions being neither expreſsly "in ſatisfaction of the bairns "part," nor yet with proviſion, "That that child ſhall be a bairn in the houſe;" muſt be holden to be given and accepted, "in ſatisfaction of the portion natu-"ral." Which is confirmed by a deciſion obſerved by *Dury*, *Feb.* 1. 1622, *Smith contra Eleis*; where *Janet Eleis* having purſued the executors of umquhile *Patrick Eleis* her father, for her ſhare, with the reſt of the four bairns, in the ſaid *Patrick*'s houſe; and that by a clauſe, in her contract of marriage with *John Smith*, afterwards Provoſt of *Edinburgh*, providing her to be portioner of her father's free gear, with the reſt of his bairns, provided the reſt were foriſfamiliated, and provided likeways by their father. In which caſe, the ſaid *Janet* was found to have her ſhare, albeit two of the bairns were not married, but only provided: whereby it appears, that the Lords accounted proviſion as foriſfamiliation.

Yet the contrary opinion is more probable, *viz.* That nothing can take away the bairns legitime, unleſs it be diſcharged. And that a preſumption, of accepting a tocher, or portion, in ſatisfaction, will not be ſufficient, unleſs it bear "in ſatisfaction of the portion natural and bairns part." 1. Becauſe the legitime is ſo ſtrongly founded in the law of nature, and poſitive law, that preſumption or conjecture cannot take it off. 2. This is more ſuitable to the civil law, which we follow in this caſe, whereby the difference betwixt children, being emancipated or foriſfamiliated, or *ſui juris, and betwixt them that are* under the paternal power, and in the family, is taken off as to the ſucceſſion and legitime. And therefore there is introduced *collatio bonorum*, whereby all that the emancipated or foriſfamiliated received from their father, muſt fall in under the accompt. So their tochers, gifts, proviſions, *&c.* are imputed in a part of the legitime, but are never preſumed to be the whole, unleſs it were expreſſed. 3. *Collatio bonorum* is ordinary with us, by which the tocher of the married children comes in the accompt of the bairns part, which could not take place, if thoſe tochers were (*always*) preſumed to be in ſatisfaction of the bairns part, unleſs the clauſe to be a bairn in the houſe, were expreſsly added. Which was ſo found, *Feb.* 27. 1627, *Roſs*. Where the purſuer being married and tochered, was not excluded from the bairns part, there being no other bairns of the family. Yet there was a wife in the family, and ſo the executry was tripartite. Neither was the purſuer made to bring in her portion, *collatione bonorum*. But here the *daughter's marriage*-contract bare, that the tocher was in ſatisfaction of that daughter's right to her mother's third, who was her father's firſt wife. If then it be urged, that the clauſe, "to be a bairn in the houſe," ſignifies nothing. It is anſwered, That the clauſe may be *propter majorem evidentiam et ſecuritatem*; but alſo (*it may ſerve*) as to the clearing of this queſtion, Whether that clauſe hath not this effect, that that child ſhould not only come in to have a ſhare of the portion natural with the bairns of the family, as if that clauſe had not been adjected, but the child had come in only *proviſione legis*. (In which caſe, the child foriſfamiliated behoved to have brought in the tocher, or portion, *collatione bonorum*) but (*that*) when the child comes in alſo *proviſione hominis*, the effect is, that it be without

collation. Which is ſo much the more evident, that oft-times children are provided to be bairns of the houſe, "after the reſt are likewiſe provided." So that, when that condition is not adjected, the meaning is, that without conſideration of the tocher, or former proviſion, the children by that clauſe ſhould have equal ſhare. And it was ſo found, *Spotiſ. teſt. Corſen contra Corſens.*

XLVI. Collation then hath only place amongſt children, where it is not prohibited, expreſsly or implicitly by the father, providing that child to be a bairn in the houſe. But collation hath no place as to the wife; becauſe tochers in ſuch proviſions, being, as *inter vivos*, of its own nature, it is no part of the executry *, but is done by the huſband *in legitima poteſtate*, who is *dominus omnium bonorum*, at leaſt hath *plenam adminiſtrationem*, notwithſtanding the communion of goods in the wife; but *collatio* is only a remedy introduced in law, to keep equality amongſt the children, who have an equal intereſt in their father and his moveables; but it is not introduced, to keep an equality betwixt the wife and them. Neither doth it deſign an equality in all things, but in proviſions or tochers in money, which muſt be accounted to thoſe who got the ſame. But land diſponed to a ſecond ſon for love and favour, not bearing for his portion, or in ſatisfaction thereof, was not found to exclude him from his ſhare of the bairns part, with his ſiſter; nor to require him to collate what he got in land, *Feb.* 14. 1677, *Duke and Ducheſs of Buccleugh.* Hence ariſeth another branch of the former queſtion, Whether, if all the children be foriſfamiliated and provided, but have not diſcharged their portion natural or bairns part, or accepted the proviſion in ſatisfaction thereof; if in that caſe they will have acceſs to a portion natural, in prejudice of the relict and legatars? I ſay, if they be all provided, becauſe if ſome of them be in the family unmarried and unprovided, the relict and legatars will be no more prejudged, if all the bairns come in, or only ſome of them, becauſe many, or few, they will have all the bairns part, and no more. The former caſe, *Roſs contra Kelly*, ſeems to bring in the children, though all foriſfamiliated, to a legitime with the relict, becauſe there was but one child, and ſhe married, and tochered. Only it is obſerved, that her proviſion was in ſatisfaction of her mother's part; ſo that, albeit ſhe was married, yet it appears that ſhe was not provided, *ex bonis paternis*, but only *ex bonis maternis.* And therefore it remains yet unclear, and there ſeems much reaſon, that the wife's intereſt being a diviſion of her communion of goods, ſhe ſhould not divide with them who are out of the family and provided, unleſs they had a proviſion to be bairns in the family **. By the common practick alſo, *the* Commiſſaries divide *the* executry in two, where there is a wife, and the whole children married, and ſo preſumed to be provided. And it was ſo found, where there was but one child married and provided, though not expreſſed in ſatisfaction, but the child was admitted to a third, offering to confer, *Feb.* 18. 1663, *Dumbar of Hempriggs.* And where a defunct had only two daughters, beſides his heir, the one in her contract of marriage, getting a tocher in full ſatisfaction of her portion natural and bairns part, and the other in her contract, being provided to be a bairn in the houſe, was found to have the whole right to the bairns part, and to the dead's part, and office of executry, excluding the other, who was found to ſucceed to no part, as being renounced in favour of her father, and returning back from him by his ſucceſſion; but that it accreſced to the other, though ſhe was not executrix nominate, but dative: and therefore the confirmation of her ſole executrix, was ſuſtained, *Jan.* 27. 1680, *Sandilands.*

XLVII. There is another conſiderable difference between the condition of the wife and children, introduced by the act of Parliament 1641, revived, *Parl.* 1661, *cap.* 32. whereby bonds and proviſions bearing clauſes of annualrent, which before were heritable, and ſo fell not within executry, now are moveable as

* This is obſcure. The meaning is, that tochers, or ſuch proviſions to children, granted *inter vivos*, are a legal diminution of the goods in communion.

** This contradicts what is ſaid above, § 45. 2. *h. t.* That the legitime is always due, unleſs where it is expreſsly renounced. See Lord Kaims's deciſions from 1716, to 1728. No. 66. & 67.

as to the bairns, neareſt of kin, executors and legatars, only excluding the relict, and are diſpoſable by legacy, or nomination, and at the defunct's diſpoſal, by teſtament, or any deed on deathbed; and they are exhauſtible by debts of the ſame nature: which debts of that nature do not exhauſt the relict's part; which is inferred by a neceſſary conſequence from the foreſaid act of Parliament 1641 [m]. For ſeeing thereby wives have no ſhare of their huſbands bonds bearing annualrent, as they have not the benefit, ſo they ought not to be burdened with ſuch bonds, unleſs the huſband or wife die before the term of payment of the annualrent, or that the bonds become moveable *ſimpliciter*, by a charge, or purſuit thereof for payment, whereby the creditor's mind is preſumed to make the ſum ſimply moveable: in which caſe the wife hath both the benefit and burden of ſuch bonds in her ſhare, *July* 19. 1664, *Scrimzeor*. Yet the wife hath her ſhare of the annualrent of all bonds, tho' heritable, due before diſſolution of the marriage: but no ſhare of the ſaid annualrents after, nor of the ſtock, *June* 24. 1663, *inter eoſdem*. In this caſe a bond being payable to the huſband and wife, the longeſt liver of them two, but bearing no annualrent, the relict was found to have her option, either to lift the whole,and re-employ it for her liferent uſe, or to have the half of the ſtock, ſeeing it bare no annualrent; but not to have both the annualrent of the whole,and the half of the ſtock. But bonds which exclude executors are heritable *quoad creditorem*, but moveable *quoad debitorem*; becauſe the creditor excludes his executor: whereas the debtor's executor is not excluded, but liable. But bonds bearing clauſes of infeftment are ſimply heritable, both as to the debtor and creditor: for by theſe the mind of the creditor appears, to exclude all others but his heir, except as to the bygone annualrents [n].

XLVIII. Heirs are excluded from the bairns part, tho' in the family, becauſe of their proviſion by the heritage except in two caſes. Firſt, if the heir renounce the heritage in favour of the remanent bairns; for then the heir is not to be in a worſe caſe than they, but they come in *pari paſſu*, both in heritable and moveable rights, which is a kind of *collatio bonorum*, *July* 16. *and* 23. 1678, *Murray*.

XLIX. Secondly, it was found, if there be but one child *in familia*, and ſo both heir and executor, that child hath not only the heritage, but the whole bairns part, and ſo abates the relict's part, and dead's part, without collation of the heritage, *January* 12. 1681, *Trotter*.

L. In the diviſion of executry, reſpect is had to the time of the defunct's death, as to the relict and children, tho' before confirmation, or any one's owning of the ſucceſſion: for then, if there be a wife ſurviving and children, the executry is tripartite, whether the bairns be of the ſame marriage, or ſome other marriage; as was found, *June* 17. 1631, *Chapman:* in which caſe there was but one bairn, who, if the father had been dead, would have been heir. The like *July* 18. 1634, *Henderſons*. So the wife and children ſurviving, tranſmit their parts to their neareſt of kin *ipſo jure*. And legatars have right to, and do tranſmit legacies to their executors, tho' they have not inſiſted or recovered them in their own life, unleſs the legatar die before the teſtator, for then the legacy is not due, or that the legacy be conditional, and the legatar die before the condition be purified [o]. And if any of the children, who ſurvive the defunct, die before confirmation, they tranſmit.

LI. Yea the neareſt of kin ſurviving, tranſmit their right by the act of Parliament 1540, *cap.* 120. whereby it is clear that the neareſt of kin have a proper right, and not ſolely by the office of executry: but it is more clear by the act of Parliament 1617, *cap.* 14. which maketh *jus agnationis* due by executors to the neareſt of kin, tho' the neareſt of kin be not confirmed executors, ſo *as to* have intereſt

[m] III. 4. 24. *fin.* [n] See above, II. 1. 3. *et* 4. [o] See *l.* 4. *et l.* 5. *pr. et* § 1. *et* 2. *ff. quando dies legat.*

intereſt only by the office. And ſo it was found amongſt the executors of umquhile *Patrick Bell* in *Glaſgow*, whoſe three ſiſters having confirmed his teſtament, one of them was found to tranſmit her ſhare to her children, tho' ſhe died before execution; for the ſon of that ſiſter was found to have his ſhare, albeit the office of executry accreſced to the two ſiſters ſurviving, and with the office the third of the dead's part, *Feb.* 12. 1662. The like was found ſince betwixt *Agnes Maxwel* and the E. of *Wintoun* *. And, after full debate, it hath been determined, *Feb.* 14. 1677, *D. of Buccleugh*, that the intereſt of the neareſt of kin is only extended to thoſe who are exiſtent neareſt of kin the time of the confirmation of the defunct's teſtament, which is *aditio hæreditatis mobilium*; and the executor is *hæres fideicommiſſarius*, who muſt reſtore to the relict and bairns their part of the free gear, debts deduced; and to the neareſt of kin, whether bairns or any other *in proximo gradu* the time of confirmation, the dead's part, the legacies deduced, reſerving to the executors nominate, if they have no proper intereſt, a third of the dead's part unexhauſted by legacies; ſo that the executor *adit hæreditatem*, not for himſelf only, but for all parties having intereſt, which is ſuitable to the entry of heirs in heritable rights, and whereby *jus ſanguinis* of the neareſt of kin is not prejudged, ſeeing immediately after the defunct's death edicts may be ſerved, and the neareſt of kin will be confirmed executors, if a nomination be not produced. And tho' any of the neareſt of kin ſhould die before a confirmation can be expede, it is an extraordinary contingency, which law regardeth not. And the act of Parliament 1617, which eſtabliſhes the right of the neareſt of kin, by making executors countable to them, pre-ſuppoſeth a confirmation before the intereſt of the neareſt of kin be eſtabliſhed. But tho' the executor die before the teſtament be executed, there muſt be an executor *ad non executa*, who will be countable to thoſe who were neareſt of kin *at* the time of the firſt confirmation. And if any of them die before they attain their ſhare, their bairns or neareſt of kin will have no right, till they confirm the teſtament of the neareſt of kin deceas'd, and give up an inventary of what will be due to the defunct's neareſt of kin, by the executors of the prior defunct. Neither will the ſhare of any bairn, or neareſt of kin, deceaſing without children, belong to the ſurviver *jure accreſcendi*, who *thereby would* [p] not repreſent them *paſſivè*, and be liable to the debts; and therefore muſt be confirmed as executors to them, and thereby have both an active and paſſive title [q]: all which was found *Feb.* 14. 1677, *Duke and Ducheſs of Buccleugh.*

LII. By the premiſes it is evident how executry is to be divided, what dead's part is, and how it may be affected with legacies, or deeds of the defunct in teſtament, or on deathbed. For firſt, all perſons who have no wife, or children unforisfamiliated, and wives without huſbands, tho' they have children, have the whole diſpoſal of the executry, and may leave legacies, and donations of their moveable eſtates, and do other deeds on deathbed, equivalent to their free goods; ſo that dead's part is the whole. But if the defunct had a wife and children unforisfamiliated, then the executry is tripartite; and dead's part is a third, the wife's part is a third, and the bairns part a third. But if the defunct have a wife and no children unforisfamiliated, the executry is bipartite, the dead's part is a half, and the wife's part another half; or if he have children unforisfamiliated, and no wife, the executry is alſo bipartite: and in either caſe, his legacies or deeds on deathbed, may be equivalent to the half of his free gear. And if the Commiſſaries, by error or miſtake, make the diviſion otherwiſe, none are prejudged thereby who are not called and compearing, but may ſummarily, without reduction of the confirmation, be admitted to claim their ſhare; which was ſo found, *Feb.* 27. 1627, *Roſs*. Children have a threefold intereſt in their father's executry. Firſt, their bairns part, wherein their father cannot prejudge them. Secondly, their intereſt in dead's part, whereby they have title to the office of executry,

* This deciſion not found. See *Feb.* 17. 1663, *Forſyth.*

[p] F. will. [q] See below, § 61. *h. t.*

executry, if the defunct nominate none: or thirdly, if he die, they have all that is free of dead's part, not exhausted by legacy, or by the executor's allowance for his administration, which is the third of the dead's part. And that *tho'* he nominates executors, unless they be also universal legatars, or tho' the children appear not to claim their office, when executors-dative are confirmed by the Commissaries.

LIII. This interest is common to all other neariest of kin. This is clear by the act of Parliament 1617, *cap.* 14. as to executors nominate, that the neariest of kin may pursue them for the free gear, even for dead's part, except a third to the executors for their administration. So that if they have any legacy, it is imputed as a part of the third, and the executor nominate hath not both *separatim*, and he hath but the third of dead's part, debts and legacies being deduced. So that if there be an universal legacy to another, the executor nominate hath nothing, *Nov.* 29. 1626, *Forsyth*; *July* 9. 1631, *Wilson*; where the reason is rendered, because before the act of Parliament 1617, defuncts might exhaust all their dead's part by legacies; and that act was not to better executors, but to restrict them. The like *Jan.* 15. 1674, *Patoun*. The like *Spotis. executors of Moncrief contra Moncrief* *. And seeing the said act bears, strangers being nominate shall have but a third of the dead's part; therefore the wife will have no more but her third; or if one of the children should be nominate, or the neariest of kin: for none of these are strangers, and so have nothing for their administration but their expences, *Nov.* 28. 1676, *Ker*. But concerning executors-dative, this statute gives them no share of dead's part. The heir being executor nominate as to the executry, is a stranger, and retains a third, *Dec.* 1690. **

LIV. The order of confirmation is, that the Commissaries having emitted edicts, affixed on the church-door where the defunct died, calling all persons having interest to confirm, then, according as parties compear and compete, they prefer the greatest interest: first, the executor nominate; then the neariest of kin; thirdly, the relict, legatars and creditors: and all failing, the procurator-fiscal, or such who are surrogate by him, who enjoyed the whole dead's part till their right were reduced on a better title. But since not only the wife and bairns, who may call all executors to accompt for their parts, but also the neariest of kin, have been admitted to call the ordinary executors-dative to an accompt without reduction. But before the said statute 1617, all executors had the whole profit of the dead's part, as the narrative of it bears. And yet of old it appears the executors had little benefit, if there was any debt, heritable or moveable; for they were (*not*) only liable for a year, *but* [s] thereafter to find caution to relieve the heritor, *Parl.* 1503, *cap.* 76. But these executors-dative have not a third of dead's part, for their administration, tho' they be strangers: for the statute gives that only to executors nominate, being strangers: but the fiscal, by the trust commited to Bishops to have a care of defuncts executry, and the *quota*, which is the twentieth penny of the free gear, should execute the executry, where none are nominate by the defunct; and therefore executors-dative are his assignies, surrogate in place of the fiscal, *Nov.* 28. 1676, *Ker*. The Commissaries horning had general letters, to charge all concerned to confirm, and if none appeared, they confirmed their fiscals, or datives in their place. But by the late act of Parliament 1690, *cap.* 13. general letters are taken away, and *by act* 26. *Parl.* 1690, none can be confirmed but bairns, wives, neariest of kin, legatars, or creditors ***. This interest of children, as neariest of kin, is never taken away, unless they renounce or discharge, not only the bairns part, or portion natural, but all that they may succeed to by their father's death; but if they die before confirmation, the bairns part is transmitted to their executors or as-

* This decision not found.
** This decision not found.
*** The Procurator fiscal may be confirmed in the case mentioned, act 41. P. 1695, where the neariest of kin, in order to prejudge his own creditors, will not confirm.
[s] F. and.

ſignies, yet not their ſhare of dead's part [t]. To come now to the office of executry, and what power executors have *activè*, and how far they are liable *paſſivè*, we muſt diſtinguiſh executors; they are either nominate, or dative conſtitute by the Commiſſaries, and theſe are preferred according to their ſeveral intereſts in the executry; and thoſe who are creditors of the defunct, preferred *hoc nomine*, are called executors-creditors. Executors are alſo principal, or *ad omiſſa, et male appretiata*, or *ad non executa*. And all theſe may be either ſole executors or co-executors. All executors are obliged to give up inventary upon oath, bearing, that they have omitted nothing known to them, nor have miſappretiate the ſame, and muſt find caution to make the executry forthcoming to all parties having intereſt. They uſe alſo to proteſt, that what further comes to their knowledge they may eik or add to the inventary; which they may ſtill do before another do diligence to confirm a dative *ad omiſſa, et male appretiata*, or before they be purſued for ſuper-intromiſſion.

LV. An executor nominate in England was admitted to purſue in Scotland, upon a confirmation there, without inventary, in reſpect of the cuſtom there, not to make inventary, *Feb.* 16. 1627, *Lawſon* [u]. But in that caſe an executor-dative, confirmed in Scotland, having found caution, was preferred to the executor nominate and confirmed in England, *Spotiſ.* teſtament, *inter eoſdem*. An executor being decerned, tho' not confirmed, may purſue not only the defunct's wife and bairns to give up inventary, but alſo ſtrangers, *Had. Nov.* 11. 1609, *Heriot contra Heriot*. But till he be confirmed, or have licence to purſue, he cannot purſue for payment, *Had. Dec.* 12. 1622, *Cathcart contra Cunninghame*.

LVI. Executors intending to confirm uſe to get a licence to purſue; which ordinarily bears *excludendo ſententiam:* which was ſuſtained tho' general, to purſue for all the defunct's debts, naming none, *Hope*, executors, *Farquhar contra Law* *. But the obtainer muſt be firſt decerned executor: for till an edict be ſerved, and an executor *decerned* [w], there can be no title given to purſue; yet before confirmation the licence may be granted. A decreet being extracted on ſuch a licence before confirmation, the decreet found null, *Hope*, executors, *Aitken contra Richarſon*. Licences uſe not to be granted after the principal confirmation; and therefore was not ſuſtained as a title *ad omiſſa*, *Dec.* 14. 1621, *Haliday*; yet it was ſuſtained for purſuing a debt particularly expreſſed therein, being *dubii juris*, *Jan.* 21. 1624, *Carnouſie*. The like where the licence was granted to a creditor, ſurrogate as executor-creditor *ad omiſſa*, *June* 30. 1665, *Stevinſon*; *Feb.* 21. 1668, *Scot*: where the reaſon is rendered, that there is more reaſon to give licence after confirmation, when the worſt or moſt doubtful debts are omitted **. Executors confirmed have right to call for, and uplift all the defunct's moveables confirmed. The executor of a donatar of a liferent-eſcheat, was found to have right to the bygones of that liferent, before the donatar's death, and his heir to the profits of the liferent after the donatar's death; albeit *in his life he had obtained no ſentence therefor*, *Jan.* 28. 1671, *Keiry*. Sums ſecured by a condition in a reverſion, that no redemption ſhould be till theſe ſums were paid, (where the diſpoſition was not granted for theſe ſums, as the cauſe thereof) tho' they affect the ground diſponed, yet remain a moveable right befalling to executors, *Feb.* 18. 1676, *Wauch* [x].

LVII. It uſeth to be controverted betwixt the heir and executor, about the rents of lands, and others, which run according to the legal terms, and decided thus [y], if the heritor or liferenter ſurvive Whitſunday and Martinmaſs, their executors have that whole year, albeit it be victual payable at Candlemaſs, becauſe the laſt legal term is Martinmaſs. And it was ſo decided even in the caſe of a mill, *Feb.* 21. 1635, *L. Weſtniſbet*. The like was found, albeit the entry of the tenant

* The contrary was found, *July* 23. 1625, *Wemyſs*.

** The two deciſions here quoted are directly contrary to that above mentioned, obſerved by *Durie*, *Dec.* 14. 1621, *Haliday*, and ſeem better founded.

[t] See below, § 61. *h. t.* [u] See above, § 35. *h. t. et* I. 1. 16. [w] F. confirmed. [x] See above, II. 4. 1. & act 5. P. 1696. [y] See above, II. 6. 9.

nant was at Whitſunday, and the conventional terms of payment of the mill-rent, were the firſt half at Candlemaſs, and the ſecond at Whitſunday, that a life-renter ſurviving Martinmaſs, being the laſt legal term, had the rent of the mill, both payable at Candlemaſs and Whitſunday, after that Martinmaſs, *July* 20. 1671, *Guthry*. But if they live only till Whitſunday, then their executors have the half of the rent, victual or money: if they live till the term-day, tho' they die that day, their executors have the term wherein they died. And it was ſo found, that the defunct dying on Martinmaſs day, at eleven hours, his executors had the whole year's rent, *Hope, de ſucceſſionibus, tenants of Merchiſtoun contra Napier*. The like where the defunct died on Martinmaſs day, in the afternoon, the executor got the whole year, *Feb.* 16. 1642, *La. Bruntoun relict of the Biſhop of Galloway*.

LVIII. Steelbow goods (being recently ſet) belong to executors, after expiry of the tenants tacks, as preſumed to be the ſame which were ſet; but not to the heir, or his relict for her part, *Dec.* 4. 1638, *Counteſs of Weſtmorland*.

LIX. Co-executors cannot purſue unleſs the reſt be concurring, or called, *March* 8. 1634, ——*contra Lag*. Yet if any of the executors confirmed will not concur, and contribute equal pains and expence, the purſuit will be ſuſtained without him; and he may be excluded by a proceſs before the Commiſſaries on that ground, *June* 26. 1629, *Young*. But when co-executors have obtained ſentence, and ſo executed the teſtament, every one may purſue for their ſhares ſeverally, without concourſe or calling of the reſt, *Jan.* 25. 1665, *Menzies*. One executor cannot diſcharge a debt wholly, ſeeing the other executors have equal ſhare in all, *March* 17. 1630, *Semple*. An executor's diſcharge was ſuſtained *as to her ſhare*, tho' ſhe died before the teſtament was regiſtrate, ſhe having confirmed, made faith and found caution, *Hope*, executors, *Lawſon contra La. Humby*. Amongſt co-executors the office accreſceth to the ſurvivers, who are in the ſame caſe as if the defunct-executor had not been named; only in ſo far as the teſtament was executed before that executor's death, his ſhare is tranſmitted to his executors, and accreſceth not; but is tranſmitted *cum onere debitorum defuncti, pro rata* [a].

LX. Aſſignations granted by executors have only the effect of procuratories, and ceaſe by the death of the executor, unleſs they have attained effect by ſentence or ſatisfaction, whereby alone the teſtament can be executed. And if all the executors die before the teſtament be executed, then, in ſo far as it is not executed, the goods remain *in bonis defuncti*; and the aſſigny cannot purſue, but there muſt be an executor *ad non executa*.

LXI. If all the executors be dead, and any part of the teſtament unexecuted, then there is place for executors *ad non executa*. A teſtament is executed when the debt is eſtabliſhed in the perſon of the executor *activè*, and of the debtor *paſſivè*, either by a new ſecurity, or by a decreet: for albeit the wife's part and bairns part befal them, rather as a diviſion of the defunct's moveable eſtate, than as a ſucceſſion, and ſo fall due to their executors, tho' the teſtament was not confirmed before their death, yet *the adminiſtration and poſſeſſion is in the executor, and* the goods are eſteemed as *in bonis primi defuncti*, and muſt be confirmed ſo as *non executa*; and yet the neareſt of kin to the wife or bairns muſt alſo be confirmed executors to them, to eſtabliſh the obligement of the firſt defunct's executors in their perſons, for payment of their ſhares, the goods and eſtate being *in bonis* of the firſt defunct. But the bairns intereſt as neareſt of kin, falls not to them unleſs the teſtament be confirmed ere they die: for there is no right of repreſentation in moveables as to the dead's part, whether befalling to bairns or others neareſt of kin, tho' living the time of the defunct's death, but only to thoſe who ſurvive the confirmation [b].

LXII. Executors *ad omiſſa et male appretiata*, ought to call the principal executor to their confirmation, elſe their confirmations are null, *Feb.* 14. 1622, *Bain*;

[a] See below, § 79. *h. t.* [b] See above, § 51. *h. t.*

Bain; *March* 12. 1631, *Duff.* But this holds not in executors-creditors *ad omiſſa*, *June* 28. 1623, *White.* Theſe having a more favourable intereſt for ſatisfying their own debt. It may be queſtioned here, whether theſe things can be called *male appretiata*, which are appretiated by the defunct himſelf? Doubtleſs *modica differentia* is not to be regarded; but if the price be conſiderably to the leſion of creditors, legatars, or others, as being a half, or third within the juſt price, they may be repretiated, *Feb.* 1. 1662, *Belſkes.* Otherwiſe it ſtands, though both the quantity and price were known to be greater, the difference not being exorbitant, *Feb.* 2. 1672, *Nimmo.* Otherwiſe executors are comptable, according to the ordinary prices; ſeeing *id non agebatur* by the price, to gift to the executor; unleſs it had been expreſſed that the price ſhould not be queſtioned, and then it is as a legacy to the executor, and to be imputed in part of the benefit of his office; and prejudges none but legatars. For the defunct can do no deed on deathbed, or in teſtament, further than extends to the dead's part.

LXIII. Executors-creditors muſt inſtruct their debt before their commiſſars; and therefore if they have no writ to inſtruct it, they muſt purſue the neareſt of kin *cognitionis cauſa*; and, having obtained decreet, it will inſtruct their intereſt, to get confirmation as executors-creditors *. Nevertheleſs they muſt inſtruct their debt to the defunct's creditors, or others, but the confirmation is not alone ſufficient, though the debt were produced as the ground on which the commiſſars preferred the creditors to be executors-dative, *Spotiſ.* teſtaments, *Reid contra Lochier.* Yet no objection againſt their title or debt, or that they are ſatisfied by the executry, or otherwiſe, will exclude them, as that the debt was a bond on deathbed, though proponed by other executors-creditors, confirming within ſome days after, *Feb.* 16. 1628, *creditors of Marſhal.* And therefore they may confirm, and uplift much more than the debt due to them, but are liable for the ſuperplus; but their confirmation prejudgeth not other creditors, who uſed diligence before their confirmation.

LXIV. So much for the office, power, and intereſt of executors *activè*. Let us now conſider their duty and burden *paſſivè*. And that is, firſt, all executors are liable for diligence in executing the teſtament, but not all equally; for thoſe who have a profitable office, are liable for more diligence, than thoſe who have not; as executors nominate, where dead's part is not exhauſted with legacies, are moſt obliged for exact diligence. But if there be an univerſal legatar, whereby the executor hath no benefit, the executor is only liable *quoad dolum et latam culpam*, and for ſupine negligence, but not to uſe horning and poinding, but to aſſign whenever the legatar inſiſteth, *June* 11. 1629, *Nivin.* The like as to a ſpecial legacy, whereof the executor had no benefit, and the legatar might have purſued for it himſelf, *Dec.* 2. 1628, *Pool.* The ordinary diligence required of executors, is ſentence and regiſtrate horning againſt the defunct's debtors; but how ſoon this muſt be diſpatched, is according to the difficulty and length of the proceſs, *quod eſt in arbitrio judicis.* Executors are liable in the firſt place, to the defunct's creditors, *ſecundum vires inventarii*, and no further. And that not only to the creditors to whom moveable debts are due, but alſo to the creditors in heritable debts, or obligements preſtable by the executor not conſiſting in facts proper to heirs, as to diſpone lands, *&c. Had. Dec.* 14. 1609, *Gray contra Craig*; *Feb* 24. 1627, *Carnagie contra Lermonth*; *Hope*, executors, *Adam contra Gray.* And ſo were found liable, to employ a ſum on land or annualrent for a wife's liferent-uſe. *Hope*, executors, *Trad contra Jackſon.* And alſo for warrandice of an infeftment being liquidate, *July* 22. 1630, *Salmond.* And an executor was found liable to pay a creditor of the defunct, the price of lands ſold to the defunct by a minute, without reſtricting the creditor to the heir, who only would get the right of the land by the minute, which remained incompleat; or without cauſing the creditor diſpone the land to the executor, in lieu of the moveables

* By act 41. P. 1695, a method is preſcribed, whereby the defunct's executry may be attached by the creditors of the neareſt of kin, or of the defunct, where the neareſt of kin lie out and do not confirm.

ables exhauſted by the price, reſerving to the executor relief againſt the heir as accords, *July* 1. 1662, *Baillie*. And generally, creditors have their option, to purſue the heirs or executors of their defunct debtors. Yet executors were not found liable for an annualrent not acceſſory to a ſtock, for years after the defunct's death, but only his heir, *Feb.* 5. 1663, *Hill*. But if there had been no heritable right to affect, the executor would have been found liable.

It was long dubious, whether executors-creditors were liable for any diligence, ſeeing they confirmed for payment of their own debts; and therefore were only obliged to aſſign to creditors after the executors themſelves were ſatisfied, or at leaſt that they had ſufficient time to recover ſatisfaction. But the Lords, by act of Sederunt, 14th of *Nov.* 1679, declared executors-creditors liable for what they confirm, as other executors-dative, but that they are not obliged to confirm the whole inventary; and that they might have licence to purſue, to find out the moſt ſolvent debts of their defunct debtors, making faith that they doubted of the exiſtency, probation, or ſolvency of theſe debts, and finding caution to confirm what they found good debt; and that other executors might be confirmed *ad omiſſa*, who ſhould be liable to all parties as principal executors. The reaſon whereof was, becauſe the means of orphans, might be neglected by the confirmation of executors-creditors, who were obliged to give up, and confirm a full inventary upon oath, though far exceeding their own debt, whereby other executors that were obliged to diligence, were excluded and hindered. Executors-creditors are liable for the defunct's privileged debts; as funeral expences, ſervants fees for a year, or a term, as the ſervants were fied, which are preferable to the executors-creditors own debt, *Nov.* 25. 1680, *Crawfurd*. Where ſervants fees for a year current, were found privileged, unleſs they were fied for a leſſer time.

LXV. Executors have relief of all heritable debts againſt the heir, as the heir hath of moveable debts againſt the executor, *July* 30. 1630, *Carnouſie*; *Dec.* 11. 1632, *Shaw* [d].

LXVI. Executors may not prefer one creditor to another, and ſo may not make voluntary payment, but upon ſentence without colluſion. And if before payment, any other creditor uſe citation, they may not pay ſecurely, till in a double poinding the creditors be called, and diſpute their preference, *Dec.* 2. 1628, *Lyel*; *Dec.* 16. 1629, *White*; *July* 8. 1634, *Preſtoun*. Unleſs the creditor citing, paſs from that inſtance, *Dec.* 5. 1623, *Rochead*. And therefore the ordinary defence is, That the inventary is exhauſted by payment made upon ſentences before intenting of the purſuer's cauſe. Yet if the executor have paid, he may alledge, that the creditor to whom he hath paid, had done more timeous diligence, and ſo was preferable; in which caſe he will be heard, as if that creditor were competing. And executors may pay creditors whoſe debts are acknowledged in teſtament, without proceſs, if the ſame be paid before intenting of any other creditor's purſuit; but, after citation, debts may not be paid, though given up by the defunct in teſtament, *March ult.* 1624, *La. Curriehill*. Neither may the executor pay any other debt, though before citation, in prejudice of the debts in the defunct's teſtament, which puts the executor *in mala fide*, and in neceſſity to ſuſpend on double poinding, even though theſe debtors teſtamentary inſiſt not, *March* 8. 1631, *Duff*. Yea, executors may not ſafely pay any creditor of the defunct, not being a teſtamentary or privileged one, but upon ſentence. Otherwiſe executors might before purſuit prefer what creditors they pleaſed, *June* 7. 1677, *Andrew*.

LXVII. Executors may be purſued immediately after confirmation, before they can have time to do diligence, but the decreets againſt them, ought to be qualified by ſuperſeding execution for a competent time, that they may do diligence.

LXVIII. Becauſe creditors at *a* diſtance may be excluded, not knowing of the defunct's death; therefore the Lords, by act of Sederunt, *Feb.* 28. 1662, did de-

 clare,

[d] See below, IV. 22. 22. above, III. 5. 13.

clare, that all creditors of defuncts uſing legal diligence at any time within half a year of the defunct's death, by confirming themſelves executors-creditors, or by citation of the defunct's executors, or vitious intromitters with their goods, ſhall all come in *pari paſſu*, without reſpect of the priority or poſteriority of their diligence.

LXIX. After the ſix months from the defunct's death, creditors purſuing thereafter, are preferable according to their diligence; and the colluſion of executors, cannot prejudge them, by defending againſt one and not againſt another, or preferring creditors obtaining decreets in inferior courts, before decreets of the Lords, (which require longer time) the citation thereof being prior to the other citation.

LXX. If the executor make payment *bona fide* to the relict, bairns, or legatars of the defunct, before intenting of any creditor's cauſe, he will be ſecure againſt creditors intenting poſterior proceſs; for he could not hinder the payment of theſe, upon unknown creditors. But voluntary payment, without ſentence at the inſtance of the relict, bairns, and legatars, will not ſecure him. By the Roman law, legatars were obliged to find *cautionem mucianam*, obliging them to refound their legacies, in caſe poſterior creditors did purſue, which hath not been accuſtomed with us. But there is competent to ſuch creditor's action of repetition againſt the relict, bairns, or legatars, which will be inſtructed by their diſcharge to the executors.

LXXI. Teſtaments or confirmations are executed, when the inventary is eſtabliſhed in the perſon of the executor, either by obtaining payment, bond or decreet; yet thereby the executor becomes not to have the full property of the defunct's goods and debts ſo eſtabliſhed; but he remains *fideicommiſſarius*, and is obliged to reſtore to the defunct's creditors, before his own creditors. Yea, the decreets or bonds granted to him for the defunct's eſtate, may be affected for debts due by the defunct. And in competitions betwixt the creditors of the defunct, and the creditors of the executor, the defunct's creditors are preferable; though the creditors of the executor *proprio nomine*, have done more diligence, *Dec.* 16. 1674, *Kelhead*. And for the ſame cauſe the rebellion of the executor, or his delinquency, doth not confiſcate the executry, although eſtabliſhed in his perſon by decreets, in prejudice of the defunct's creditors, but only the executors own intereſt therein [e], *Dec.* 21. 1671, *Gordon*.

LXXII. But executors may ſafely pay funeral expences, comprehending medicaments to the defunct; becauſe theſe have a privilege, from the common obligation of humanity to the dead [f], and therefore are preferable to all other debts of the defunct, and ſo may be paid at any time, *Dec.* 16. 1674, *L. Kelhead*. Servants fees for a year or term as they are hired, and a term's houſe-mail, or drugs to the defunct on deathbed, have the like privilege.

LXXIII. Arreſtment was found, to put the executor *in mala fide* to pay other creditors, not calling the arreſter, who being a cautioner, arreſted all ſums in the executor's hands *which belonged* to the *defunct*, though he had not uſed diligence thereupon to make forthcoming, *June* 14. 1625, *Cowper*. Yet, without legal diligence or intimation, exhauſting as aforeſaid, was not found relevant againſt a creditor, whom the executor had acknowledged by paying annualrents to him, *Spotiſ.* executors, *Tailfer contra Moffat*. The executry is likewiſe exhauſted, by debt due to the executor himſelf, without any proceſs, but meerly by exception of compenſation, though he be not confirmed executor *qua* creditor, but executor otherwiſe.

LXXIV. The defunct's debtor will not get compenſation, upon an aſſignation to any debt of the defunct's, taken after the defunct's deceaſe, whereby that debtor would be preferred to other creditors doing diligence [g], *Feb.* 8. 1662, *Crawfurd*; *Feb.* 14. 1662, *children of Mowſwell*.

LXXV. The

[e] See above, III. 3. 13. *fin.* I. 18. 6. 7.

[f] See below, IV. 35. 3. above, § 64. *fin. h. t.*

[g] See above,

LXXV. The old cuſtom was, that executors behoved to get exoneration before the commiſſars, calling the creditors and all having intereſt, and compting to them. And it was not relevant to alledge exhauſting, by exception, but there behoved to be a decreet of exoneration obtained, which is the only full and general liberation. But it was not valid againſt creditors having put the executor *in mala fide*, as being creditors teſtamentary, or acknowledged by the executor, or uſing citation *or arreſtment*, *June* 14. 1625, *Cowper*. Neither was exoneration valid being general, not containing a particular accompt, *March* 10. 1632, *La. Ludquharn*.

LXXVI. But now for a long time, the Lords have been accuſtomed to admit the exception of exhauſting, albeit there hath not been a decreet of exoneration obtained. For inſtructing exhauſting, executors may found upon payment of the privileged debts at any time, upon the expence of confirmation, upon debts due to themſelves before confirmation, (but not upon debts aſſigned to them after confirmation) upon payment of teſtamentary debts *after ſix months*, tho' without proceſs, upon payment of other debts thereafter, according to the priority of diligence, upon abſolvitors by proceſs *of debts due to the defunct in the inventary*; *upon diligence by* execution for recovery of the defunct's debts not recovered; and upon expences of proceſs or executions, ſeeing executors get no expences modified againſt the defunct's debtors, who are not obliged to pay without ſentence.

LXXVII. All theſe being allowed, if any thing in the inventary remain unrecovered, the executor will either get time to do further diligence, or will be liberate on granting of aſſignations to the creditors, according to their diligence *. Executors are not obliged to make faith upon *the reference of creditors as to the debts claimed as due to them by* the defunct, except in ſo far as may concern the executors *ſhare*, without prejudice to creditors, legatars, wife, bairns, and neareſt of kin, *Spotiſ.* executors, *Monteith contra Smith*; *March* 6. 1627, *Scot*; *March* 13. 1627, *Ker*. And therefore they cannot exoner themſelves by decreet, upon their oath, or holding them as confeſſed, without having other probation.

LXXVIII. Executors are not conveenable ſeverally, nor liable *in ſolidum*, but *pro virili parte*, unleſs they have intromitted with as much as will ſatisfy the debt in queſtion, *July* 22. 1630, *Salmond*; *July* 12. 1626, *Turnbull*; *Hope*, legacies, *M'Michael contra Mewharie*.

LXXIX. If any of the executors be dead, the office accreſceth to the ſurvivers, and they are liable and conveenable alone. But if the deceas'd hath intromitted with, or done diligence for any part, in ſo far as the teſtament was executed before the executor's death, it liberates the ſurvivers, and the purſuers muſt have acceſs to thoſe repreſenting the deceas'd. (But for what is wanting through negligence of the whole executors, the ſurvivers are liable.) And ſo where the deceas'd had intromitted with their ſhare, the ſurvivers were only found liable for their own parts [h], *Hope*, executors, *Haliday contra Haliday*; *July* 18. 1628, *Peacock contra Peacock*; *July* 23. 1625, *Aitken contra Ewat*.

LXXX. Executors are liable for the inventary, without neceſſity for any to prove that they intromitted therewith; which is preſumed, unleſs the executor ſhow his diligence, and how he was excluded; which was ſuſtained as to the moveables of the defunct, confirmed by an executor-creditor, *Feb.* 7. 1679, *Pearſon*. And an executor was found liable for ſums confirmed, due by bonds whereof the *dates* were expreſſed in the confirmation; which were preſumed paid *to him*, ſeeing the bonds were not produced, *Jan.* 29. 1681, *Gray*.

LXXXI. Executors are to be confirmed *ubi defunctus habuit domicilium*; and as to theſe who had houſes, or reſidence in diverſe commiſſariots, the chief reſidence is the domicile, and that Commiſſary only confirms the whole, tho' in other juriſdictions,

* This will hold if the executor has not been negligent, *Gosford*, *June* 17. 1669, *Kers*.

[h] See above, § 59. *h. t.*

dictions, *Had. June* 25. 1611, *L. Abercromby*. But as to defuncts reſiding out of the country, their teſtaments are confirmed at Edinburgh; yet if they die in Edinburgh, or elſewhere, not *animo remanendi*, their teſtaments are not to be confirmed at Edinburgh, but where they had their domicile. So albeit a defunct had dwelt in Edinburgh half a year, in a houſe taken for a year, and furniſhed for himſelf, it was found, that his teſtament behoved to be confirmed in the country; becauſe he had his principal domicile there, with ſome children and ſervants, and attended at Edinburgh *only* on law-affairs, *Feb.* 7. 1672, *Commiſſar of Edinburgh*.

TITLE IX.

Vitious Intromiſſion.

I. *Vitious intromiſſion is only a paſſive and not active title, even againſt other vitious intromitters, without aſſignation from the creditor.*

II. *Vitious intromiſſion is the moſt extenſive paſſive title, reaching not only thoſe who might repreſent the defunct, but all other intromitters.*

III. *The reaſon of the large extent of this title.*

IV. *All vitious intromitters are liable* in ſolidum, *and conveenable ſeverally.*

V. *Whether vitious intromiſſion be competent by way of exception?*

VI. *Vitious intromiſſion when ſuſtained generally.*

VII. *Vitious intromiſſion is only competent to creditors. The intromiſſion muſt be* per univerſitatem.

VIII. *Vitious intromiſſion is excluded, if executors were confirmed before citation, tho' after the intromiſſion.*

IX. *Whether an executor-creditor, being confirmed, excludes vitious intromiſſion purſued thereafter.*

X. *How far confirmation of executors, altho' after citation, excludes vitious intromiſſion.*

XI. *Super intromiſſion.*

XII. *Vitious intromiſſion how far excluded by gift of eſcheat and declarator.*

XIII. *Vitious intromiſſion is excluded by any colourable title, tho' defective.*

XIV. *Vitious intromiſſion* ſapit delictum, *and is only competent againſt intromitters themſelves during their life.*

XV. *Vitious intromiſſion is excluded by acquiring* bona fide.

VITIOUS intromiſſion is only a paſſive title, making the intromitters liable to all the defunct's debts *paſſivè*, but is not an active title, whereby the intromitter can call and purſue *activè*: for thereupon there is no ordinary action competent at the inſtance of the intromitter, againſt his complices for mutual relief; but the intromitter paying muſt only make uſe of the creditor's name to give him a title, upon the creditor's aſſignation, which will neceſſitate the other intromitters to ſatisfy, but only *pro rata*, they proving that it is to the behoof of another intromitter, whoſe part at leaſt muſt be abated.

II. This is the largeſt paſſive title, extending not only to thoſe who have relation to the defunct, and have a title to be his heir or ſucceſſor in moveables, but to any ſtranger intromitting without any intereſt; whereas *geſtio pro hærede*, and *ſucceſſor titulo lucrativo poſt contractum debitum*, can be incident to none but apparent heirs *qui præcipiunt hæreditatem*. But not only the children, and neareſt of kin intromitting, are liable *in ſolidum* for the defunct's whole debts, but any other perſon having no legal intereſt of ſucceſſion; which is peculiar to this and no other nation, and not without ground.

III. The riſe and reaſon of this paſſive title is, becauſe moveables are more eaſily abſtracted from creditors of defuncts than their lands, or profits thereof; which every one will not attain without a title, at leaſt without being apparent hei

heir therein. But if defuncts moveables might be meddled with without confirmation, or making inventary upon oath, and no further hazard than ſingle reſtitution, there would never be a confirmation; but both creditors and orphans would be highly prejudged, by abſtracting and concealing the moveables of defuncts. And to remedy this, our law hath introduced this paſſive title, that without confirmation, or other title, the meddler ſhall be liable *in ſolidum* to creditors.

IV. Vitious intromiſſion is ſo far extended, that one intromitter may be conveened ſingly *in ſolidum*, and his alledging other intromitters will not liberate him *pro tanto*, *July* 12. 1628, *L. Moriſtoun*. But where more intromitters are conveened, and decerned together, they are only decerned equally, tho' their intromiſſion were unequal, it not being alledged, that any of them were inſolvent.

V. Vitious intromiſſion is hardly competent by exception, but only by action, *Nov.* 20. 1630, *Pride*. Yea, vitious intromiſſion may always be purged by confirmation, before intenting of the purſuer's cauſe. To which it is more conſonant, that they who alledge vitious intromiſſion ſhould not be permitted to do it by exception, but by purſuit, that before the purſuit the intromitter may have liberty to purge.

VI. Vitious intromiſſion is alſo ſuſtained generally, without neceſſity to the purſuer to condeſcend on particulars, if the intromiſſion be referred to the defender's oath, who knows his own intromiſſion, and muſt either adject a quality which is competent, or propone a defence to purge the vitioſity.

VII. This paſſive title being ſo large, wants not its own limitations and exceptions; as firſt, it is only effectual to creditors, and not to legators, or any other party, who cannot purſue upon this ground, nor for any further than is truly intromitted with, in ſuch caſes where thoſe can purſue intromitters, as in ſpecial legacies, *&c.*

The intromiſſion muſt be univerſal; not that the intromitter muſt meddle with all the defunct's moveables, but muſt meddle *quaſi per univerſitatem*, becauſe heritage is *per univerſitatem: as* he that meddles with a flock of ſheep meddles *per univerſitatem*; yet many of the flock may be meddled with by others, but what remains being ſtill the flock, he is only ſaid to meddle with the flock. And ſo intromiſſion with one thing, or ſome ſmall thing, will not infer this paſſive title.

VIII. It is a legal defence againſt vitious intromiſſion, that there are executors confirmed to the defunct, whether it be the intromitter or any other, tho' the intromitter derive no right from theſe executors; for the confirmation gives the executor the property of the goods. Even tho' the intromitter cauſed a perſon wholly inſolvent be confirmed, and find a cautioner *inſolvendo*, and the intromitter paid the quote, and was at all the expence, *July* 28. 1626, *Tenent*; *Spotiſ.* univerſal intromitters, *Toures contra Douglas.*

IX. Some have queſtioned, Whether confirmation of executors-creditors could purge vitious intromiſſion, ſeeing creditors do only confirm for their own ſatisfaction, and not to execute the defunct's executry, and ſo need confirm no more than will ſatisfy themſelves. But I have not obſerved it repelled, nor is the difference convincing *.

X. Confirmation of executors, whether by the intromitter, or others proponed by exception or reply, to purge vitious intromiſſion, is relevant? But not in ſo far as concerns thoſe creditors who had uſed citation and diligence againſt the vitious intromitters before confirmation, whoſe ſentences are drawn back to their citation; eſpecially *ſi non ſint in mora*, and ſo *eſt jus iis quæſitum*, at leaſt *inchoatum*, before confirmation, *Had. Dec.* 12. 1609, *Dowie contra Clark*. But this muſt be limited thus, If the creditor had uſed citation ſhortly after the defunct's death, there being no competent time to confirm, neither any time limited in law other than year and day, after which the executor muſt be comptable to relieve the heir; and therefore, unleſs the intromitter were meerly *prædo*, having no intereſt, as neither being wife, bairn, neareſt of kin, nor having a diſpoſition without delive-

* By act 20. P. 1696, it is declared, that thoſe who intromit with the moveables of defuncts, being neither confirmed executors, nor having right before their intromiſſion from an executor-creditor, ſhall be liable as vitious intromitters, notwithſtanding the confirmation of ſuch executor-creditor in a particular ſubject.

ry, it is ſufficient to confirm after the intenting of the creditor's cauſe, being within year and day; in which caſe the intromitter confirming will be liable *ſecundum vires inventarii*, albeit only conveened as intromitter, not as executor, without neceſſity of a new proceſs. It was ſo found in the caſe of the defunct's ſon, who intromitting, and being cited, yet confirming within year and day, was only liable as executor, *Jan.* 24. 1628, *Aldie*; *Hope*, executors, *Bald contra Hamilton*; *Spotiſ. eod. Thomſon contra L. Rentoun*, *Jan.* 28. 1663, *Stivenſon contra Ker and others.*

XI. The exception of confirmation of executors is elided, by alledging that the intromitter, tho' having confirmed, yet hath fraudulently concealed ſome part of the goods and means, not put in the inventary; which ſuper-intromiſſion *doloſe* is relevant to elide the defence on confirmation, *Hope*, executors, *Raeſide contra Cathcart*; *Spotiſ. eod. Cleland contra Baillie.* Super-intromiſſion was alſo ſuſtained without a dative *ad omiſſa*, to elide exhauſting proponed by an executor, *Jan.* 24. 1639, *Inglis.*

XII. Declarator of eſcheat hath the ſame effect to exclude vitious intromiſſion, as the confirmation of executors, which is not only competent to the donatar intromitting, but to any other intromitter, both being univerſal titles, reaching the defunct's moveables, every intromitter therewith is liable to him. But the defence was elided by continuing poſſeſſion, the gift being holden ſimulate, *Dec.* 15. 1638, *Ogilvie.* It is not relevant to alledge, that the defunct died at the horn, and thereby had no moveables, they having become eſcheat to the King; nor that the defender had a gift, *poſt litem motam*, without declarator, *Feb.* 7. 1662, *Gray.*

XIII. Vitious intromiſſion was alſo reſtricted to the ſingle value, when it is by virtue of a diſpoſition from the defunct, albeit the diſpoſition was found null by reply, as done in defraud of creditors, by a huſband to his wife, *June* 16. 1671, *Bowers.* And in a diſpoſition of moveables, with an inſtrument of poſſeſſion, being for a cauſe onerous, granted while the defunct was on deathbed, tho' there was no natural poſſeſſion till after his death, was ſuſtained to purge vitious intromiſſion, *July* 6. 1664, *Brown.* But if the diſpoſition were ſhortly before the defunct's death, his continuing in poſſeſſion will not infer ſimulation or fraud, but the ſame will purge the vitious intromiſſion, at leaſt reſtrict it to the ſingle value.

XIV. Vitious intromiſſion being penal, *ſapiens naturam delicti*, is not to be ſuſtained againſt any as repreſenting the intromitter, when no action is intented againſt the intromitter in his own life[i]; after which no other can be able to clear the title of his intromiſſion with moveables *quæ tranſeunt per commercium*; and ſo the defunct might have bought them *bona fide*, *July* 10. 1666, *Cranſtoun.* Yet tho' decreet were not obtained before the intromitter's death, if litiſconteſtation were made againſt him compearing, when it was proper to him to purge his intromiſſion by any competent defence; if the ſame were proved after his death, it might overtake his ſucceſſors.

XV. Vitious intromiſſion is ſimply excluded by thoſe who acquire, by way of commerce *bona fide* for a juſt price, albeit in ſome caſes executors may recover defunct's goods *rei vendicatione.* But where *bona fides* doth not appear, but colluſion or fraud, the buying of defunct's goods will not be ſuſtained: as was found in the caſe of a party deponing that he bought a defunct's goods within ten days after the defunct's death, when he knew there could be no confirmation of the ſame, or lawful title thereto, albeit he deponed that the ſeller had a diſpoſition from the defunct, but did not produce it, and his oath was not found to prove it, but the acquiſition was found to be a colluſion, the buyer being the defunct's good-ſon, pretending to buy from a ſtranger, *Nov.* 29. 1679, *Irving.*

The End of the Third Book.

THE

[i] See above, III. 6. 5.

THE INSTITUTIONS OF THE LAW of SCOTLAND.

BOOK IV. TIT. I.

The Authority of the Lords of Council and Seſſion.

THE Inſtitutions of the law and cuſtoms of *Scotland*, as to the conſtitution and tranſmiſſion of the ſeveral kinds of private rights, in all matters civil, having been printed and publiſhed *anno* 1681, and the copies being all ſold. And now a ſecond edition being alſo printed, with many corrections and additions; I would not longer diſappoint the deſires and expectations of many, to add the laſt part of the Inſtitutions propoſed in the former edition; which I did the rather forbear till now, that I might know how the former part did ſatisfy, and that, if any objections were made as to the former parts, they might be amended in this, where I found reaſon for it; and that if any had written againſt the matter and method I had followed, I might be able to give them a reply in this. For the matter is the ſame in this, and in the former parts, though here it is to be ſet in the form of proceſs, pleadings and deciſions. And the good acceptance the former parts have had, obliges me the more to conſummate the matter, by the new edition of the former parts, and the addition of this. And in this edition I have added what alterations have occurred by law ſince the former, or what hath been further cleared or altered by poſterior deciſions, ſo far as I could find them, which are but very few, before I was reſtored, having found none obſerved by any of the Lords in that time.

I had not ſo ſoon publiſhed the former edition, if I had not ſeen evidently enough, that I could not continue to enjoy that ſtation (to which I had right during my life,) as things then ſtood; for if I had continued, my modeſty would not have allowed, to hear any thing of mine cited, while I was preſent; nor had it been fit to have given any appearance of being pre-determined in my judgment, in points that had not come the length of a fixed cuſtom; and therefore I did ſtill forbear to be poſitive in ſuch points, but rather held forth what had been decided by the Lords. And in the deciſions obſerved by me, I have been ſo tender of their honour, as not to expreſs my own particular judgment. But in this laſt edition, I have propoſed my opinion, what emendations were juſt and fit to be made by acts of Parliament, or of Sederunt. And I do declare, That I will not eſteem it my honour nor my credit, to be tenacious upon my own opinion, but ever to be ready to concur with what I ſhall be convinced to be juſt. And certainly a juſt inclination is beſt ſeen, and with leaſt ſuſpicion, by giving opinion when there is leaſt intereſt or influence of any party, but the caſe ſtated as between *Titius* and *Mævius*. I have reſolved very ſeldom to uſe citations of law, or of our deciſions; for, in the former parts, I endeavoured rather

rather to hold forth what had been decided by the Lords, than to give my own opinion, which now I reſolve more freely to give, much of form occurring in this part; wherein I will offer my opinion, in what I think might be amended. And I may ſay, without vanity, that I know no man, that ever had ſo much opportunity of experience, in this judicature, as myſelf, ſo that I ſhould need the leſs to urge my opinion by deciſions.

I. The firſt point neceſſary to be cleared, in judicial deciſion of private rights, and making the ſame effectual by legal execution, is to clear the juriſdiction and authority of the judicature, which is to determine the ſame. The authority of the Lords of Seſſion was requiſite to be known at all times, and never more than now. Some few had appealed from them to the Parliament (as is expreſſed in the deciſions obſerved by me) but when they became more calm, they did paſs from their appeals, or diſowned the ſame, as without their warrant. This was taken notice of in the claim of right, whereby appeals were diſclaimed; yet proteſtations for remeid of law, from the Seſſion to the Parliament, were claimed, and very juſtly. But there was neither determined the time when, nor the caſes in which they were competent, which yet, there is no doubt, the king and eſtates of Parliament will in due time determine. There is no queſtion the Lords of Seſſion may exceed their authority, and there is no other judicature that can control the ſame, or warrantably judge therein, ſave only the Parliament. And therefore parties grieved may proteſt, that they acquieſce not in ſuch ſentences, and may proteſt for remeid of law by the Parliament, albeit ſuch proteſtations are never mentioned in our law before. But though it is not to be imagined, that by that part of the claim of right, it was meaned, that all the ſentences of the Seſſion might thereby warrantably be brought into the Parliament; yet of late, ſeveral perſons have been ſo litigious, and ſo far miſtaken in that deſign, that ſome have directly appealed, and others have proteſted for remeid, both againſt the interlocutors, and definitive ſentences of the Lords.

Note, that the 22. article of the declaration of rights, by the Estates of Scotland in 1689, is in these words. "That "it is the right & "privilege of the "subject to protest "for remedy of "law to the King "or Parliament "ag.t sentences "pronounced by "the Lords of Sessi.n "provided the "same do not "stop the execu- "tion of senten- "ces."

For clearing this matter, which is of the greateſt importance, on which depends much of the ſecurity of every man's right, and the quiet of their minds, by knowing how the ſame may become unqueſtionable, without the hazard of ſuſtaining any proceſs or plea againſt them; it will be neceſſary to ſhew what courſe this nation has followed, for obtaining this great end, which all the nations of the world (in any meaſure civilized) have moſt carefully endeavoured to eſtabliſh inviolable. We ſhall therefore begin with the moſt antient eſtabliſhment, for the final determination of pleas in this kingdom, by our ſtatutes of Parliament; and thence ſhall proceed to the alterations made for curing any inconveniencies that did appear in that eſtabliſhment.

II. The eſtabliſhment of this laſt reſort of pleas and proceſs is clearly ſettled, *Parl.* 1424, *c.* 45. by K. James I. who was one of the moſt excellent and beſt experienced Kings we ever had. He had moſt of his breeding among the Engliſh, by whom he had been taken while he was on his voyage to France, and detained priſoner eighteen years; and he was likewiſe for ſome time in France, being brought thither by Henry V. king of England, of deſign to influence the Scots in his favour, they having about that time fought in France with ſingular valour and ſucceſs againſt the Engliſh. So that he had opportunity to learn and underſtand the order of the adminiſtration of juſtice in both theſe kingdoms. He did fix moſt of our forms, by erecting of the chancery, and the brieves thereof, which were the fixed tenors of all ſummonſes before the ordinary courts, as they yet are in England, and without them no ſuit can be commenced in the court of common pleas, which is the moſt proper judicature of the common law of England, which brieves they enlarge by declarations, extending the ſame to the ſeveral ſpecial matters; and it behoved alſo to be ſo with us, till the erection of the College of Juſtice, wherein the clerks or writers to the ſignet, were intruſted with the forms of ſummonſes and diligences: yet there have ſtill remained with us ſome brieves of the chancery, of the greateſt importance and utility, ſuch

ſuch as the brieves of mortanceſtry, for entering all heirs of defuncts, the brieve of idiotry, for cognoſcing the furioſity or fatuity of perſons, and the brieve of diviſion, for dividing of lands, *&c.*

III. The narrative of that ſtatute, *anno* 1424, is in theſe terms; "As anent "bills of complaint, whilks may not be determined by the Parliament, for di-"vers cauſes belonging the common profit of the realm." The ſtatutory part is in theſe terms: "It is ordained, that the bills of complaint be execute and deter-"mined, by the judges and officers of the courts, whom to they pertain of law, "either juſtice, chamberlain, ſheriffs, bailies of burrows, baronies, or other "ſpiritual judges, if it effeirs to them." The recourſe from theſe ordinary judges, is determined in theſe words: "If the judge refuſe to do the law even-"ly, the party complainand ſhall have recourſe to the King, who ſhall ſee rigor-"ouſly puniſhed ſik judges, that it ſhall be example to all others." The ſtatute alſo clears what is meant by doing the law evenly, *viz.* "That but fraud or guile "they do full law and juſtice."

IV. By this ſtatute it is clear, that whatever the courſe of the final determination of proceſs were before in Parliament; yet both king and Parliament did then determine, that it was for the common profit of the realm, that bills of complaint may not be determined by the Parliament, but that they be determined and executed by the judges ordinary of the courts which then were: As firſt, The juſtice-general, who had an univerſal juriſdiction, both civil and criminal through the whole kingdom, and held juſtice-airs through the country twice in the year, *Parl.* 1440, *cap.* 5. once on the graſs, and once on the corn, *Parl.* 1483, *cap.* 94. the chamberlain's juriſdiction is alſo univerſal, in relation to the towns, "That their common goods be obſerved, and kept to the common profit "of the town, to be ſpent in common, and neceſſary things of the burgh, by "the advice of the council in the town, and deacons of crafts, where they are, "and inquiſition yearly to be taken in the chamberlain-air, of expences and diſ-"poſitions of the ſame, and that all tacks ſet thereof for longer than three years, "thereafter be null," *Parl.* 1491, *cap.* 36. The juriſdiction of the juſtice-general was reſtricted to criminal cauſes by ſeveral ſtatutes thereafter; and the chamberlain and juſtice-airs came to be in deſuetude, as now the whole office of the chamberlain is neglected.

V. By this ſtatute of K. Ja. I. There is recourſe to the King, but not for altering the ſentences of the judges-ordinary, but for puniſhing of them, if they had not adminiſtrate juſtice "without fraud or guile;" which can go no further than manifeſt and palpable injuſtice againſt law, which doth always infer fraud by wilful injuſtice, but reacheth not to dubious caſes, where juſt and rational men may be of different judgments, unleſs there be corruption by bribe, or biaſs: otherwiſe no man but a beggar, or a fool, would be a judge.

VI. Albeit the ſaid eſtabliſhment mentions only recourſe to the King, for puniſhment of the malverſant judges-ordinary; yet the ſtatute of the ſame King the next year, *Parl.* 1425, *cap.* 65. erecteth the Seſſion, to which the laſt reſort was to be had. The title of this act is, "Of the Seſſion to be holden, of their power "and expences." The act is in theſe terms: "Our Sovereign Lord the King, "with conſent of his Parliament, has ordained that his Chancellour, and with "him certain diſcreet perſons of the three Eſtates, to be choſen and depute by "our Sovereign Lord the King, ſhall ſit frae then furth, three times in the year, "where the King likes to command them, which ſhall knaw and examine, "conclude and finally determine, all and ſundry complaints, cauſes and quarrels "that may be determined by the King and his Council."

VII. By this ſtatute it appears, that, before the eſtabliſhment in the former year, all cauſes might be determined by the King and his Council; ſo that the lieges had their option, to purſue either before the judges, or before the King and his Council. But that wiſe King found this an unſupportable burden for the King, and inſufficient for the ſubjects, the King's Council following his court,

and ſo neither being certain when to be found, nor able to determine all cauſes that might come before them, even in the firſt inſtance, did therefore ordain all cauſes, to be firſt determined by the judge-ordinary, conform to the foreſaid eſtabliſhment. But nothing being thereby provided for a remeid, againſt the malverſation of the judges-ordinary; therefore, by this ſtatute, the Seſſion is erected, with power finally to determine all complaints, cauſes, and quarrels that might be determined before the King and his Council, to wit, at that time after the eſtabliſhment; whereby there was only recourſe to the King himſelf, without mention of his Council, and only upon complaint againſt the judges-ordinary; and therefore theſe complaints are committed to the Seſſion only, to be finally determined by them, without mention of any recourſe from them to any other judicature, whereby they were judges in the ſecond inſtance.

VIII. This Court was called the Seſſion, becauſe it was to ſit at ſuch places, as the King appointed, but was not to follow his Court, as his Council did before, nor to go through the kingdom as the juſtice-general, and chamberlain did; by that title it was alſo diſtinguiſhed from the eccleſiaſtick courts, which were called conſiſtories, where the judges did ſtand in adminiſtring juſtice.

IX. But the power of the Lords of Seſſion, is cleared and enlarged by K. Ja. 2. *Parl.* 1457, *cap.* 61. whereby it is again put in the option of parties, to purſue before the Lords, or the judges-ordinary, in theſe terms: "And the parties "complainand to have full freedom to follow their actions before the ſaid Lords, "or their ordinary judge:" but if the queſtion concern fee or heritage, and not the matter of poſſeſſion only, "The Lords ſhall gar the ſheriff reſtore the party "to the lawful poſſeſſion, and recognoſce the lands in the King's hands:" but if there be no queſtion of right, but only of poſſeſſion; "The judge-ordinary "ſhould only judge thereon for a year after that act *." And by the next act of the ſame Parliament, the manner of bringing cauſes before the Lords, is determined thus: "The ſheriffs of the ſhires where the ſaids Lords ſhall ſit, ſhall "be warned to proclame in ilk ane of the places, three months before the Seſſi- "on; and if any perſon has any action to follow, he ſhall wairn them to paſs "to the King's chapel, and raiſe ſummons, upon fifteen days at leaſt, after the "citation; and if any action pertaining to the ſaids Lords knowledge, be conti- "nued in the time of the Seſſion, in the ſhire where the Seſſion ſits, *by ony per- "ſons*, theſe perſons to be arreſted forthwith by a macer, and juſtice to be done "thereupon as effeirs; and all other cauſes pertaining to the knowledge of the "ſaids Lords, ſhall be utterly decided and determined by them, but any remeid "of appellation to the King or Parliament."

X. But by the next act, *viz.* the 63d of the ſame *Parl. anno* 1457, it is declared, "That the time of the Lords ſitting was but forty days, and peradven- "ture in ſeven years not to come again to them;" whereby it is evident, that neither the time nor place of their ſitting, when and where it was to begin and end, nor the continuance of their perſons in authority were ſettled, but both were ambulatory, at the King's pleaſure.

XI. But in the reign of K. Ja. III. the *Parl.* 1469, *cap.* 26. altered the former eſtabliſhment, and parties were ordained "to come firſt to the judges-ordinary "of temporal lands," which there are named to be "the juſtices, ſheriffs, ſtew- "ards, bailies, and barons, provoſt and bailies of burrows; and if they failzie "him, he ſhall come to the King, and his Council; or, if the judge do wrong "in adminiſtration of juſtice, the party ſhall alſo come to the King and his Coun- "cil, and get letters to ſummon the judge-ordinary; who, if his office be here- "table, ſhall be put therefrae, for three years, if he be found in the wrong "and for ever, if it be not heritable."

XII. In this ſtatute there is no mention of remeiding the party leſed; but, on the contrary, if he get juſtice duly executed, and miniſtrate to him, "he muſt "be

* This clauſe is not found in the act of Parliament.

« be content :" ſo that the final determination of the judges-ordinary, is thereby insinuated.

XIII. And by the ſame K. Ja. III. *Parl.* 1471, *cap.* 41. it is ſtatute, " That « in time thereafter, where any brieves pleadable happens to be followed, before « whatſoever judge and doom given be falſed and gainſayed, by any of the par- « ties, and thereafter diſcuſſed in the Parliament ; if it happens the doom to be « determined for the party follower, baith parties ſhall paſs again to the next « juſtice-air, where the party defendant may take ane or mae other exceptions, « dilator or peremptor, as they follow in order ; but it ſall not be leiſume to « them, to take any exception that they permitted or let paſs by, at that time." This ſtatute alters the firſt eſtabliſhment in bringing exceptions before the Parliament, but does not appoint the cauſe to be determined by the Parliament, but to be remitted to the juſtice-general.

XIV. By the ſame King in his *Parl.* 1475, *cap.* 62. " Anent the adminiſtrati- « on of juſtice in civil actions and complaints, through all the realm, it is ſtatute « and ordained, That all parties complaining, ſhall firſt paſs to their judge-ordinar, « and purſue juſtice, and that the ordinar ſhall miniſter them juſtice without « partial means or ſleuth. And if the judge fails in his office and adminiſtration « of juſtice, the party ſhall come and pleanzie to the King and his Council upon « the judge, and likewiſe on party ; and in that caſe they ſhall have ſummons « baith on the judge and on the party, to compear before the King and his « Council, and there have juſtice and reformation."

XV. By this ſtatute it is clear, that the eſtabliſhment by the Seſſion was altered, and returned to the King's Council : but there is no mention or proviſion of any remeid againſt ſentences of the King and his Council.

XVI. But the ſame King, in his *Parl.* 1487, *cap.* 105. ſtatutes, " That all civil « actions, queſtions and pleas, moved between whatſomever parties, be determi- « ned and decided before their judge-ordinar, ſua that na action ſhall be dedu- « ced, called nor determined before our Sovereign Lord's Council, except alle- « narly actions pertaining in ſpecial to our Sovereign Lord, actions and complaints « made be kirk-men, widows, orphans and pupils, actions of ſtrangers of other « realms, and complaints made upon officers for fault of execution of their office, « or where the officers are parties themſelves."

XVII. All that hath been formerly ſaid of the King's Council, is not underſtood of the Privy Council ; the firſt mention whereof in the acts of Parliament, is in *Parl.* 1489, *cap.* 12.

XVIII. By King *James* IV. in his *Parl.* 1503, *cap.* 58. the King's daily Council, ſo called in diſtinction to the Privy Council, " is ordained to ſit continually in « Edinburgh, or where the King makes reſidence, or where it pleaſes him, to « decide all manner of ſummons in civil matters, complaints, or cauſes daily, as « they ſhall happen to occur, and ſhall have the ſame power as the Lords of Seſ- « ſion had." And ſo their decreets became final, without appellation to King or Parliament.

XIX. The recourſe that was before from the judges-ordinary to the King and his Council, or to the Seſſion, was by way of complaint, wherein, if juſt ground was found for remedy, the party and judge-ordinary were called to anſwer. But becauſe in France and other nations, appeals were in uſe ; therefore King *James* I. introduced appeals, *Parl.* 1429, *cap.* 116. The terms uſed to ſignify appeals is, falſing of dooms, in a very rude and peremptory way ; whereby a party, when the doom was given and pronounced, if he would appeal, might not remove out of the place he ſtood in, nor adviſe with any man, and behoved to aſſign a reaſon of his appeal, and proteſt for more reaſons ; but he had not any time of deliberation, whether he would appeal or not. This was remeided by King *James* IV. and the matter and order of appeals is clearly determined in his 6th *Parl. anno* 1503, *cap.* 95. " If the appeal be from the ſheriffs, ſtewards or baillies, or their « deputes, the party appealing was to come within fifteen days to the Juſtice-

« clerk,

" clerk, and preſent his proceſs of the falſing of doom, and, with advice of our " Sovereign Lord or his Juſtice, there ſhall incontinent thereafter be ſet a juſtice- " air, for the diſcuſſing and ending of the ſaid doom falſed : and if the ſaid doom " be falſed in the juſtice-air, or if there be any other brieves pleadable preſented to " the Juſtice, and in the purſuit of them happens the doom to be falſed, within fif- " teen days thereafter, the party that falſes the doom ſhall come to the clerk of re- " giſter, who ſhall ſhaw the ſame to the King, who ſhall depute thirty or forty " perſons, more or fewer as pleaſes him, whilk ſhall have power as it were in " a Parliament, to decide and diſcuſs the ſaid doom. And if the appeal be from " the bailies within burgh, the party ſhall likewiſe come to the chamberlain, who " ſhall ſet a court of the *four* burrows upon fifteen days, and make the ſaid doom " to be diſcuſſed. And where there is an appeal from a freeholder to any imme- " diate ſuperior of that court appealed from, he ſhall ſet his court upon fifteen " days, and make the ſaid doom to be diſcuſſed. And if it be falſed in the ſaid " court of four burrows, or in the ſheriff-court, to have ſiklike proceſs to the " court immediately ſuperior."

XX. Here is no mention of any appeal from the King and his Council to the Parliament, but only from ſheriffs and bailies of royalty and regality to the juſtice. And if there be an appeal from the juſtice, in the ſecond inſtance of that which was appealed to him, or in the firſt inſtance of proceſſes begun before him, the diſcuſſing of that appeal from the juſtice, is to be by perſons nominate by the King, who are declared to have power to determine as it were " in a Par- " liament ;" which muſt alſo be done in the appeals from the court of the four burrows, or from the chamberlain in the ſecond inſtance upon the decreets of burrows. Neither is any appeal to be diſcuſſed by the daily Council, who are only to determine ſummons in cauſes civil begun before them, wherein they have the ſame power as the Lords of Seſſion had ; from whom there was no appeal to King or Parliament.

XXI. This is the full and juſt account of the manner of diſcuſſing all civil proceſſes, from the 2d Parl. of King *James* I. *anno* 1424, till the 5th Parl. of King *James* V. *anno* 1537, *cap.* 36. at which time King *James* V. having inſtitute the College of Juſtice before, the ſame was then ratified and eſtabliſhed in Parliament. The tenor of the inſtitution is thus, " Concerning the order of juſtice, " becauſe our Sovereign Lord is moſt deſirous to have a permanent order of ju- " ſtice, for the univerſal well of all his lieges ; and therefore intends to inſtitute " a College of fourteen perſons, with a Preſident, to ſit and decide upon all " actions civil ; and the Lords are to ſit conſtantly at Edinburgh, and to be ſworn " to miniſter juſtice equally to all perſons, in ſuch cauſes as ſhall happen to come " before them ; with ſuch other rules and ſtatutes as ſhall pleaſe the King's Grace " to make, and give to them for ordering of the ſame : providing always, that " the Lord Chancellor, when preſent, ſhall have vote, and be Principal of the ſaid " Council : and ſiklike, other Lords as ſhall pleaſe the King's Grace to join to " them of his Great Council, to have vote, ſiklike to the number of three or " four. This conſtitution the Eſtates of Parliament approves, and has choſen the " perſons *named after that act*, whoſe proceſſes, ſentences and decreets, ſhall have " the ſamin ſtrength, force and effect, as the decreets of the Lords of Seſſion had " in all times bygone." The ſame King, in his 7th Parliament, *anno* 1540, *cap.* 93. " After his perfect age of twenty five years, with the advice of the Eſtates, " ratifies and approves, for him and his ſucceſſors, the inſtitution of the ſaid Col- " lege of Juſtice, to remain perpetually for the adminiſtration of juſtice to all the " lieges of this realm, and to be honoured ſiklike as any other College of Juſtice " in other realms. And attour, gives and grants to the Preſident, Vice-preſi- " dent and Senators, power to make ſuch acts, ſtatutes and ordinances, as they " ſhall think expedient, for ordering of proceſſes and haſty expedition of ju- " ſtice."

XXII. By

XXII. By this inſtitution of King *James* V. this judicatory hath been ever ſince called the Seſſion, or College of Juſtice; and the members thereof have frequently been called the Senators of the College of Juſtice, or Lords of Council and Seſſion; becauſe they have all the authority and powers of the Seſſion inſtitute by King *Jam.* I. or of the daily Council erected and regulated by King *Jam.* III. and IV.

XXIII. It is a great miſtake in ſome, who pretend, that the Seſſion at firſt was a committee of Parliament, becauſe it bears "the Chancellor, and with him cer-"tain perſons of the three Eſtates;" but they advert not to the words that follow, *viz.* "to be choſen and depute by our Sovereign Lord the King." And thoſe alſo are miſtaken, who think, becauſe the King, with advice and conſent of the three Eſtates, did chuſe the firſt nomination of the Seſſion, that therefore any total nomination muſt be by *the* King alſo with conſent of the Eſtates; for that nomination was a part of *the* firſt inſtitution, which, being a law, required the conſent of the Eſtates; and yet often the King acts with conſent of the Eſtates, ſome things which he might act by his own particular authority, and which require no ſtatute, but for the greater ſolemnity, and ſatisfaction of the kingdom.

XXIV. Some alſo may imagine, that that part of the inſtitution of the College of Juſtice in the ſaid Parliament 1537, *cap.* 68. intitled, "The King's good "mind anent the Lords of Seſſion," is not an act of Parliament, becauſe it does not repeat the words of the conſent of the Eſtates of Parliament; which imports nothing: for whatſoever is recorded amongſt the acts of Parliament, was certainly with conſent of the King and three Eſtates, tho' ſome bear only the King, and ſome only the Eſtates, and ſome only the Lords of Articles.

XXV. By this act the King promiſes, "That he ſhall not, by any private wri-"ting, charge, command, or deſire the Lords to do any thing otherwiſe in any "matter that ſhall come before them, but as juſtice requires; or to do any thing "that may break ſtatutes made by them: and that he ſhall authoriſe, maintain "and defend their perſons, lands and goods, from all harm, wrong and hurt, "and injury to be done to them be any manner of perſon: and who does in "the contrary, ſhall be puniſhed with all rigour. And becauſe they preſent his "perſon, and bears his authority in doing of juſtice, that he ſhall have them in "ſpecial honour and maintenance, and ſhall give no credit to any man that "will murmure them, or any of them, by doing wrong or inhoneſty; but they "ſhall be called before him, and gif they be found culpable, to be puniſhed there-"for, after the quality of the fault and demerit; and if they be found clean and "innocent, the perſon complaining ſhall be puniſhed with all rigour, and ne-"ver have credit with him again. Likeas, he exeems them frae all paying of "taxes, contributions, and other extraordinar charges, to be uplifted in any time "thereafter. And grants to them, that gif any perſon diſhonours and lightlies "them, or any of them, any manner of way, that they command and charge, "and put the perſon or perſons in ward in any of his caſtles they pleaſe, till "they have made ſatisfaction of the fault, at the Lords conſideration, if the fault "be ſmall and injurious; and gif it be great, till the King be advertiſed, that "he may cauſe the ſame be amended, and puniſhment made thereof as effeirs." This act bears to be ſubſcribed by the King, at the caſtle of Stirling, the 10th *June*, and of his reign the ninteenth year, which was in order to put the ſame in the books of Council, with the ſtatutes made by the Lords of Seſſion; which does not import, that it was not ſigned as other acts of Parliament when it was paſſed.

XXVI. The privileges of the College of Juſtice have been confirmed by all the ſubſequent Kings and Queens, and, without doubt, will be confirmed by their preſent Majeſties in this current Parliament.

XXVII. The Lords of Seſſion are declared to be judges competent to the reduction of infeftments, albeit confirmed in Parliament, *Parl.* 1567, *cap.* 18. They

are alſo declared judges in interpretation of acts of oblivion, *Parl.* 1587, *cap.* 44. And it is declared, that nine ordinary Lords are ſufficient at the pronouncing of *ſuch* decreets and interlocutors, as in all other cauſes, *ibid.* which alters the *quorum* in their inſtitution, that requiring ten.

XXVIII. It is implied in, and neceſſarily conſequent from the office of the Lords, to interprete all acts of Parliament, without which they were not capable to determine all civil cauſes: they muſt alſo interprete the decreets of all courts produced before them, as the titles or intereſts of parties, or means of probation, in ſo far as they are adduced in the ſaids cauſes, without exception of decreets of Parliament: which interpretations have no other effect but in relation to the ſaids cauſes, without prejudice to other judicatories, to interprete the ſame as they are convinced.

XXIX. By the 59th act, *Parl.* 1661, the Lords of Seſſion are declared to be the only proper judges, in diſcuſſing the validity or invalidity of infeftments of his Majeſty's property, or any other infeftments, which may not be diſcuſſed nor decided in exchequer, neither by way of exception, action or reply; reſerving always to the exchequer to judge in all other buſineſs concerning his Majeſty's rents and caſualities, as they might have done before the year 1633. This act, tho' it bear to be an explanation of the 18th act, *Parl.* 1633, anent the exchequer; yet in effect it is an abrogation thereof, ſtating the power of the exchequer as it was before the ſaid act 1633.

XXX. The Lords of Seſſion are declared the King's great conſiſtory, Parl. 1609, cap. 6. which is only in relation to advocations from the Commiſſars, or reduction of their decreets; but they are not judges in the firſt inſtance, in confirmation of teſtaments, or in the matter of divorce. They are alſo declared judges in the preſentation of miniſters, *as to* the pactions of miniſters with their patrons, whether they be ſymoniacal or not, Parl. 1612, cap. 1.

XXXI. After the inſtitution of the College of Juſtice, all appeals, *or* falſing of dooms, did intirely fall in deſuetude and ceaſed; and in place thereof, came advocations of proceſſes from other courts, ſuſpenſions of their own decreets, or of theſe of other courts, and reduction of their own decreets, or of the decreets of inferior courts, and of all other rights; whoſe forms became fixed and known. And there is (*with us*) no other term or tenor of action, by way of nullity, complaint or review, which have been introduced in other countries, by the importunity and obſtinacy of parties, when they had loſt the benefit of appeals; which were the ordinary remedies for ſuperior courts to rectify and redreſs the ſentences, interlocutory or definite, of inferior courts.

XXXII. When appeals were in force, they had no effect after parties did acquieſce in the ſentences of judges, interlocutory or definitive, which was neceſſary for that great intereſt, the final ſopiting of pleas, and aſcertaining of rights: and therefore, by the Roman law, appeals were not competent, not being brought in within ten days after the ſentence appealed from; for then parties were preſumed to acquieſce in the ſentence *præſumptione juris et de jure*, unleſs a clear ground for reponing them were inſtructed, as death, captivity, ſickneſs, or the like. And if they did not bring in their appeal to the judge appealed to, within thirty days after their appeal, they were in the ſame way underſtood to have paſſed from the appeal, and to have acquieſced in the ſentence: yet they had recourſe to a ſuperior judge, upon nullity of the ſentence of the inferior judge, but not upon injuſtice: yea, appeals were not only from interlocutory, or definite ſentences, but from acts of execution thereof. But our appeals had no time in proponing them, but behoved to be inſtantly, and had only fifteen days to bring them to the court appealed to.

XXXIII. Tho' appeals were very univerſal, and are yet retained in our church-aſſembly, (the order thereof in caſe a laick purſued an eccleſiaſtick is preſcribed *Parl.* 1426, *cap.* 87.) becauſe they have no conſtant and continued ſuperior judicatories, from whom they might procure advocation, nor is their time of ſitting aſcertained,

aſcertained, to be ſo long as were neceſſary (*even*) for appeals; yet, without vanity, it may be ſaid, that the order inſtituted by King *James* V. hath introduced a far more excellent way, in the remedies of law for obtaining juſtice, than by any kind of appeal. For appeals did frequently ſtop the courſe of juſtice, and had their riſe from the prejudices and paſſions of parties, and their litigiouſneſs, and had great inconveniencies; for parties are ordinarily biaſſed by their own intereſt, and when they have advice of their lawyers, and have heard them plead probable and favourable alledgeances, they are apt to truſt their opinion, or their reaſons, more than the deliberate ſentences of indifferent judges, whom conſcience and honour oblige to be ſignally juſt, juſtice being their peculiar character: and yet parties, upon the moſt mean and remote conjecture, will apprehend them to be carried another way, tho' they have remedies againſt any juſt ſuſpicion from conſanguinity, affinity to parties, or any intereſt in the cauſe, which might biaſs them. And parties, when they loſe interlocutors, are frequently in fervor and paſſion, and therefore interpoſe appeals, which after ſome time, when they were cooled, they would not have propoſed; but being engaged, and ſuppoſing they had offended the judges appealed from, they were not willing to inſiſt further before them. And, on the other part, tho' judges appealed from, were not obliged to ſiſt proceſs, unleſs the caſe were at leaſt dubious, (importing no injuſtice in their ſentence, but requiring the higheſt ſkill in a more ſolemn judicatory, where ordinarily there were more experienced judges and pleaders) yet becauſe they were cenſurable, if they refuſed to ſiſt proceſs in a dubious caſe, they were apt to eaſe themſelves of litigious perſons, by ſending them to the ſuperior court, and ſo from court to court, till they came to the laſt reſort.

XXXIV. How much more rational and convenient is it, that the reaſons againſt the ſentences of any court, ſhould be preſented unto the ſuperior court, who were not offended nor ſuſpected? For they, by conſidering the relevancy of theſe reaſons, and by production of the proceſs, ſeeing that the caſe truly is, as it was repreſented in the reaſons, do advocate or call the proceſs from that court, that the reaſons of advocation may be heard and determined before them. And yet this remedy hath no place after a definitive ſentence; for then the only remedy is by ſuſpenſion, where the reaſons and verifications are conſidered before the ſuſpenſion paſs and ſtop execution. But yet, tho' ſuſpenſion be refuſed, and that execution goes on, reduction is competent upon nullity of any decreet or ſentence; and, upon material juſtice, which doth not always import iniquity of the other court, becauſe the caſe might be ſo dubious, that neither ſide can be eſteemed a wilful and fraudulent iniquity, and yet may be over-ruled by more full conſideration upon the debate of the more eminent judges and lawyers.

XXXV. Our cuſtom doth allow no court to advocate cauſes but the Seſſion, who therefore advocate in many caſes, where they can not determine the cauſe, but only the reaſons of advocation; and ſo they advocate from all the criminal courts, and have oft advocate from the juſtice-general, when that court was in one perſon, as if the matter in queſtion were not competent to his juriſdiction, as not being criminal but civil, or as being in the prohibited degrees of affinity or conſanguinity to either party, or as intereſted in the cauſe, or as having ſhown enmity againſt the party, or as having ſhown partiality. So the Lords did advocate a cauſe of theft from a ſheriff, and remitted the ſame to the juſtice-general. And if they advocate from any criminal judge, they do either remit to the juſtice-general, or name another as ſheriff or bailie to determine that cauſe advocated, *Feb.* 21. 1666,——*contra Sheriff of Inverneſs*; yea, they did ſuſpend *and review* a decreet of aſſythment of the juſtice-general, as being meerly civil for damage, and having nothing in it of puniſhment, *Decem.* 16. 1664, *Innes.*

XXXVI. The Lords do advocate from any of the commiſſaries. And albeit the commiſſaries of *Edinburgh* have a ſuperiority over the other commiſſaries, and may reduce their decreets, and all of them have peculiar powers, which the Lords cannot

cannot judge in the firſt inſtance; yet they can judge in the 2d inſtance by advocation, ſuſpenſion, or reduction, even in their peculiar caſes, but ſo as to remit to themſelves, either ſimply or qualifiedly, directing the point in queſtion. They do alſo reduce the decreets of inferior commiſſaries immediately, or the decreets of reduction of the commiſſaries of Edinburgh, reductive of the decreets of inferior commiſſaries.

XXXVII. The Lords do alſo reduce the decreets of the high-court of admiralty, and ſuſpend the ſame. And albeit they cannot in the firſt inſtance judge a maritime cauſe; yet they can, in the ſecond inſtance, judge of the ſentence of any admiralty: and when the judge of admiralty did that which is only competent *ex nobili officio*, they did cognoſce the ſame: and therefore the judge of admiralty having in the proceſs of adjudication of ſhips, appointed an act, before anſwer, for mutual probation; the Lords required him to proceed upon the evidences adduced, and to adjudge or aſſoilzie; and, becauſe he did not, they advocate the cauſe from him, *June* 12. 1673; and *July* 9. 1673, Captain *Gilles*. The like, *Decemb.* 17. 1673, Captain *Stuart*. But by the 16th act, *Parl.* 1681, advocations from the court of admiralty are diſcharged, and ſuſpenſions are to paſs only *in præſentia* in time of Seſſion, or by three Lords in the vacance; and any bill of ſuſpenſion or ſtop, is to be diſcuſſed upon the bill ſummarily, without abiding the courſe of the roll. It is alſo thereby declared, that the high-court of admiralty may review their own decreets and ſentences, which no other ordinary court of law can do, nor could the judge of admiralty have done it before; neither is there before any mention of review in our law, but in the ſtatute approving the judicial proceedings during the uſurpation; wherein it is provided, that the Lords may review the decreets of the commiſſioners for adminiſtration of juſtice, ſummarily, upon complaint, without ſuſpenſion or reduction, within the ſpace of a year of that act, or within a year of the majority of minors.

XXXVIII. The Lords do judge the point of right, as to gifts given by his Majeſty under his own hand, or by the exchequer, and likewiſe the gifts given by the Lords of Privy Council, as of vacant ſtipends, which lately have been frequent.

XXXIX. Yea, the Lords may, and ſometimes muſt ſuſpend decreets of Parliament, as when they are fulfilled, or when full obedience is offered and refuſed; and that either when there is no Parliament, or in the intervals between Seſſions of a current Parliament; but they cannot ſuſpend *ſimpliciter*, but only until the Parliament may determine. And, *in anno* 1661, they did paſs a bill of ſuſpenſion of a decreet of Parliament, upon this reaſon, that the decreet contained in the decerniture, a perſon who was not in the libel, proceſs, nor citation, and yet was not decerned upon notoriety, without requiring citation; which being repreſented to the Earl of Middleton then commiſſioner, as being an encroachment upon the Parliament, he was deſired by the Lords to come and hear the diſpute, which he did, and was well ſatisfied, ſeeing it was only a ſuſpenſion till the Parliament ſhould determine.

XL. By this courſe parties are not excluded from remeids of law, upon their acquieſcence, and not quarrelling for ten days; or, upon their not inſiſting within 30 days, as was in the moſt favourable appeals; but they have far greater latitude to redreſs themſelves. Yet acquieſcence in the decreets given in the outer-houſe *in foro contradictorio*, if the decreet be orderly extracted, makes them as effectual as if they did proceed upon diſpute *in præſentia*; becauſe, upon conſignation of a dollar as an amand, to be forfeited to the poor, if the party be found to be litigious *, or upon a bill to the Lords, any point may be repreſented and determined by them all: for, if any ſuch diſtinction were made of decreets *in foro*, it were impoſſible for one court to determine all the pleas of a nation; and there-

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* Parties, upon conſigning a dollar, might inſiſt that the Lord Ordinary ſhould take the cauſe to report. See below, § 63. *h. t.*

fore this acquieſcence is much more favourable, juſt, and convenient, than theſe acquieſcences, which exclude remeid, where appeals are in uſe.

XLI. If this courſe be compared with the former order, which we had by appeals, it will be evident how much more convenient it is: for moſt vaſſals in the kingdom, though they had courts, yet being vaſſals of a barony, they behoved to appeal firſt to the baron-court; and if they thought themſelves leſed there, there behoved to be a ſecond appeal, to appeal to the ſheriff; and if not redreſsed there, there behoved to be a third appeal, to appeal to the juſtice-general; and if yet unſatisfied, a fourth appeal, to appeal to delegates appointed by the King. Whereby every party might have different judges, as the King pleaſed. What expence of time and money behoved this procedure to require? Whereas now there is immediate application to the Seſſion, by all, either in the firſt, or ſecond inſtance.

XLII. There is indeed an act, *Parl.* 1. *Seſſ.* 3. *Ch.* II. *c.* 9. againſt advocations for ſums not exceeding 200 merks, which were very fit to be obſerved; but parties do rarely inſiſt on that ground, knowing that it may come before the Lords at laſt; ſo the Lords do only proceed *ſecundum allegata et probata:* but if it were proponed, the Lords might not repel it, and the clerk of the bills ought to be ordered to preſent no bill for ordinary ſummons, where the ſum claimed exceeds not 200 merks, unleſs it be in favour of the members of the College of Juſtice, whoſe privilege is not taken away by this act; for their attendance upon the Seſſion, exeems them from other courts *.

XLIII. The Lords have no juriſdiction in the firſt inſtance, in thoſe cauſes which proceed by brieves out of the chancery, which can only be directed to, and ſerved by the inferior judges, ſuch as brieves for ſerving of heirs, brieves for ſerving relicts to terces; brieves for ſerving tutors of law; brieves of idiotry for cognoſcing furioſity or fatuity; brieves of diviſion of lands bruiked *pro indiviſo* by ſeveral heritors, except in the caſe of bankrupts eſtates, by the late act of Parliament; whereby, in caſe buyers be not found at a competent rate, the Lords are impowered to divide the bankrupt's eſtate, or what remains unſold, to be adjudged to the creditors.

XLIV. The Lords do eaſily ſuſpend their own decreets in abſence, albeit they have proceeded upon probation by writ or witneſſes, or by preſumptions, and other evidences in law. And albeit compearance be made, and the moſt litigious debate betwixt a major and a minor; yet they do reduce their own decreets *in foro*; not only when matters of fact then competent were omitted, but there hath been no deciſion yet to exclude further reaſons and arguments of law: yea, the Lords ſuſpend ſometimes, and more frequently reduce their own decreets upon compearance, by proponing new matter of fact, either emergent ſince the decreet, or truly come to the proponer's knowledge thereafter, although it was competent to have been proponed in the decreet, if evidence be given, that it was not *doloſè* omitted, to protract the plea. Yea, the Lords do oft-times repone parties againſt ſeveral certifications, they paying the expences of the parties delayed thereby, and giving evidence of a rational excuſe, and that there was no fraud in the caſe.

XLV. If any complaint be made of the unwarrantable extracting of decreets *in foro*, or that they were diſconform to the interlocutors; the Lords do ordinarily call in the decreet, if the alledgeance be relevant and inſtructed, *and* if it be queſtioned *de recenti*, even without ſuſpenſion or reduction. And the Lords do frequently, upon new application, reſume in conſideration, their former interlocutors, even upon the point of material juſtice; whether in relation to the relevancy, or the probation, before the final ſentence be pronounced and extracted. The Lords

* By article 16. of the regulations for the Court of Seſſion, P. 1672, *cap.* 16. it is appointed, that the clerks to the ſigner ſhall be anſwerable, that no ſummons be raiſed before the Seſſion for leſs ſums than 200 merks, except in certain caſes there mentioned, which are to be ſpecially referred to, in the Lord Ordinary's deliverance, where the ſummons proceeds on a bill.

do alſo reduce their decreets *in foro*, upon reprobatures proteſted for, againſt the hability of the witneſſes, and the truth of their preliminaries, when at the time of their examinations, reprobatures are proteſted for; otherwiſe parties are preſumed to acquieſce in the witneſſes, and cannot reduce upon their inhability, or upon the falſhood of their preliminaries; but in no caſe can they reduce upon the falſhood of their concurrring teſtimonies.

XLVI. But the Lords have never reduced or altered their decreets upon alledgeances, either in fact, or law, which were proponed and repelled therein; and if they ſhould ſo do, there could be no end of pleas. For if they could alter the firſt time, by admitting that which they did repel, or by repelling that which they did ſuſtain; there is nothing could ſecure the leiges, but that they would return again to their firſt judgment, and back from that to the ſecond, without end; and thereby no man could, with ſecurity and confidence, call any thing his own; therefore cuſtom hath ſo ſecured that point, "proponed and repelled," that it is an unbrangeable foundation of all the ſecurities of the nation. All nations have been earneſt and anxious, that there might be a known termination of pleas, *reipublicæ intereſt ut ſit finis litium*; it would mar the quiet of any nation, if they could have no rights, but what might be brought in queſtion; but if there were a ſentence attainable, which, without diſpute, might be opponed to all that might be ſaid againſt it, without another anſwer; then might they ſay, *hic murus aheneus eſto.*

XLVII. The ſtrongeſt objection that can be adduced is, That wrong can have no warrant, and that it is againſt moral honeſty, to adhere to that which might be convinced to be materially unjuſt. But this bugbear will import nothing, when rightly conſidered: Can there be any doubt, but decreets with conſent of parties, are more ſolemn and ſtrong than private contracts, which yet are liable to the ſame objections? It might be more ſtrongly objected againſt preſcription, whereby rights are cut off by the courſe of time; that the finding out of no evidents can recal, although thereby the right cut off, may be as evident as the meridian light: and in long preſcriptions there is no retreat upon pretence of fraud, either at the entry, or endurance of the poſſeſſor, if the poſſeſſion be not interrupted. All which is maintained, *Ne dominia rerum ſint incerta, ne lites ſint æternæ.* And though ſome few may have prejudice by this neceſſary ſopiting of proceſs; yet, according to the Engliſh axiom, better a miſchief to a few, than an inconvenience to all.

Divine authority aſſerts, that an oath interpoſed is the end of all ſtrife, eſpecially when it is referred, or deferred by the parties pleading; and though the cleareſt proof by writ ſhould inſtruct the contrary, yet the ſtrife is ended, *Lis eſt ſopita, lis eſt finita, res judicata pro veritate habetur, præſumptione juris et de jure*, which admits no contrary probation. A fixed cuſtom of a nation, is a common conſent of all and every one, and cannot be altered without the ſame common conſent, or by a law, wherein alſo the common conſent of all the commonwealth is implied.

XLVIII. This termination of pleas is not founded upon the honour and authority of the Lords of Seſſion, but upon the moſt eminent and evident common intereſt of the nation: and therefore, as an oath terminates pleas, though perjury were proved, yet the perjury may be puniſhed; ſo may the Lords of Seſſion, if they do by fraud, or wilfulneſs, give an unjuſt decreet, yet the decreet will ſtand; and they will be the more tender of ſolemn decreets, that they cannot reduce them. It is not the Lords tenaciouſneſs for their honour and reputation of their juſtice, that makes them ſtand to this: for, if a decreet be found null through want of a neceſſary point, the Lords have *(thereafter)* frequently recalled the ſame interlocutors, which they neither would nor could recal, except in the caſe of nullity, and yet the point of honour is alike in both. And they do of courſe hear, and conſider again, all alledgeances and decreets in abſence, be-

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cauſe both parties have not been heard, although the caſe hath been clearly enough propoſed and unanimouſly determined.

XLIX. The reaſon why the Lords reduce decreets upon nullities, is, becauſe theſe points which infer nullity come not to be conſidered, nor determined by the Lords; but are to be noticed, and obſerved, by parties and lawyers.

L. There is another requiſite for termination of pleas, and ſecuring of rights, *viz.* That decreets of the Lords *in foro contradictorio*, cannot be looſed nor reduced upon alledgeances, which were competent before final ſentences, and were omitted, and not proponed. The reaſon of this is, becauſe litigious parties might draw pleas to a great length, by forbearing to propone all that they might propone in law, or fact, before ſentence, and might again ſuſpend upon new grounds, and ſo make as many proceſſes and decreets as they could have defences; whereby the litigious would overthrow the innocent, and the rich, the poor, by wearying them out, and making them unable to attain their right. This defence againſt quarrelling decreets *in foro*, was accuſtomed only to be extended, for defence of decreets in the firſt inſtance by ordinary actions, but not in decreets of ſuſpenſion: and therefore parties were accuſtomed to be abſent in the firſt decreet, and to ſpin out as many ſuſpenſions and decreets thereupon, as they could adduce, or pretend reaſons in law, or fact; and that, becauſe reaſons of ſuſpenſion behoved to be inſtantly verified, and ſo as they got new inſtructions, they might raiſe new ſuſpenſions. To obviate which inconveniencies, the Lords, by act of Sederunt, *in anno* 1649 *, declared that they would not ſuſtain reaſons of ſuſpenſion, which were competent and omitted, either in the firſt decreet, or in ſubſequent decreets of ſuſpenſion; which did not exclude reaſons of ſuſpenſion that required a courſe of probation, becauſe theſe were not competent in ſuſpenſions, to ſtop the execution of decreets, but by reduction, unleſs it had been in the firſt ſuſpenſion of a decreet in abſence: and if new inſtructions were found after the decreet, and that it did appear by ſufficient evidence, that they were not *doloſè* omitted, they were receivable againſt decreets, as well in the firſt inſtance, as in the ſecond. And as for alledgeances *in jure*, *ignorantia juris neminem excuſat*; and if parties do not employ ſkilful advocates, it is their own fault, and ought not to prejudge others, but competent and omitted is not ſuſtained againſt ſtrangers, *July* 23. 1667, *Hans Jurdan*. Neither is it ſuſtained againſt the decreets of inferior courts, *ubi non eſt copia peritorum*, unleſs it did appear to be *doloſè* omitted in caſes obvious to every capacity, *Jan.* 31. 1677, *Gardin*; *Feb.* 13. 1677, *Baggat*. But it was ſuſtained in a decreet *in foro*, proceeding upon an act before anſwer, as well as upon an ordinary litiſconteſtation, *June* 4. 1674, *Cockburn*.

LI. This defence of competent and omitted, is not only neceſſary for termination of pleas, and innocent, becauſe it takes no place where the omiſſion [a] is purged of fraud; but it hath alſo been eſtabliſhed by the 41ſt act, *Parl.* 1471, bearing, "That "if any doom be falſed, and diſcuſſed in Parliament, if it happens the doom to be "determined for the party-follower, baith parties ſhall paſs again to the next ju- "ſtice-air, where the party-defendant may take an or mae other exceptions dila- "tor or peremptor, as they follow in order; but it ſhall not be leiſom to them to "take any exception, that they pretermitted, or let paſs by at that time;" whereby not only competent and omitted is eſtabliſhed, when it is abſolutely omitted, but even when it is omitted to be proponed in its due order: and ſo dilators are not competent after peremptors. Alſo in the act of regulation competent and omitted is eſtabliſhed by act of Parliament, *Parl.* 1672, *cap.* 16. *article* 19.

LII. The authority of the moſt ſolemn ſentences of Seſſion being thus cleared, it comes next to be conſidered, how far proteſtations for remeid of law, from the Seſſion to the Parliament ought to be extended; that is, how far now there is law or cuſtom for extending ſuch proteſtations, and how far it would be to the common

* This act of Sederunt not found.

[a] F. it.

mon benefit of the nation, by a ſtatute to extend the effect of ſuch proteſtations. As to which, conſider, 1. That certainly there is no cuſtom for bringing cauſes unto the Parliament on ſuch proteſtations, tho' the narroweſt inquiry were made, both by the records of Parliament and Seſſion. 2. There is no ſtatute, nor act of Parliament, for bringing proceſſes from the Seſſion to the Parliament, in any of all the conſtitutions, or orders of government before related: for before the erection of the Seſſion, "it is ordained, that the bills of complaint be execute and "determined by the judges and officers of the courts whom till they pertain of "law, *viz.* juſtice, chamberlain, ſheriffs, bailies, and ſpiritual judges; and if the "judge refuſe to do the law evenly, the party complaining ſhall have recourſe to the "King, who ſhall ſee rigorouſly puniſhed ſik judges, *Parl.* 1424, *cap.* 45." And when the Seſſion was erected, their power is expreſſed in theſe terms, "That they "ſhall know, examine, conclude, and finally determine all and ſundry complaints, "cauſes and quarrels that may be determined before the King and his Council, "*Parl.* 1425, *cap.* 65."

LIII. There is neither expreſſion nor inſinuation in either of theſe conſtitutions, for bringing cauſes from the Seſſion to the Parliament, but on the contrary, "That it was for the common profit of the realm, that bills of complaint may not "be determined by the Parliament, but that they be determined and execute by "the judges-ordinar." Yea, it is expreſsly ſtatute, *Parl.* 1457, *cap.* 62. "That "all cauſes pertaining to the knowledge of the Lords, ſhall be utterly decided "and determined by them, but any remeid of appellation to the King or the "Parliament."

LIV. And when the daily Council was ſet up again, and appeals brought in and ordered, as hath been before ſhown, the laſt reſort was to delegates to be named by the King, to determine as if it had been determined in Parliament, without any mention of an appeal, or of a complaint to the Parliament, except once in relation to pleadable brieves, *Parl.* 1471, *cap.* 41. which yet doth not bear, that the Parliament ſhould determine the cauſe, but that when an exception was brought to be conſidered in Parliament, it was provided, "That it "ſhould return and be determined by the next juſtice-air," which is wholly hetroclite from the order then eſtabliſhed. So that it cannot, with any congruity, be otherwiſe interpreted, than when the juſtice-general being doubtful of an exception, referred it to the Parliament to be cleared, and whether any more exceptions ſhould be received: for in the ordinary courſe, the King's Council had the ſame power as the Seſſion had, and ſo might determine without appeal to the King or Parliament; which was in relation to cauſes brought before themſelves in the firſt inſtance; but there lay no appeal to them, as is clear by the act ordering appeals.

LV. There is as little ground of bringing proceſſes from the Seſſion to the Parliament, by the inſtitution of the College of Juſtice; for thereby the Senators of the College of Juſtice had the ſame power and authority that the Lords of Seſſion, and the daily Council had before; and ſo their final ſentences were ultimate, without appeal to King or Parliament, appeals then being in vigour and obſervance, but did abſolutely become in deſuetude and ceaſe, by the inſtitution of the College of Juſtice.

LVI. Yet proteſtations for remeid of law are not in all caſes againſt law, but are ſometimes juſt and neceſſary, as when the Lords of Seſſion determine without, and beyond their authority and juriſdiction committed to them. But this is not peculiar to the Lords of Seſſion; for it is competent againſt the ſentences and decreets of all ſovereign courts ordinary, when they exceed their proper juriſdiction; for no other court can redreſs what they ſo do, but only the Parliament. And tho' the eſtates in the claim of right, did particularly declare againſt appeals from the Seſſion, and did declare for proteſtations for remeid of law, (becauſe ſome had attempted to appeal from the Seſſion) for proteſting againſt the ſentences of the Lords, more than againſt the ſentences of any other ſupreme

preme judge-ordinary; yet this being *remedium extraordinarium*, which hath not occurred in any memory, but of late, it is no wonder that in our written law there be no mention of it. But of late, ſince the claim of right, many have made uſe of ſuch proteſtations, as if it had been deſigned, that every one, at their arbitriment, might thereby bring their actions from the Seſſion to the Parliament, which cannot be thought to have been the meaning of the Eſtates, ſeeing it were impoſſible for the Parliament, which ſitteth but ſeldom, and hath no determinate time, to diſcuſs all theſe proteſtations, which every litigious perſon might bring in: therefore, till the King and Eſtates of Parliament determine in what caſes ſuch proteſtations may warrantably be uſed, and in what caſes they ought to be puniſhed, as murmuring againſt the Lords, it is fit to conſider and propoſe in what caſes the lieges may enſnare themſelves, and become liable to puniſhment for murmuring againſt the Lords, contrary to the inſtitution of the College of Juſtice, and the authority and privileges thereof.

LVII. Firſt then, This proteſtation is not an ordinary, but an extraordinary remedy, which the Lords are not obliged to admit of in all caſes: and particularly, an extraordinary remedy is never to be allowed, where an ordinary is competent; and therefore is never to be allowed where the Lords, by their authority, can give remedy of law. In what caſes the Lords may give remedy againſt their own ſentences, hath been before expreſſed. Therefore ſuch proteſtations ought not to be uſed againſt interlocutory ſentences, except declinators of the Lords juriſdiction, where they have not authority, neither againſt decreets in abſence, neither againſt decreets of ſuſpenſion, upon alledgeances not inſtantly verified; becauſe there is a remedy for ſuch by way of reduction, without ſtopping execution in the mean time. And in very many caſes the Lords admit not exceptions, or alledgeances in the firſt inſtance, where they are not inſtantly verified, but reſerve the ſame to another inſtance; as in general declarators they refer many exceptions to ſpecial declarators: and other alledgeances they reſerve *contra executionem*, as is ordinary in adjudications, becauſe thoſe only come to have a ſhare who adjudge within the year after the firſt effectual adjudication. The Lords are alſo very apt to repone parties againſt circumduction of the term, when recently propoſed, upon reaſonable excuſes againſt contumacy, and upon competent evidence; or to repone parties holden as confeſſed to their oaths.

LVIII. And on the other part, there is no doubt that the lieges have right to proteſt for remeid of law, from the Seſſion to the Parliament, whenſoever the Seſſion determines beyond, and without the authority given them by the King and Eſtates in Parliament; for they have but a limited juriſdiction.

And therefore, firſt, No deciſion paſſed in Parliament betwixt party and party, by proceſs after cognition of the cauſe, ſhall be called in queſtion by any inferior judge, *Parl.* 1587, *cap.* 39. This does not hinder the ſuſpending of the decreets of Parliament, upon obedience, by the Lords, when the Parliament is not ſitting, which does nowiſe call in queſtion the ſentence of the Parliament.

Thence it is alſo clear, that the Parliament may decide cauſes upon cognition before themſelves, which will not warrant parties to raiſe proceſs before the Parliament, even in the firſt inſtance, as they do before the Seſſion, which muſt determine every cauſe that is brought before them, but warrant ſhould be obtained from the Parliament for proceſſes to be decided before them, that no more may be admitted than they ſee reaſonable, otherwiſe a great inconveniency would follow, that parties by intenting proceſs before the Parliament, might propone declinators of the Seſſion in the ſame cauſe; unleſs it were remitted to the Seſſion, as the *Parliament* did in the reduction of the forfeiture of *James Wood* apparent of *Boningtoun*, as appears by the fifth unprinted act, *Parl.* 1604; and thereby parties who found themſelves to be moſt in danger, and to have leaſt right, might intent a proceſs before the Parliament, declaratory of their right, that the Seſſion

might not be in capacity to cognoſce the ſame, if there were not an antecedent warrant of Parliament for that proceſs.

The Parliament of old did ordinarily name a committee of their number to determine cauſes before them, who were called *domini ad quærelas*, as the Lords of articles were called *domini ad articulos*: but ſince the inſtitution of the College of Juſtice, that hath not been ordinary, except in extraordinary caſes, as after revolutions: and ſo in the *Parl.* 1661, (being the firſt after King *Charles* II.'s reſtauration) there was a committee of the ſame kind, but termed the committee of bills, which judged in cauſes brought before them, in the firſt inſtance, not generally, but upon account of oppreſſion, or of neceſſity of a preſent remedy, the Seſſion then not having been re-ſtabliſhed after the uſurpation.

The commiſſion for valuation of teinds was inſtituted by ſeveral acts of Parliament, not as a committee of Parliament, to terminate with the Parliament, but as a ſtanding commiſſion, continuing as an ordinary judicature, until another commiſſion were named, with a parliamentary authority, in ſome points extraordinary, which were neceſſary for the end for which it was erected. They are the only ordinary judicature having power to value teinds, to modify ſtipends to miniſters, to allocate the ſame upon the teinds of particular lands, to ſell teinds in the hands of titulars or tackſmen to the heritors; and becauſe the teinds were generally under tacks, having leſs tack-duties than could be ſufficient for the miniſters ſtipends, therefore the commiſſion hath an extraordinary power to heighten the tack-duties, and, in recompence thereof, to prorogate the tacks. They have alſo power to divide or unite pariſhes, and to alter the ſituation of kirks. But theſe things being done, the rights ariſing therefrom belong not to their juriſdiction, but to the Lords of Seſſion.

The Privy Council hath alſo its proper juriſdiction, as to matters of ſtate, and preſerving of the publick peace, and determining and puniſhing all riots, and violent encroachments upon lawful poſſeſſion. The Lords of Juſticiary are the ſupreme ordinary judges in criminals. The Admiral is the only judge of prizes, and ſome maritime cauſes, in the firſt inſtance; and by the forementioned act of Parliament the Lords of Seſſion are excluded from advocating ſuch cauſes. And the Commiſſaries are the proper judges in the comfirmation of teſtaments, and in the matter of divorce. And inferior courts are *the* only competent judges in the firſt inſtance, of ſums not exceeding 200 merks.

In theſe things therefore there may be a proteſtation for remedy of law, from the Seſſion to the Parliament, if they ſhall decide and determine theſe proper ſubjects of the other courts.

LIX. There may be likewiſe a proteſtation for remedy of law, from the Seſſion to the Parliament, if they ſhall reduce or alter their own decreets *in foro contradictorio*, upon iniquity, wherein they have no juriſdiction, becauſe they are *functi officio*: their decreets are declared final and ultimate, without any remedy by appellation to the King or to the Parliament, appellation being then the ordinary remedy. And if there be no appeal to the King, or to the Parliament, but that their ſolemn ſentences be final, there is no pretence for themſelves to reduce the ſame; for then their ſentences ſhould not be final, neither could there be any termination of pleas; which would be contrary to one of the greateſt intereſts of mankind, which hath been endeavoured to be *ſecured*[a] by this and all other civil nations. For if, upon alledgeance of iniquity, the ſolemn ſentences of the Lords ſhould come again to be determined in Parliament, pleas would be inavoidably perpetuated, as will forthwith appear. Yea, if the Lords of Seſſion ſhould recal or reduce their ſolemn decreets, upon new arguments, pleas would never end, ſo long as human invention can continue: for new pretences will never be wanting, if they were receivable upon new arguments. But if new matter of fact, competent and unknown, before ſolemn decreets *in foro* were

[a] F. prevented.

were admitted, the rich and litigious might thereby weary out the innocent, and there could not be that termination of pleas that is neceſſary and requiſite for the quiet of men's minds, and the ſecurity of their rights. No nation doth allow fraudulent deeds, much leſs ſuch fraud as hath ſo pernicious conſequences.

LX. The extremes on either hand being equally thus cleared, there remains no more in controverſy, but as to proteſtations for remeid of law, upon alledgeance of injuſtice or iniquity committed by the Lords: as to which there is difference to be made of their ſentences out of the ſphere of their juriſdiction, and theſe within the ſphere thereof.

Their ſentences without their juriſdiction may be queſtioned in two caſes, 1. In declinators, refuſing their juriſdiction, in things not proper thereto; which, if they repel, and ſuſtain themſelves competent where they are not, if the party repelled proteſt for remeid of law to the Parliament; in ſo far the juſtice of that ſentence repelling the declinator, muſt be diſcuſſed in Parliament, and can be no where elſe determined; yet it will not ſtop their procedure, unleſs they voluntarily do the ſame, but it will annul the ſentence upon incompetency.

But, 2. It is more doubtful what ſhould be ſaid, if parties called before the Lords, in cauſes not competent to their juriſdiction, ſhall not decline, or having declined and being repelled, ſhall yet proceed in their defences: for, in either of theſe caſes, the defenders do prorogate the juriſdiction, and ſo do conſent thereto, and conſequently cannot quarrel theſe ſentences, unleſs they be allowed to quarrel all their ſentences upon iniquity, not only as to the competency, but as to the material juſtice of the cauſe. Yet even, in theſe caſes, there is a great difference between their ſentences, which have only vigour by the conſent of parties, and thoſe which have force by their proper authority; for the prorogation of their authority ſtates them but as arbiters, whoſe decreets are quarrellable, not only upon incompetency, but upon enorm leſion, by iniquity.

LXI. But that the meaning of the eſtates in the claim of right ſhould be underſtood to be, that parties in their humour, at their pleaſure, might proteſt for remeid of law by the Parliament, upon alledgeance of injuſtice, in matters proper to the Lords juriſdiction, can hardly be ſuppoſed, for many reaſons.

Firſt, If proteſtations be admitted in this caſe to any one, it muſt be equally to all, ſeeing there is no ground of diſtinction; and then farewell all honour, deference, or reſpect to that judicature, which hath been in great reputation, both by natives and ſtrangers, ſince the inſtitutions of the College of Juſtice; ſo that, in that caſe, no murmuring againſt them can be the leaſt fault, albeit they repreſent the King's perſon, and bear his authority, and have been acknowledged as the ſupreme judicature in all cauſes civil, *Parl.* 1661, *cap.* 23. and the ſupreme judges under his Majeſty in all cauſes civil, *Parl.* 1661, *cap.* 50.

Secondly, If, upon pretence of iniquity, the ſentences of the Lords be all recognoſcible in Parliament, it would require perpetual Parliaments: for all cauſes behoved to be pleaded of new before the Parliament, which yet have no fixed time of their ſitting; and if they ſhould, would make an untollerable burden of expences upon the nation.

Thirdly, It will be obvious to every capacity, to conſider whether the rights and intereſts of the nation, will be more ſecured by the determination of judges, who have devoted their lives and ſtudies, to meditate on, and underſtand, not only material juſtice, the common rule of the world, but alſo the particular ſtatutes of this and neighbouring nations, and who are cenſured if they go out of the bounds of diſcretion, than if they were to be determined by the Parliament, the greateſt part of the members whereof, (without the leaſt derogation to their honour, natural abilities and faithfulneſs,) cannot be ſo qualified, nor are they cenſurable for any thing they ſhall do.

Fourthly, If the ſentences of the Lords of Seſſion be recognoſced in Parliament, then it is impoſſible to terminate pleas, and ſo no man can ſay that any right he hath, or can have, may be ſecure (for they can never be without queſtion and debate,

debate, what is juſt and what is not) and that to any proceſs that ſhall be intented they may at laſt ſay, there can be no further proceſs; becauſe, what is alledged, is already proponed and repelled, without neceſſity to make further anſwer. In this all ordinary judicatures are at an end in determining rights, and are puniſhable if they bring the matter again in queſtion, which is not poſſible to be in the decreets of Parliament; becauſe the Parliament can never exclude the full liberty of themſelves, or of their ſucceſſors; no more than perſons can by one reſolution ſecure that they cannot reſolve the contrary; and therefore the ſame Seſſion of Parliament may judge that to be unjuſt, that it judged to be juſt, and contrarywiſe, as oft as they will; and much more may different Parliaments: for, whatever a Parliament can do at one time, in making of laws, or determining of cauſes, may be at their pleaſure abrogate or derogate. So, whatſoever hath been ſaid before, of that common intereſt of mankind for termination of pleas, is much more evident in the deciſions of Parliament.

Fifthly, Such proteſtations upon account of injuſtice, would at once unhinge the moſt ſolemn ſentences of all the judicatures of the nation; for there was no anterior law, more in relation to the Seſſion, than to any other judicature; and much more was eſtabliſhed by expreſs law for the Seſſion, than for any other judicature, their ſentences being declared final, and without remeid by appellation to the King or Parliament: yet the ſame is the right both of the Privy Council and Juſticiary, who are ſupreme ordinary judges in their proper juriſdictions.

Sixthly, It is another great and common intereſt, that men's rights ought to be determined, not alone by the laws ſtanding when the determination is, but by the laws that were ſtanding when the rights were acquired, or the deeds done, although thereafter theſe laws were abrogated: ſo the rights of teinds, benefices, and patronage, that were acquired in the time of Popery, are to be judged by the canon law: the rights of land before King *James* I. were ſufficiently eſtabliſhed by charters, and being entered in natural poſſeſſion, without ſeiſin; and theſe acquired after that, were ſufficiently eſtabliſhed by charter, precept and ſymbolical poſſeſſion by the inſtrument of a nottar, without neceſſity of being regiſtrate; but now, ſince the act for regiſtration of ſeiſins, rights of lands cannot be eſtabliſhed againſt ſingular ſucceſſors, without ſuch an inſtrument of ſeiſin being regiſtrate. And therefore, ſeeing the ſentences of the Lords of Seſſion, at the firſt inſtitution, were declared to be final, without appeal to King or Parliament, and the ſame power was given to the King's daily Council, and again the ſame power was given to the Senators of the College of Juſtice; Can the ſentences given conform to theſe laws, be altered or reduced, while theſe laws are ſtanding?

It would be a pitiful evaſion to pretend, that albeit the ſentences of the Lords were without remedy by appeal, yet now appeals have ceaſed, which hinders not but that they may be reviewed or reduced in Parliament; for the meaning of ſtatutes is not to be meaſured by words, but by the ſenſe and intent, which is evident to be, that there might be an end of pleas; and they would have been plainly eluſory, if there had been remedy by review or reduction, which might have been uſed when appeals were in vigour; but both the words and meaning of the ſtatute is, that the ſentences ſhall be final, without remedy; and though appellation, which was then the ordinary remedy, be named; yet the remedy *was* not by the appeal, but by the reduction following upon the appeal, as now it would be upon the proteſtation: the difference of which is only this, that, in appeals, ſometimes the judge appealed from, ſiſted, but was not obliged to ſiſt, unleſs the caſe had been at leaſt dubious; whereas proteſtation doth not ſiſt proceſs or execution in any caſe; and though in that it be eaſier than an appeal, yet in this it is more inconvenient, that if an appeal was not brought in, and inſiſted in before the judge appealed to, in a few days, it was deſerted, and no further remedy was allowed; but there is nothing determined to regulate thoſe proteſtations, either when they ſhall be taken, or when they ſhall be inſiſted in.

LXII. The juriſdiction of the Lords is exerciſed thus. At the firſt inſtitution of the College of Juſtice, ten of the ordinary Lords made a *quorum*, but thereafter it was brought to nine, as hath been before ſhown. This *quorum* muſt be preſent at all interlocutors and ſentences, upon diſpute *in præſentia*, upon report, and upon deliverances on bills: and there is no difference of power, whether the *quorum* be more or leſs, providing they be alwiſe nine.

LXIII. One of the Lords hears cauſes diſputed in the outer-houſe, and determines the ſame, where he finds the caſe clear; but if it be dubious, he doth either of his proper motion declare, that he will adviſe with the Lords; or if any Advocate preſs for the Lords anſwer, if there be any dubiety, the ordinary will not refuſe it, upon conſigning of a dollar as an amand, to be forfeited to the poor, if the proponer be found litigious. But if the caſe be fully clear, the ordinary may refuſe an amand, and yet the proponer may give in a bill to the Lords with his reaſons, which will coſt him more, and he may receive a reprimand if his bill be found impertinent, which thoſe who are ingenuous and tender of their credit will not do. So the ordinary in this caſe judges as a *quorum* doth, and not by delegation only, but by the inſtitution, whereby the ſentences interlocutory or definitive of the ordinary, have the ſame effect as thoſe of a *quorum, as ſoon* [b] as acquieſced in. But the ordinary may ſtop the ſame to hear the parties further, being in his own week, when he ſits without, or within ſix days after the interlocutor: and for diſcuſſing any ſuch ſtops as he hath given in his own week, he ſits without the next week thereafter, before the ordinary of that week come out; and if he cannot reach all in that week, he hath an hour at the ſide-bar weekly, till he diſpatch all that he ſtopped in his week.

LXIV. When any point is to be reported to the Lords, the parties are allowed inſpection of the minutes, and if either party find any thing not minuted as it was proponed, upon application to the ordinary, he will order it, and will allow either party to add reaſons in law for the ſame, being in his own week, or the week following: and that either party may be ready, the ordinary affixes upon the wall, a roll of theſe cauſes he is to hear again in the ſubſequent week, or at the by-bar.

LXV. The ordinary, in diſcuſſing of cauſes, muſt exactly follow his roll, and may not continue, or paſs by any cauſe, unleſs he decline himſelf, or be declined upon a relevant ground; in which caſe the next ordinary goeth out before him the next day, to hear and determine the ſame.

LXVI. The ordinary may not give a ſtop, until he receive a note of the points deſired to be heard, whether the ſame be new matter of fact, or new reaſons of law, againſt his former interlocutor; whereof there ſhould be two doubles, one to be detained by the ordinary, and the other to be delivered to the ſub-clerk to give up to the party concerned, that he may ſee and be ready to anſwer the ſame; with which note the double of the former interlocutor ſhould be given to the ordinary by the party *; whereupon the ordinary muſt put the ſame in his particular roll, either for the next week after he was ordinary, or for the by-bar.

LXVII. No bill ſhould be given in to the Lords, or read, which hath a remedy by the ordinary; unleſs the bill bear, that the ordinary repelled, or refuſed to hear upon the application as aforeſaid; for an extraordinary remedy by a bill to the Lords, ſhould not be uſed while there is an ordinary remedy by the Lord Ordinary.

LXVIII. Another of the Lords doth weekly ſerve upon the bills of advocation and ſuſpenſion, both in the time of Seſſion and of vacance, to whom only in their weeks theſe bills are to be preſented, that there be not claſhing nor confuſion. And if the ordinary give any bill to be ſeen, or give a ſtop of execution; the paſſing, or refuſing, or the hearing and determining that bill (albeit it were

* By act of Sederunt, 13th *Nov.* 1691, copies of the laſt interlocutors are appointed to be produced with all reclaiming bills; and by act of Sederunt, 11th *Nov.* 1708, all written ſtops are appointed to be ſubjoined to a repreſentation, craving the ſame.

[b] F. and.

preſented on Saturday, and ſo cannot be anſwered till Tueſday thereafter) yet returns to the ordinary to whom it was firſt preſented. And the ordinary ought to give an anſwer to every bill of ſuſpenſion or advocation offered in his week, and ſign his deliverance thereupon. But if it be a bill of ſuſpenſion againſt a decreet *in foro*, if it be in Seſſion-time, the ordinary cannot paſs it, but muſt report it to the Lords; or if it require a charge to ſet at liberty. But if ſuch a bill be preſented in the vacance, it may be refuſed by the ordinary alone; but it cannot be paſt, but by a meeting of three of the Lords, and that by the next preceeding and ſubſequent to the ordinary, if they be in town. If the ordinary hear parties upon a bill, either as to paſſing thereof, or as to the diſcuſſing of the cauſe upon a bill of ſuſpenſion, or even the cauſe advocated being ſo referred; the ordinary hath privilege, at any time to intimate at the by-bar, that he is to hear ſuch a bill, having given competent time to the other party to ſee the ſame; and to appoint the time, when he will hear the ſame, which muſt be at the by-bar, before the hours deſigned for hearing of cauſes, which came from the outer-houſe; otherwiſe their time would be confounded, and none would be ſecure when to be heard. Alſo, he only, paſſeth all the ordinary bills of horning, caption, ſummons and diligences, the deliverance being written on the back thereof by the clerk of the bills, whoſe truſt it is, that nothing paſs but what is ordinary, until he obtain ſpecial warrant; the reſt paſs of courſe without the ordinary's obſervation; for one of the Lords were not able to read them, in the time he is to attend, hundreds being oft-times preſented together, yet all are paſt *periculo petentium.*

If a bill hath been preſented and refuſed, the clerk of the bills ought to retain the bill; and if another bill be preſented, he ought to ſhow the ordinary the refuſed bill, that if the new bill contain new matter of fact, he may paſs or refuſe it; but if it only contain arguments of law or reaſon, urging the former points, he may not paſs, but by a meeting of three, or by a report to the Lords; for *par in parem non habet imperium.*

LXIX. There are other two Lords that ſerve weekly on the witneſſes, who do both attend in the afternoon, each Sederunt day, except Saturday; and do examine witneſſes ſeverally; or, if the caſe be of great importance, as tenors or improbations, they muſt concur in examination. They muſt examine no witneſſes, but ſuch as have been produced at the bar and have made faith, and unleſs there be in the minute-book the ſame day, a minute bearing *aviſandum* and witneſſes upon the proceſs; which, being once called, needs not a new calling, unleſs the witneſſes be brought to the bar on Saturday, in which caſe the *aviſandum* muſt be till the next Tueſday. The ordinaries on the witneſſes muſt diſcuſs the objections againſt the hability of the witneſſes, and in caſe of dubiouſneſs, muſt report to the Lords.

TITLE II.

The Order of diſcuſſing Proceſſes.

NEXT to the authority of the Lords of Seſſion, which hath been ſpoke to, both as to the whole Lords and their *quorum* jointly, or by the ordinary Lords, who ſerve ſeverally in the outer-houſe, on the bills, and on the witneſſes; the order of exercing this authority comes fitly here to be conſidered, and that as to the order of calling, hearing, reporting, and determining of cauſes, from their firſt dependence, till the final decreets concerning them.

I. It had bred intolerable confuſion and inconvenience, if there were not a fixed and known order, whereby every point, falling under the Lords juriſdiction, or pretended to fall under it, were to be heard and determined; ſo that all concerned might know when to attend. For the Seſſion is not a court of peremptory

ry diets, ſuch as are other courts, that have not a fixed and continued time of ſitting, as the Privy Council, Juſtice-court, *&c.* which no man is obliged to attend, but on the day to which they are cited, or by an act of continuation to another fixed diet, which is alſo peremptory: but the Seſſion being a court that hath a continued and fixed time of ſitting, all points of proceſſes before them are with continuation of days.

II. There was a neceſſity of a particular continuation of certain ſummonſes of great importance, which behoved to be called and continued by an act of continuation, whereupon letters were iſſued for a ſecond citation, which letters were called the ſecond ſummons: but that order hath been with good advantage changed, by act 6. *Parl.* 2. *Seſſ.* 3. *Char.* II. So that now ſummonſes which before were to be continued, have two diets; and the citation to the firſt diet may be by any perſon that can write his execution, whoſe name is held as inſert in the blank of the ſummons, which are always direct to "ſheriffs in that part;" becauſe of old, all executions were by the ordinary ſheriffs, but ſince the inſtitution of the College of Juſtice, the Lords direct to ſheriffs in that part, that is, to ſheriffs conſtitute by them to that effect. And the ſecond citation is only given by meſſengers, and not until the diet of the firſt citation be paſſed *.

III. Without this fixed order of hearing and determining, all parties that were cited behoved conſtantly to attend every day of the Seſſion, till the cauſe were determined, unleſs the ſame were not called in a year after the diet in the ſummons, or after the laſt calling by a clerk: for then there is neceſſity of a new ſummons of wakening, for the cauſe is holden as ſleeping; which will not occur but by the interruption of the ſitting of the Seſſion, or by the negligence of the party which may call.

IV. The Lords are obliged to ſit during the time appointed for the Seſſion by act of Parliament, unleſs there be a warrant from the King, or Parliament, or Privy Council to the contrary, except in ſolemnities warranted by law or cuſtom. They ſit every week-day except Monday; that day being free, becauſe cauſes heard upon Saturday could have no time for drawing informations, if the diſpute were to be decided on Monday in the forenoon: yea, every ordinary Lord is obliged conſtantly to attend, and if he be abſent, without an excuſe admitted by the Lords, he loſes ſo much of his ſalary, as is correſpondent to the ſederunts while he is abſent. And likewiſe parties and pleaders would be confounded and ſurpriſed, if they could not know when they might be called, or when their diſputes might be reported and adviſed.

V. For ſhunning theſe inconveniencies, in the inſtitution of the College of Juſtice, there was appointed a table, in which all ſummonſes to be called were to be ſet down: but the kingdom was divided in four quarters, and the time of calling their cauſes was only in that quarter of the year appointed for them: and ſuch particular cauſes were to be called upon Monday; and Friday was for the King and Queen's cauſes, and for ſtrangers; but all other cauſes any day of the week.

But the inconvenience that followed upon this method made it fall in deſuetude; ſo that no cauſes were to be called or diſcuſſed upon Monday, for the reaſon now adduced: and it was very inconvenient that no party might call any cauſe but in their own quarter of the year, ſo that for three quarters they could have no juſtice; therefore cauſes were called promiſcuouſly, at the option of the Ordinary for the outer-houſe, or at the option of the Chancellor or Preſident for the inner-houſe. By this the whole nation became in dependence and clientel of the Chancellor and Preſident, and ſuch Ordinaries as went to the outer-houſe, whereby every one might call their own friend, ſo that the defenders were all in diffidence, ſurprize and confuſion, ſuppoſing the cauſes to be called upon particular reſpect

* By act 12. P. 1693, it is declared lawful to give citation for the firſt and ſecond diets of compearance, at the ſame time, provided it be done by a meſſenger at arms.

ſpect of perſons, and when they were not in the advocates recent memory; ſo that they wrangled upon every frivolous pretence, and did not acquieſce in the interlocutors.

VI. The Lords became ſenſible of the great incovenience by ſurpriſe, and therefore by acts of Sederunt began to give remedies, which were perfected by the act of regulation, till which the Lords would not paſs from their privilege of calling their friend in their own week; and, after much debate, it was yielded, that they ſhould have Saturday privileged, to call what cauſes they would on that day, which gave great offence and ſuſpicion, that when ſo good a remedy was fallen upon, it ſhould have an exception; therefore the King gave a commiſſion under the Great Seal, *September* 21. 1669, for regulating the manner of procedure in all judicatures; whereupon the commiſſioners did frequently meet, and in *March* 1670, did return to his Majeſty certain rules and articles of regulation, which his Majeſty did approve. But becauſe this way could not be effectual without authority of Parliament, therefore the ſaids rules were confirmed in Parliament, *Auguſt* 30. 1672, by act 16. *Parl.* 2. *Seſſ.* 3. *Char.* II. By this act of regulation this general and juſt ground was laid, "That all proceſſes "ſhould be diſcuſſed and determined, as the parties are in readineſs, and do call "for juſtice, after the proceſſes have been ſeen by the defender's advocates, and "and are returned by them; and that according to the date of the returns which "are ſet down and ſigned by the defender's advocate, upon the proceſs itſelf, that "no parties be preferred in obtaining juſtice, to any other who was ready and call-"ing for it before. And it was appointed that books of inrollment be made, for "inrolling of proceſſes, according to the dates of their returns: and that no cauſe "be called but according to theſe rolls, except only the King's cauſes, which "may be called at any time when his Majeſty's Advocate pleaſeth, upon either of "the two next ſederunt days after the proceſſes are returned, or at any time there-"after, upon fifteen days advertiſement to the defender's advocates, that they may "acquaint their clients to be preſent."

VII. But becauſe there was neceſſity to give diſpatch to ſome cauſes more than others, therefore there were appointed two books of inrollment for the outer-houſe, in the one were inrolled ſuſpenſions, advocations, removings, ejections, and recent ſpulzies; and in the other were inrolled all other cauſes, according to the date of their returns.

VIII. And for preventing of the miſcarrying of writs produced in proceſſes, in reſpect copies, altho' atteſted by notars, are not ſufficient, becauſe the other parties muſt ſee the principals, that they may conſider whether there be any ground of ſuſpicion of forgery or vitiation, and that they may by their clients, and by other writs, conſider whether the ſubſcriptions be the ſubſcriptions of the parties, that they may propone improbation as they ſhall ſee cauſe; and that it might be known how long the defenders kept up the proceſs unreturned: therefore the leader of the proceſs cauſes write upon the back of the proceſs the writs given out therewith, and ſubjoins thereto given out by him ſubſcribing the ſame: and when the proceſs is offered to the leader of the proceſs for the other party, he may compare the writs with the liſt, and if all in the liſt be not given therewith, he may refuſe to receive the ſame.

By this means two great inconveniencies are ſhunned, which did before exceedingly endanger parties, and trouble the Lords; to wit, the forcing of defenders to give back proceſſes, for which advocates were frequently called, and much altercation about the time they had the proceſs, which is now evident by the date of the out-giving. And likewiſe debates are ſhunned concerning writs that were a-miſſing, which now is cleared by the liſt on the back of the proceſs.

IX. There were likewiſe appointed two books of inrollment for the inner-houſe; the one for ordinary actions proper to the inner-houſe, *viz.* reductions of heritable rights of lands or annualrents, after the production is ſatisfied in the outer-houſe,

outer-houſe, and aviſandum made for diſputing the reaſons, declarators of rights of lands or annualrents, probations of tenors, *ceſſiones bonorum*; wherein, after the dilators are diſcuſſed in the outer-houſe, a great aviſandum is made: and of ſuch cauſes where the Lords, upon report of the diſpute from the outer-houſe, ſhall, for the importance, intricacy, or preparative of the points reported, ordain the cauſe to be heard *in præſentia*. In which book the cauſes ſhall be inrolled, as they are offered to the keeper of the book, in the Seſſion-houſe, each Saturday from two till *four* o'clock in the afternoon, according to the dates of the great aviſandums, or of the interlocutors for hearing of the cauſes in preſence. The other book of inrolment for the inner-houſe, is for concluded cauſes only, to be inſert as aforeſaid, according to the date of the acts concluding the cauſe, wherein a great aviſandum is made. Theſe great aviſandums are ſo named, in diſtinction from aviſandums for reports, or for witneſſes.

The cauſes preſented every Saturday are to be ſet down according to the dates of their returns.

X. The Lords, both in the outer-houſe and inner-houſe, are ordained by the ſaid act "to proceed to the diſcuſſing of proceſſes, in order as they ſtand in the "ſaids rolls *reſpectivè*, without paſſing over, or anticipating any cauſe. And it "is appointed that each proceſs ſhall be ſtill called in its order, until it be brought "to an act, proteſtation, or decreet; and if it be delayed till ſomething be pro-"duced or done, which requires not an act extracted, then, after the day to "which it is delayed, the ſame ſhall be called till it be diſcuſſed. And where, "at the calling of any cauſe in the inner or outer-houſe, the purſuer inſiſts not, "the proceſs ſhall be delete out of the roll, and proteſtation ſhall be granted if "it be demanded:" but if no proteſtation be demanded and extracted, the purſuer may enter the cauſe again in the books of inrolment, as it ſhall be offered, as before is expreſſed, but after all that were entered before, tho' the return be of a prior date. And that it may appear what cauſes are diſcuſſed, and what delete, or delayed upon ſomething to be done not requiring an act to be extracted, it is appointed, that it be written upon the margine of the roll at every cauſe, diſcuſſed, delete, or delayed till ſuch a day; after which day the cauſe muſt be put in the roll as it ſtood before, without a new inrolment in the books. Yea, to make all ſecure, "If any cauſe be called out of its due place, the purſuer's "advocates may refuſe to inſiſt, or the defender's advocate to anſwer: and the "clerks are prohibited to write upon any proceſs called out of its own due courſe, "or to extract any act or decreet thereupon."

XI. Thus the calling and hearing of all cauſes is ſo aſcertained, that the moſt powerful or moſt favourable perſon of the nation, yea, the King's Advocate for the King's proper cauſes, cannot obtain the meaneſt or moſt unfavourable perſon in the nation to be poſtponed or delayed: ſo that none have reaſon to complain that they get not equal hearing and diſpatch in juſtice as they are ready, and call for it *.

Not only is the equal hearing of cauſes ſecured, but leſt any might be ſurpriſed in reporting the points at interlocutor, when they could not know the time of the report, that they might have given timeouſly their informations to the whole Lords; therefore the Lords have done all that is poſſible, to aſcertain the time of the reports to be made to them, in this manner:

Firſt, The ordinary in the outer-houſe doth firſt report, after notice given by him to either party, and that before the reading of any bill, and while he is reporting, the ordinary of the preceeding week goeth out to the bench of the outer-houſe, and heareth any cauſe, wherein he gave interlocutor in his week, and ſtopped the ſame; but he is to call no other cauſe: he is to go out half an hour before

* By act of Sederunt, *July* 13. 1739, a book of inrolment is appointed for informations and petitions with anſwers, and another book for cauſes ordered to be heard in preſence; from which two books a ſhort roll for the inner-houſe is appointed to be made up every Seſſion-day, to be adviſed on the days not occupied by the inner-houſe ordinary actions and concluded cauſes.

the Lords ſit down, and ſo continue (if he have need) till ten o'clock. If he hath then any point to report, the ſame muſt be reported on his day of report from the by-bar.

Secondly, If any point hath been diſputed *in præſentia*, that the Lords have thought fit to allow informations to be given on, the Preſident reports the ſame upon the day appointed for that report.

Thirdly, The ordinary upon the witneſſes report any dubious point, occurring at the examination of parties or witneſſes, which may leaſt admit delay, becauſe of the attending of parties and witneſſes.

Fourthly, The ordinary upon the bills reports what occurs, immediately on peruſal of the bills, which requires no information: but when the Lords by deliverance appoint advocations or ſuſpenſions to be heard upon the bill, the ordinary on the bills muſt go out to the by-bar and hear the ſame, before the Lords ſit down, that he may not hinder the reſt in their courſe at the by-bar; and what reports he is to make, muſt be made before the reports of the reſt from the by-bar.

Fifthly, Reports from the by-bar are made in this order. The neceſſity of calling cauſes at this bar is, becauſe of controverſies that ariſe upon the minutes of the clerks in the outer-houſe, or upon alledgeance of new matter; therefore the Lords were accuſtomed to go to this bar as they had occaſion, whereby more than one came together, which bred confuſion, and the noiſe troubled the ordinary on the bench; advocates alſo were uncertain what was to be called at the by-bar: whereupon much complaint was made againſt hearing at that bar, which was not of old known. But theſe did not conſider, that formerly any ordinary (upon ſuch occaſions as now bring them to the by-bar) went to the bench, and ſtopped the ordinary, the prejudice whereof was not then perceived, when none could know what cauſes had no hearing at all, while it was at the option of the Lords to call whom they pleaſed.

But, to remedy the inconveniences ariſing from the by-bar, the Lords ordained, that none ſhould go to the by-bar but one at once, and that in order as they ſit; ſo that three go out every day, if they have need: the firſt from nine to ten, the ſecond from ten to eleven, the third from eleven till twelve; whereby every week every ordinary may have an hour to hear at that bar, and none report that week, but they report the weeks thereafter, in the ſame order as they went out to hear. They muſt alſo affix upon the wall a roll of the names of the parties whom they are to hear at the by-bar, and the time they are to hear; ſo that none can be taken tardy, either in hearing or reporting. Theſe reports from the by-bar are made laſt; becauſe they occur frequently upon the neglect or litigiouſneſs of the parties, who procure ſtops, which, with the multiplicity of bills, is the ground that cauſes fall behind in diſpatch. And it were moſt juſt, that if the parties delayed to attend, they ſhould have their expences from the parties, who by their neglect or litigiouſneſs do delay them. But the Lords have done all that is poſſible to make little and regular hearing at the by-bar, having of late ordered every ordinary to go to the bench the next week after he ſat, before that week's ordinary come out *; and after five ſederunt days, they are not allowed to give any ſtop, but parties muſt in that caſe ſuſpend if they have cauſe, act of Sederunt, *Nov.* 4. 1686. **

Yet

* By act of Sederunt, *June* 6. 1733, made perpetual by act of Sederunt, *June* 5. 1734, the court is appointed to meet at ten o'clock; and from nine to ten every Seſſion-day, three Lords are appointed to ſit in the outer-houſe, for diſcuſſing their hand-rolls, by which means each Lord has one ſide-bar hour every week; and the laſt week's ordinary is allowed two hours.—By act of Sederunt, *Nov.* 25. 1738, the ſeveral hand-rolls are appointed to be put on the wall, the day before theſe rolls are to be called.——By act of Sederunt, *Nov.* 23. 1752, this muſt be done at 12 o'clock, mid-day.

** By act of Sederunt, *July* 9. 1709, reclaiming petitions to the court, againſt interlocutors of Lord Ordinaries, muſt be preſented within eight Sederunt-days; and petitions againſt inner-houſe interlocutors muſt be preſented within ſix Sederunt-days; but in this computation Saturday is not included, *Feb.* 1. 1715.—By act of Sederunt, *Feb.* 16. 1723, the days allowed for repreſenting to an ordinary againſt interlocutors in the outer houſe, are limited to ten Sederunt-days, including Saturday.

Yet after all theſe remedies, parties do frequently importune the Lords with bills, containing long narrations of matters of fact; and frequently a repetition of the ſame matter of fact, without diſtinct propoſing thereof, and the manner how they would prove the ſame, which oft-times is nothing but a repetition of what hath been heard and determined, which doth unneceſſarily conſume a great part of the leiges time, by reading thereof; and that oft-times, when the matter formerly determined is forgot. And therefore the Lords do ſtrictly enjoin the clerks, to give out acts, proteſtations and decreets, within days after they are pronounced in the outer-houſe, and within days after they are pronounced in the inner-houſe, if the ſame be demanded by either party *; and after theſe days they will receive no more bills (unleſs new matter of fact do emerge, or come to knowledge) without expences to the party delayed, and amands to the poor. If this courſe were not followed, the bills of wilful perſons could not be brought to an end **.

XII. The order of diſpatching bills is thus: By the inſtitution of the College of Juſtice, *Parl.* 1537, *cap.* 52. it is ſtatute, "That all parties, or their procurators, "deliver to the Chancellor or Preſident their bills." And to the effect that not only they, but the remanent Lords, may have time to read bills, before they be preſented; the Lords have appointed boxes for every Lord, to be ſtanding upon a table in the waiting-room of the inner-houſe, from three of the clock till ſix ***, that all who have bills to offer, may put them into theſe boxes, by a ſlit in the cover of them; whereby bills may be put in, and cannot be got out, till the Lords open their ſeveral boxes. By this the leiges are eaſed of the trouble to go to the Lords at their ſeveral dwellings through the town; and the occaſion of ſollicitation is prevented: for further preventing whereof, the Lords do at the beginning of every Seſſion declare, and engage upon their honour, that they will admit of no ſollicitation, by word or letter.

For preparing the diſpatch of theſe bills, with as little conſumption of time as may be; the Preſident cauſes write a liſt of all bills, except ſuch as paſs in courſe: And if he conceive them to be groundleſs, cauſes writ on the liſt, that they be "reported by the clerk," that they may be rejected without an anſwer; wherein there is no hazard, ſeeing all have received the copies, and if any deſire a reported bill to be read, it will be done. And where there is any doubtfulneſs in the matter, the Preſident cauſes write upon ſuch bills, "The party to ſee;" whereby much time is gained; by which means there is no bill rejected, till it be reported or read. The clerks make intimation of what bills are to be ſeen, and the time appointed for returning anſwers: and if the anſwer be not returned as aforeſaid, he doth ordinarily intimate again, "with certification, that the "Lords will adviſe the bill, without an anſwer ****."

XIII. If bills and reports be ſo multiplied, that they cannot be overtaken in the forenoon; or, if any cauſe be to be adviſed, wherein there are many points, writs, and witneſſes; the Lords, according to the act of regulation, do meet in the afternoon, for diſpatch of the ſame.

XIV. Whereas

* The act of Sederunt, *Nov.* 7. 1690, here referred to, appoints, That the clerks ſhall give out extracts, if required, within 24 hours, after reading in the minute-book, notwithſtanding ſtops granted. This appears by act of Sederunt, 11th *Nov.* 1708, to have related to verbal ſtops; and, by this laſt act, the endurance of written ſtops was limited to a forthnight in time of Seſſion, or to 8 days after the ſitting down of the enſuing Seſſion.

** A more effectual remedy is provided by act of Sederunt, 26th *Nov.* 1718, diſcharging the clerks to receive more reclaiming petitions againſt any interlocutor in preſence, than one; unleſs, upon new matter of fact, recently come to knowledge.

*** This altered by act of Sederunt, 23d *Nov.* 1752, whereby all papers are ordered to be put into the boxes, before twelve o' clock, when the boxes are to be carried away.

**** Interlocutors on ſingle bills are, by act of Sederunt, 10th *Feb.* 1739, ordered to be inſerted daily in a book, and then to be immediately put upon the wall. Anſwers to petitions are now uſually ordered to be given in at a day certain, under a penalty of forty ſhillings.

XIV. Whereas formerly no interlocutors were ſigned by the Preſident, or the Ordinary; now all interlocutors and bills which are paſt in the inner-houſe, upon hearing there, or upon report, are ſigned by the Chancellor or Preſident; and all that are paſſed by the Ordinaries, are ſigned by them.

XV. Acts are called in the outer-houſe weekly, upon Wedneſday and Saturday, after they have been called twice by the clerks, who, at the third calling, are publickly to report what is to be proved, that certification may be granted, or the term circumduced, or ſecond diligence granted.

XVI. Whereas formerly the Lords adviſed all cauſes, wherein probation was by witneſſes, with cloſs doors, calling no advocates; now parties are preſent at the examination of witneſſes, and oaths of parties *; and the advocates are called at the adviſing thereof, by the roll of concluded cauſes; except plain oaths which go not to the roll, but are read by the clerks, and adviſed by the Lords, as they are offered **. And when parties are called in concluded cauſes, they are heard upon the oaths, and alſo they are allowed to call for the teſtimonies of the particular witneſſes, that they ſuppoſe to make for them, in relation to the ſeveral points to be proved, in order, as they are ſtated in the acts, without neceſſity for the Lords to read over all the witneſſes, more than they need read over large writs adduced for probation, whereof they have alwiſe been accuſtomed to read the clauſes pitched upon by either party, and therefore they muſt mark theſe clauſes with figures or letters, and likewiſe the teſtimonies or parts thereof ought to be marked, and called for by the number of the witneſſes adduced; whereby parties do alſo know, that no depoſitions can be abſtracted, or neglected by the clerks.

XVII. Probation adduced by acts of litiſconteſtation, or acts before anſwer, is only adviſed by the Lords *in præſentia*; yet the ordinaries may hear and determine any writs produced *ab initio* before litiſconteſtation: and if any plain and ſingle point be referred, or deferred to an oath of calumny, or verity; they may take and inſtantly adviſe the ſame; but the ordinaries may determine reaſons of reduction, upon iniquity, or upon nullity of decreets of inferior courts, on that ground that there was not ſufficient probation, and may hear parties debate upon the teſtimonies of the witneſſes, and find proved, or not proved, being done before litiſconteſtation; in the ſame way, as they may determine writs produced *ab initio*: as was found, *June* 21. 1677, *Sir Andrew Ramſay*. But they cannot adviſe writs produced after litiſconteſtation, *Feb.* 21. 1678, *Oliphant*. And if writs be produced to ſatisfy the deſire of an act of litiſconteſtation, if the writs do not concern the matter in queſtion, but are only produced, to ſtop the circumduction of the term, to get delay, for producing further, till the cauſe come into the roll of concluded cauſes; the ordinary ought to reject the ſame, and circumduce the term, *Feb.* 21. 1678, *Oliphant*.

XVIII. By what hath been ſaid of the office and duties of the Lords of Seſſion; it will eaſily appear, that this court is brought to as diſtinct and accurate methods, for equal and expedite adminiſtration of juſtice, as ſhould be deſired: and that if it be compared with the ſupreme courts that have been, or are in other nations; there will be found no reaſon to repent, or be aſhamed, of that great deference, that this nation hath alwiſe had to the Seſſion, ſince the inſtitution of the College of Juſtice; and that they are not the beſt friends to the nation, who would diminiſh or derogate from the authority, or honour thereof. It is alſo very viſible, how much the weight and toil of the Lords of Seſſion, are increaſed, above what they were.

Firſt, Before the act of regulation, it was not known what cauſes the Lords had upon hand, and were obliged to diſcuſs and finiſh; for when they called what cauſes they pleaſed, and left others uncalled; thoſe who could not get their

* This was introduced by act 18. P. 1686,—and by act 26. P. 1693, all cauſes are appointed to be adviſed with open doors.

** By act 17. P. 1693, the Lords are appointed to adviſe ſummarily all oaths of parties, which ſhall be marked by the Lord Examinator, to be clearly affirmative or negative.

their cauſes called, and who for obtaining the ſame, were neceſſitated to a long, expenſive and anxious attendance, behoved to leave them, and endeavour by references, to bring their pleas to an accord; wherein arbiters muſt drive the going nail, and adviſe thoſe, who might worſt ſuſtain the preſent prejudice, to purchaſe the remedy, by ceding a part of that, which, (if they were authoritative judges,) they would determine in their favour: but now, by the books of inrolment and the rolls, which are every day on the wall; it is evident, how far at any time the Lords are behind with their work: which, though it exceedingly benefits the nation, and excites the Lords to extraordinary diligence; yet it triples the toils they took before.

Secondly, Formerly when parties obtained calling, if the ordinary brought the cauſe to an interlocutor, and reported the ſame, unleſs he had particular favour, he went no further, but left the parties to make their application to the next ordinary: by this, matters of any length or perplexity, came to have interlocutors by divers ordinaries, not very quadrant, whereby the cauſe was rendered more perplext, than if nothing had been done, and others ſcarred to meddle with it; this is now amended, and the ordinary is obliged to continue to hear, according to the roll, until the cauſe be brought to a decreet, proteſtation, or act; which doth alſo prevent that great inconveniency, that what the ordinary in his week had ſtopped, his ſucceſſor behoved to enter upon.

Thirdly, Formerly there were no interlocutors ſigned by the Chancellor, Preſident, or Ordinary, but only bills were ſigned: now all interlocutors muſt be ſigned, not only upon report in the inner-houſe, but by all the ordinaries, of all that paſſeth upon ſummons or acts; whereby the Preſident is obliged to ſit after the reſt, a long time, for ſigning all bills and interlocutors that are paſt that day, while they are freſh in remembrance; and the ordinaries muſt reviſe every thing that is paſt, and ſign the ſame; which is very uſeful to the leiges, but very troubleſome to the Lords.

Fourthly, Formerly the oaths of witneſſes and parties were taken by the Lords, when no other were preſent, but each ſeverally as he was to depone; but ſince the act of Parliament for publiſhing of teſtimonies, *P.* 1686, *c.* 18. parties are all allowed to be preſent, and have a great advantage by offering verbal interrogatories, ariſing from the anſwers to written interrogatories; yet the altercation of parties and pleaders, ariſing therefrom, is very burdenſome to the Lords.

Fifthly, Formerly the teſtimonies of witneſſes, were adviſed with cloſs doors; but now parties and procurators are called, *P.* 1693, *c.* 26. whereby thoſe that are wilful, breed the Lords a great deal of trouble, and conſume much time, debating upon the import of the teſtimonies, not only at the firſt, but by ſeveral bills thereafter; whereby the Lords are neceſſitated, ſeveral times, to reviſe and adviſe the ſame teſtimonies.

By all theſe, and other ſuperadded burdens, the Lords are neceſſitated to have long Sederunts, every week in the afternoons, which formerly was very rare; but, without theſe, the Lords could not now overtake their work.

TITLE III.

Ordinary Actions generally.

FROM the authority and power of the Lords of Seſſion, jointly in their *quorum*, or ſeverally by the ordinaries in the outer-houſe, on the bills, and on the witneſſes, and the order of their hearing, determining or reporting; we come now to the exerciſe of that authority, as to the matter and manner thereof. And from juſtice, in the ſeveral private rights thence ariſing, in their nature and conſtitution, and in their tranſmiſſion from the living, by aſſignation of perſonal

ſonal rights from private parties, or by gifts of rights confiſcated, or by diſpoſition of real rights by conſent, or by law, or rights ariſing from the dead by ſucceſſion; we come now to the application of juſtice, by judgment; which comprehends the cognition, trial and determination of all manner of private rights, and the excution of what is determined, by making the ſame effectual, ſo far as can be.

We are not to inſiſt in the cognition or execution of juſtice, competent to the inferior courts, but only ſo far as is competent to the Lords of Seſſion, who are the ſupreme judges-ordinary in all civil cauſes, either in the firſt, or in the ſecond inſtance: and ſo, whatever is cognoſced by inferior courts, may be recognoſced by the Lords, whoſe deciſions regulate all the inferior courts. And their ſubjects and form of procedure being known by the former title; the law that inferior judges are to be ruled by is the ſame.

It were of great advantage to the nation, that all who attend the inferior judicatures were firſt advocates, who, for a conſiderable time, had attended the houſe, and practiſed; which would be a great mean to keep all the courts ſuperior and inferior uniform, for preventing the trouble and expence of the leiges. And where the inferior magiſtrates do not themſelves ordinarily attend, they might elect their deputes of ſuch. This would alſo encourage the ſtudy of law, to which many of our youth are inclinable, whereby they ariſe to a greater number, than that the affairs of this nation can afford ſuitable proviſions to their ſpirits and parts.

I. This general difference between the Lords, and the inferior courts is to be obſerved, That the Lords have privilege *ex nobili officio*, which is competent to no inferior court. The diſtinction and import of *nobile officium* with us, hath its riſe from the Roman law, whereby all cauſes were judged by the Prætor, under whom there were not ſuch inferior courts as we have, where cauſes might be firſt determined without the Prætor's authority, who could not poſſibly diſpatch all the cauſes, even of the city of Rome; though, when it increaſed to a great bulk, many Prætors were appointed, yet all theſe could not diſpatch the cauſes of the city perſonally; and therefore they delegated judges in ſuch cauſes as they thought fit, reſerving matters of the greateſt import to themſelves. Theſe delegates were not arbiters; yet ſometimes, by conſent of parties, they named arbiters, who had a greater latitude in judging according to equity, than the *judices dati*, who being at that trouble and attendance, had a legal allowance from the parties for their pains; and therefore their office was called *officium mercenarium*; but the proper office of the Prætor was *judicium nobile*. This diſtinction hath been retained, under the ſame ſignification, where the Roman law hath any reſpect, but not under the ſame terms; and therefore with us, the proper terms are *officium nobile* and *officium ordinarium*: ſo that the juriſdiction of inferior courts is not mercenary, but yet hath not the *officium nobile*, which is extraordinary; and therefore they muſt keep their ordinary form of proceſs, and if they do debord, their ſentences do become null.

The Lords of Seſſion have both the *officium ordinarium* and *nobile*. For it is only in ſome caſes, that they may proceed, not according to the ordinary forms, which cuſtom hath determined, for any caſe which hath formerly occurred: (but in new caſes, there is neceſſity of new cures, which muſt be ſupplied by the Lords, who are authorized for that effect by the inſtitution of the College of Juſtice). And if they might in other caſes extend their *officium nobile*, it would render the ſubjects unſecure, and the power of the Lords too arbitrary. But, in many caſes, it is neceſſary wherein they may have recourſe from ſtrict law to equity, even in the matter of judgment; and in more caſes they may recede from the ordinary form and manner of probation, whereof there are many inſtances commonly known.

Every ſovereign court muſt have this power, unleſs there be a diſtinct court for equity, from that for law, as it is in England, where the judges of the court of

of common pleas judge all according to the rigour of law, and ſo they cannot modify the moſt exorbitant penalties, nor give remedy but by the tenor of their known brieves; which being found highly inconvenient, their Kings at firſt aſſumed to themſelves, to remedy the inconveniency, which they found the common law defective in, either by want of forms, or want of power to qualify theſe exorbitances, that were inconſiſtent with equity, and a good conſcience: but theſe caſes multiplying, and many pretending unwarrantably to them, the King could no longer diſpatch them in his own perſon, but gave that power to the Chancellor, with the aſſiſtance of twelve maſters of the Chancery. And there are ſince ſeveral courts of equity and conſcience, ſet up by authority of Parliament. Other nations do not divide the juriſdiction of their courts, but ſupply the caſes of equity and conſcience, by the noble office of their ſupreme ordinary courts, as we do.

II. The Seſſion comes neareſt to the prætorial power, which did ſupply what was wanting by their common law of the twelve tables, or by their recent law, made by the ſuffrage of the people, or by the ſuffrage of the Plebeians, or of the Senate, or by their ſtrict forms of actions at firſt, or thereafter by their ſtrict obſervance of the kinds of actions, tho' not of the preciſe words; yea, they had power to correct the extremity of theſe laws, and ſo they accounted *ſummum jus, ſummam injuriam.* We ſhall only give ſome inſtances of the *nobile officium* of the Lords of Seſſion.

Firſt, They modify exorbitant penalties in bonds and contracts, even tho' they bear the name of liquidate expences with conſent of parties, which neceſſitous debtors yield to; theſe the Lords retrench to the real expences and damage of parties [d]: yet theſe clauſes have this effect, that the Lords take ſlender probation of the true expences, and do not conſider whether they were unneceſſary or not, ſo that they exceeded not the ſum agreed upon; whereas, in other caſes, they allow no expences, but what is neceſſary or profitable.

Secondly, When the advantages of legal execution are exorbitant, eſpecially in appriſings and adjudications, when the queſtion is in that which may make the legal expire, the Lords do ſtrictly judge the nullities and informalities, and extend the profits received by theſe rights, to this equitable effect only, that they be not perpetually redeemable, or require a new legal; but they determine a leſſer time, in which the ſame may be redeemable. And if there be no hazard of the legal, they ſuſtain theſe diligences as redeemable ſecurities, altho' there be many nullities and informalities therein, if there be not a more formal right in competition.

Thirdly, The Lords, in the reduction of their own decreets *ex nobili officio*, do paſs over nullities and informalities, where they ſee nothing wanting in material juſtice: but if any defect be in material juſtice, they do moſt ſtrictly judge all informalities and nullities for opening the decreet, that any thing eſcaping in material juſtice may be amended, as is more ordinary in interlocutors.

Fourthly, By our moſt ancient cuſtom there was no legal remedy for payment of debt, but by poinding of moveables, whereby creditors had warrant to poind the goods of their debtors, yea all the goods upon their ground, tho' not belonging to themſelves, but to others, till that excellent ſtatute, *Parl.* 1469, *cap.* 36. which both ſhows the diſeaſe, that tenants goods were by the brieff of diſtreſs or poinding, taken for their Lord's debt, without limitation, and alſo provides a cure; for by that ſtatute it is limited only to their moveables, where their mail extends to the avail of the debts, or at leaſt to their current term's mails or duties, albeit the term be not come. By this ſtatute appriſing of the debtor's lands is introduced; which thereafter was not only made effectual againſt the debtor infeft, but alſo againſt his apparent heir not being infeft, but being charged to enter heir, if he did not renounce to be heir: yet no ſtatute did provide a remedy in caſe the apparent heir renounced; which therefore the Lords, *ex nobili officio*, ſupplied, by adjudging

[d] See above, III. 2. 32.

adjudging the lands, either for the debt of the defunct, or for the debt of the apparent heir.

Fifthly, When diſpoſitions were granted of lands or annualrents in property or liferent, but without precept of ſeiſin, or procuratory of reſignation, ſo that ſuch diſpoſitions became ineffectual, the Lords introduced another kind of adjudication, adjudging the lands or annualrents from the diſponer to the purchaſer, he having firſt uſed the ordinary remedy by horning.

Sixthly, The Lords, by their ordinary office, cannot take away writ by witneſſes; yet where there are many concurring evidences, tho' not full probation, the Lords *ex officio* examine witneſſes *ad rimandam veritatem*, without diſcuſſing the relevancy till probation were ended; and if, at adviſing of the probation and other evidences, they find them pregnant, they do ſuſtain them probative; and ſo truſts are diſcovered *, and retiring of writs lying by defuncts uncancelled, and oft-times with blank aſſignations or diſpoſitions: and all manner of frauds are found out this way, which cannot otherwiſe be found out.

Seventhly, The Lords do frequently make acts for probation before anſwer to the relevancy, which is only *ex nobili officio*, and may alone be uſed, when there is eminent hazard to carry away moſt important rights by two pickt-out witneſſes; as when the queſtion is of deeds done on deathbed [e]. For the ordinary exception is health or convaleſcence, evidenced by going to kirk and market; and the reply is, that theſe evidences were done of deſign, and nature violented, and could not fully make out the attempt, but that the party was ſupported, or that it was evident the ſickneſs was continued; in this caſe two witneſſes choſen by the defender, would carry to him the greateſt eſtate; or two witneſſes choſen by the purſuer, might both prove the ſickneſs and ſupport, and ſo carry the eſtate to him: To prevent which, the Lords do not allow contrary probations in theſe points, to be adduced by the ſeveral proponers, but do allow either party to adduce a certain number of witneſſes, not exceeding ſuch an equal number, to be examined upon theſe points, "What was the condition of the defunct, "when he ſubſcribed the diſpoſition in queſtion? Whether he went to kirk and "market after? And whether he went freely, none touching him? Or if he was "helped or ſupported? And what evidence there was of the continuance of his "ſickneſs upon him?" The like is done when the queſtion falls concerning deeds *in confinio majoris ætatis*, being queſtioned upon minority and leſion, and in ſuch others. Upon the ſame grounds the Lords did prohibit the judge of admiralty to make any act before anſwer, in a proceſs of adjudication of a ſhip, for clearing who was the owner, and what was the port, *June* 12. 1673, *Captain Gilles*; *Dec.* 17. 1673, *Captain Stuart* **.

III. Let us now return to the exerciſe of the juriſdiction of the Seſſion, wherein it is to be conſidered, the matter of their juriſdiction and the manner of it. As to both, it will be fit to conſider the moſt ancient manner of cognition of cauſes in this kingdom, and what alterations were therein, till both matter and manner were finally ſettled by the inſtitution of the College of Juſtice.

Firſt, By the 45th act, *Parl.* 1424, it is clear, that all complaints were to be decided before the judge-ordinary, as they then were, in theſe terms: "Anent bills "of complaint, whilk may not be determined by the Parliament, for diverſe cauſes "belonging to the common profit of the realm, it is ordained, that the bills of com-"plaint be execute and determined by the judges and officers of the courts "whom to they pertain of law, auther juſtice, chamberlain, ſheriffs bailies of "burrows, barons, or other ſpiritual judges: and gif the judges refuſe to do the "law evenly, the party complaining ſhall have recourſe to the King, who ſhall "ſee rigorouſly puniſhed ſuch judges. But by the 65th act, *Parl.* 1425, the "Seſſion

* Truſt can now be proved, only by writ or oath of party, P. 1696, c. 25.

** By the preſent practice the relevancy is generally left undetermined, till both parties have brought their proof before anſwer.

[e] See below, IV. 20. 48.

« Seſſion was erected to examine, conclude, and finally determine all and ſun-« dry complaints, cauſes and quarrels, that may be determined before the King « and his Council." The power of the Lords of Seſſion is further cleared, *Parl.* 1457, *cap.* 61. and the manner of bringing cauſes before them by the ſame *Parl.* *cap.* 62. But all actions were firſt to be purſued before the judges-ordinary, *Parl.* 1487, *cap.* 105. The way of bringing actions from the judge-ordinary to the Seſſion, was by a ſummons of error, which is the ſame with a reduction; but it mentions the quarrelling the verdict of the inqueſt, and ſo relates not to civil cauſes, but to criminal, wherein the great inqueſt of forty five recognoſced the verdict of the ordinary inqueſt. But becauſe the Seſſion was not appointed to ſit conſtantly, a daily Council was erected, with the ſame power that the Lords of Seſſion had, *Parl.* 1503, *cap.* 58. And the way of bringing proceſſes before that Council, was only in the firſt inſtance: for appeals, or falſing of dooms, and the order thereof in all caſes, is determined in that ſame Parliament, *cap.* 95. but they come never to that Council, but to other delegates to be named by the King: and thus it continued till the inſtitution of the College of Juſtice by King *James* V. after which all appeals ceaſed, and in place thereof came advocations, ſuſpenſions, and reductions of decreets.

IV. King *James* I. having been eighteen years priſoner in England, being taken as he *was going to* France, he underſtood the courſe of juſtice in both theſe kingdoms, and was the inſtituter of the Seſſion, and of inſtruments of ſeiſin: he did alſo inſtitute the forms of all ſummonſes, which, for their comprehenſion of much in few words, were called brieves; and he erected a chapel or chancery, and gave them the *formula* of all theſe brieves, as the ſame were uſed in England, which every one took out in courſe, without any ſpecial warrant. The chief brieves were the brieve of right, whereby the right both of property, ſuperiority, annualrent, and liferent were determined; and the brieve of diſſeaſing, whereby the point of poſſeſſion was decided, and ſecured againſt all attempts of diſpoſſeſſion. The ſame courſe by brieves doth yet continue in England, in the courts of law, and are directed to the ſheriffs to be executed; but becauſe it was not poſſible to reach all ſpecial caſes by theſe brieves, purſuers were allowed to join therewith declarations of their own, extending the general heads of the brieves to their particular circumſtances, which muſt alſo have been ſo with us. But by the inſtitution of the College of Juſtice, clerks to the ſignet, now called writers to the ſignet, were inſtituted as a part of the ſaid College; and then all the brieves of the chancery fell in deſuetude, except thoſe which yet remain, which are ſtill directed, and only to be ſerved by ſheriffs, ſtewards, bailies of royalty or regality: and in place of the reſt of the brieves, ordinary ſummonſes were introduced by the ſtiles accuſtomed by the writers to the ſignet, and ſuſtained by the Lords, and were directed to ſheriffs in that part, having a blank for inſerting the name of any perſon the purſuer pleaſed, who thereby was ſubſtitute in place of the ſheriff; and they behoved to be continued, and entered into a roll or table, dividing the ſeveral cauſes for every day in the week, and for the four quarters of the kingdom. And becauſe ſome ſummonſes required more ſpeedy diſpatch, therefore the writers could make no alteration in theſe points, but did addreſs to the Lords by bills, and did obtain warrant from the Lords for ſummons, diſpenſing with ſome or all of theſe requiſites, which therefore were called privileged ſummonſes, and they bear at the end of the ſummons, *Ex deliberatione Dominorum Concilii.* And likewiſe ſuch ſummonſes paſſed upon bill, as were of a ſpecial nature, not comprehended in the ordinary ſtile; which at firſt were peruſed and conſidered by the ordinary on the bills, and paſſed if they were found relevant; but being exceedingly multiplied, they paſſed in courſe upon the truſt of the writers and clerk to the bills, that no bill paſs but what is accuſtomed; and therefore they paſs only *periculo petentis.*

V. The brieves which are now taken out of the chancery are of two ſorts, retoured and not retoured. The brieves for ſerving of heirs are returned to the

chancery, after they are ſerved by the judge-ordinary, and are regiſtrate and kept there, and extracts thereof granted, which are therefore called retours. Theſe brieves require no citation of particular parties, but are ſerved by a publick citation at the market-croſs of the head-burgh of the ſhire, or other juriſdiction, upon fifteen days warning. The heads and meaning of theſe brieves are explained, *tit. heirs*, § 28.——41. And there muſt be called an inqueſt, whoſe ſentence is called a ſervice, which is retoured to the chancery. The tenor of the brieve is this, "CAROLUS, &c. vicecomiti et balivis ſuis de, &c. ſalutem, Mandamus "vobis et praecipimus, quatenus per probos et fideles homines patriae, per quos "rei veritas melius ſciri poterit (magno ſacramento interveniente) diligentem et "fidelem inquiſitionem fieri faciatis, de quibus terris et annuis redditibus cum "pertinen. quondam A. B. de G. pater C. D. latoris praeſentium, obiit ultimo "veſtitus et ſaſitus ut de feodo, ad fidem et pacem noſtram infra balliam veſtram? "Et ſi dictus C. D. eſt legitimus et propinquior haeres ejuſdem quondam A. B. "ſui patris de dictis terris et annuis redditibus cum pertinen.? Et ſi ſit legiti-"mae aetatis? Et quantum valent dictae terrae et annui redditus nunc per an-"num? Et quantum valuerunt tempore pacis? De quo tenentur? Per quod "ſervitium tenentur? Et in cujus manibus nunc exiſtunt? Qualiter? Per quem? "Ob quam cauſam? Et à quo tempore? Et quod per dictam inquiſitionem dili-"genter factam, eſſe inveneritis, ſub ſigillis veſtris et ſigillis eorum qui dictae in-"quiſitioni intererunt faciendae, ad capellam noſtram mittatis, et hoc breve. "Teſte meipſo. Apud Edinburgum, decimo quarto die menſis Julii et anno regni "noſtri decimo quarto, 1662."

VI. The ſecond retourable brieve is the brieve for ſerving tutors of law, which is retoured to the chancery, and thence there is a nomination taken out deſigning the tutor of law [e]. The tenor of this brieve is as follows: "Vicecomiti et balivis "ſuis de, &c. ſalutem, Mandamus vobis et praecipimus, quatenus per probos et "fideles homines patriae, per quos rei veritas melius ſciri poterit, (magno ſacra-"mento interveniente) diligentem et fidelem inquiſitionem fieri faciatis, quis ſit "propinquior agnatus, id eſt conſanguineus ex parte patris dilecto noſtro B. filio "legitimo quondam A. ſui patris? Et ſi ille propinquior exceſſit aetatem viginti "quinque annorum completam? Et ſi ſit ſui rei providus, et potens cavere idoneè "de adminiſtratione rei alienae? Et ſi illa propinquior ſit immediate ſucceſſurus "ipſi B. ſi ipſum contigerit in fata decedere? Et ſi ſit; quis tunc ex parte ma-"tris idoneor, apud quem, uſque ad ejus legitimam aetatem, poſſit et debet edu-"cari? Et quod per dictam inquiſitionem diligenter factam, eſſe inveneritis, ſub "ſigillis veſtris et ſigillis eorum qui dictae inquiſitioni intererunt faciendae, ad ca-"pellam noſtram mittatis, et hoc breve. Teſte meipſo. Apud Edinburgum, &c."

VII. The third retourable brieve is the brieve of idiotry, which is a ſpecial kind of brieve of tutors of law; for thereby ſuch tutors are ſerved to idiots, or furious perſons, as are their neareſt agnates, paſt twenty five years of age. The tenor of this brieve is as follows: "Vicecomiti et balivis ſuis de E. ſalutem, "Mandamus vobis et praecipimus, quatenus per probos et fideles homines pa-"triae, per quos rei veritas melius ſciri poterit, (magno ſacramento interveniente) "diligentem et fidelem inquiſitionem fieri faciatis, ſi B. ſit incompos mentis, fatu-"us et naturaliter idiota, ſic quod timetur de allienatione tam terrarum ſuarum, "quam aliarum rerum mobilium et immobilium? Et quamdiu ſuſtinuit iſtam fa-"tuitatem? Et ſi ſit, quis ſit tunc propinquior conſanguineus dicto B? Et ſi ille "propinquior ſit ſuae rei providus, et potens cavere idoneè de adminiſtratione rei "alienae? Et ſi ſit legitimae aetatis? Et quod per dictam inquiſitionem diligen-"ter factam, eſſe inveneritis, ſub ſigillis veſtris et ſigillis eorum qui dictae in-"quiſitioni intererunt faciendae, ad capellam noſtram mittatis, et hoc breve. Teſte "meipſo. Apud Edinburgum, &c."

But if the party be furious, the brieve bears to inquire, "Si ſit incompos men-"tis, prodigus et furioſus, viz. Quod neque tempus neque modum expenſarum "habet,

[e] See above, l. 6. 9.

" habet, ſed bona et poſſeſſiones dilacerandas et diſſipandas profundit, et quam-
" diu ſuſtinuit illam furioſitatem? &c."

This brieve is retoured to the chancery, and thereupon a nomination of the tutor is given out.

VIII. On theſe three retourable brieves there are iſſued decreets of the chancery. On the firſt brieve the retours of heirs are decreets of the chancery, and upon them follow precepts commanding the ſuperior to receive and infeft the heirs conform to their retours, when the retours contain lands or annualrents. And upon the executions thereof, if obedience be not given, there are ſubſequent precepts for making the firſt effectual, as is explained, *tit. heirs.*

IX. The nominations of the tutors on the brieves of tutory and of idiotry, are the decreets of chancery, but have no precepts following thereon; theſe nominations being the titles whereby theſe tutors act. In all theſe decreets and precepts, the King himſelf decerneth and commandeth immediately, without a ſubordinate judge.

The difference between the brieves and nominations of ordinary tutors of law, and thoſe of idiots or furious perſons, are theſe; the ordinary tutory inquires, " Who is the neareſt agnate of twenty-five years compleat? And if he be fit for " adminiſtration, and to find caution?" which is the firſt head of the brieve. The next is, " If he be neareſt to ſucceed, and who is the moſt fit perſon on the " mother ſide, with whom the pupil may be educated?" But in the brieve of idiotry, the firſt head is, " Whether the perſon be *compos mentis*, *fatuus*, or a na-
" tural idiot, and that there is ground of fear that he may alienate his lands or " goods?" Whereby not only idiots, but any uncapable to manage their affairs, as perſons dumb or deaf, are to be underſtood. The next point of the brieve is, " How long the party hath been under that incapacity?" For deeds only done in that time are void. The third point is, " Who is the parties neareſt agnate " of lawful age?" (which is not to be underſtood by his majority, but by his being twenty-five years compleat) " and if he be fit to adminiſtrate the affairs of " another, and able to find caution?" Therefore the nominations are not to be given out to either of theſe tutors, till ſufficient caution be found. But in the brieve of idiotry, that article is not expreſſed, " Whether the tutor be neareſt " heir; and that if he be, a perſon be nominate for cuſtody;" which therefore the Lords ought to ſupply, as having the Prætorian power.

X. The brieves not retourable, are four, which are not decreets, but precepts directed to ſheriffs, *&c.* who thereupon cite parties, and hear and determine: and therefore they are called pleadable brieves; becauſe particular parties are called ſpecially, and not generally only at the market-croſs, as in the other brieves; wherein yet parties may appear tho' not called, and may plead ſo far as they can inſtantly verify, either by objections againſt the brieves and executions, or by exceptions inſtantly verified; but tho' none appear, they are not contumacious, neither doth an executorial follow by horning and poinding, as in other decreets.

XI. The firſt of theſe unretourable brieves, is the brieve of terce, whereby a relict is to be ſerved to a third part of the tenements, wherein her huſband died laſt veſt as of fee [f]: it is a warrant to the ſheriff, ſtewart, or bailie, where her huſband's lands ly, to call an inqueſt, and therewith to cognoſce what lands or annualrents the huſband had the time of his death; and to aſſign her a reaſonable terce thereof, which ſhe may either crave to be kenned, that is, to be divided from the two thirds belonging to the heir, or otherwiſe ſhe may bruik the third of the rent, until the diviſion be made. The tenor of this brieve is as follows: " Vi-
" cecomiti, &c. ſalutem, Mandamus vobis et praecipimus, quatenus dilectae
" noſtrae B. relictae quondam A. latrici praeſentium, haberi faciatis rationabi-
" lem tertiam partem ſuam, de omnibus et ſingulis terris et annuis redditibus
" cum pertinen. quae et qui fuerunt dicti quondam A. ſui mariti haereditarie,
" infra

[f] See above, II. 6. 13.

" infra balliam veſtram, quas et quos de nobis tenuit in capite, et de quibus obiit
" ultimo veſtitus et ſaſitus ut de feodo. Tantum inde facien. quod pro veſtro
" defectu, amplius inde juſtam quaerimoniam non audiamus. Teſte meipſo.
" Apud, &c."

In the ſerving of this brieve, all muſt proceed according to what was holden and reputed, *viz.* That the relict was holden and reputed as lawful wife in the husband's lifetime, and that the matrimony was not accuſed in their lifetimes, *Parl.* 1503, *cap.* 77. yet the contrary may be proved, by way of declarator or reduction before the Lords. The ſervice muſt alſo bear, that the huſband is reputed to be dead, and at what time; that thereby the relict may have right to the profits of the terce, from the next term after her huſband's death; it is alſo ſufficient to inſtruct, that the huſband died in poſſeſſion of the lands in queſtion, and was holden and reputed heritable poſſeſſor thereof, albeit it will be ſecurer againſt reduction, that the ſeiſin be produced; yet his poſſeſſion as heritable poſſeſſor muſt be known.

XII. The ſecond unretourable brieve, is the brieve of diviſion, whereof the tenor follows: " Salutem, Mandamus vobis et praecipimus, quatenus totas et in-
" tegras terras de, &c. cum pertinen. jacen. infra balliam veſtram; inter *A.* ex
" parte una, et B. ex parte altera, portionarios dictarum terrarum, juſte et ſe-
" cundum aſſiſam terrae contingentem, partiri faciatis. Tantum inde facien.
" quod pro veſtro defectu amplius inde juſtam quaerimoniam non audiamus.
" Teſte meipſo, &c."

The portioners are ſuch as bruik *pro indiviſo*, whether they be heirs-portioners, or portioners by appriſing or adjudication, or if there be divers tercers, who have not been kenned to a particular diviſion; for, in that caſe, the brieve of terce, is not the competent way of diviſion, for that is only competent between the tercer and the heir.

XIII. The third unretourable brieve, is the brieve of lining, which is of this tenor: " Praepoſito et Ballivis burgi de, &c. ſalutem, Mandamus vobis et prae-
" cipimus, quatenus pro duodecim de melioribus et fide dignioribus burgenſibus
" dicti burgi, per quos rei veritas melius ſciri poterit, (magno ſacramento inter-
" veniente) juſte et ſecundum leges burgi, lineari faciatis tenementum terrae
" Jacobi *A.* jacen. in dicto burgo ex parte Boreali viae Regiae ejuſdem, inter te-
" nementum terrae Joannis B—— ex parte orientali, ex una parte; et tenemen-
" tum terrae Davidis C. ex parte occidentali, ex altera parte; et ſicut dictum
" tenementum terrae per dictos lineatores lineatum fuerit, ita illud de cætero
" firmiter faciatis obſervari. Tantum inde facien. quod pro veſtro defectu am-
" plius inde juſtam quaerimoniam non audiamus. Teſte meipſo, &c."

XIV. The fourth unretourable brieve, is the brieve of perambulation, which is for clearing controverted marches, and is of this tenor: " Vicecomiti, *&c.* ſa-
" lutem, Mandamus vobis et praecipimus, quatenus per probos et fideles ac an-
" tiquiores homines patriae, juſte et ſecundum aſſiſam terrae, perambulari faci-
" atis rectas metas et diviſas, inter terras de, &c. cum pertinen. quae ſint *A.* ex
" parte una; et terras de, &c. quae ſunt *B.* ex parte altera, jacen. in baronia
" de, &c. et infra balliam veſtram. Et ſicut dictae diviſae et metae juſte et
" ſecundum aſſiſam terrae perambulatae fuerint, ita eas de caetero firmiter faci-
" atis obſervari. Tantum inde facien. &c. Teſte meipſo, &c.

But though the brieve bear generally *pro probos et fideles homines patriae*, which might extend to any man of the kingdom; yet it is ſtatute, *Parl.* 1579, *cap.* 79. That in all time thereafter, in cauſes of perambulation, no perſons be received upon the inqueſt thereof; but thoſe who have heritage of their own, and dwell maiſt eweſt the ſame, to wit, within the ſheriffdom where the lands lie; or (if they may not be had within that ſhire) then within the four next adjacent ſhires, unleſs the marches be inſtructed by bounding charters, or other evidences in writ.

XV. All

XV. All theſe brieves muſt be ſerved with inqueſts, and ſo cannot be ſerved before the Lords in the firſt inſtance; and though the brieves may be advocated, yet they muſt be remitted unto ſheriffs, to wit, the ordinaries, if the reaſons of advocation be not ſuſtained; or to others in their place, if the reaſons be ſuſtained: in which caſe brieves for ſerving heirs, are accuſtomed to be remitted to the macers and aſſeſſors, if any difficulty ariſe; and ſo may the brieves of idiotry.

XVI. There remains yet in the Chancery, a brieve for calling the Parliament, which was the ordinary way of calling the ſame; but ſince, it hath been accuſtomed to be called by publick proclamation. The tenor of that brieve is this: "Jacobus Dei gratia Rex Scotorum, Vice-comiti, et ballivis ſuis de Argyle, ſalutem, quia ordinavimus Parliamentum noſtrum tenendum apud Edinburgh, et Inchoandum die Sabbati, octavo die menſis Julii proxime futuri, cum continuatione dierum; vobis praecipimus et mandamus, quatenus ſummoneatis, ſeu publicè ſummoneri faciatis, omnes et ſingulos epiſcopos, abbates, priores, comites et barones ac caeteros libere tenentes totius balliae veſtrae; et de quolibet burgo, tres vel quatuor de ſufficientioribus burgenſibus, ſufficientem commiſſionem haben. quod compareant coram nobis, dictis die et loco, in dicto noſtro Parliamento, una cum aliis regni noſtri praelatis, proceribus et burgorum commiſſariis, qui tunc ibidem propter hoc intererunt congregati; ad tractandum, concordandum, ſubeundum et determinandum ea quae in dicto noſtro Parliamento, pro utilitate regni noſtri et reipublicae, tractanda fuerint, concordanda, ſubeunda et determinanda: et vos vicecom. ſitis ibidem dicto die, haben. vobiſcum ſummonitionis veſtrae teſtimonium, et hoc breve: et hoc ſub poena quae competit in hac parte, nullatenus omittatis. Datum ſub teſtimonio noſtri magni ſigilli. Apud Halie-rude-houſe decimo quinto die menſis Maii, anno regni noſtri viceſimo 1587.—Vice-comiti et ballivis ſuis de Argyle. Pro Parliamento."

XVII. There is another diſtinction of brieves into theſe that are pleadable, and theſe that are not pleadable. Pleadable brieves are theſe, that require particular citation, as is the brieve of diviſion, and as was the brieve of right and diſſeaſing; for there the defenders were ſpecially cited, and might propone defences, and get terms to prove: but there are other brieves which now remain, that are called not pleadable, becauſe they admit no terms to prove; yet any concerned may propone any objection againſt the brieves and executions, or any exception that can be inſtantly verified.

XVIII. If the judges, to whom theſe brieves are ordinarily to be directed, be concerned in the cauſe, or in near relation to the parties concerned, or in enmity againſt them; the Lords will advocate the brieves to the macers, or others as ſheriffs in that part; or if brieves be to ſerve heirs to lands in divers ſhires, they will cauſe the brieves be directed to the macers; and in caſe of intricacy therein, or in other brieves advocated, they will appoint ſome of their own number to be aſſeſſors, who will report any difficult point to the Lords, and proceed by their direction.

XIX. Before we come to ordinary actions before the Lords, it is fit to explain what is meant by thoſe terms which ordinarily occur, *viz.* a cauſe, an action, a proceſs, an inſtance, and a plea. A cauſe is the right to be diſcuſſed and determined, ſo called, becauſe it is the cauſe of all the reſt; for thence an action doth ariſe, a proceſs doth proceed, or an inſtance, and a plea.

XX. An action is defined by *Juſtinian*, to be *jus perſequendi in judicio quod ſibi debetur*; about which there are many debates, eſpecially why an action ſhould be defined a power to proſecute, it being rather a proſecution of a power; for all right is comprehended in ſome kind of power: or how it ſhould be ſaid to be for proſecution of that which is due, which would rather import perſonal actions only, and can hardly be ſtretched to all real actions: neither doth an action extend only to what is done in judgment; for he who uſeth citation of courſe, without any particular warrant, is in action, but is not in judgment, till the de-

fender be called by the judge to appear. But an action may be more plainly deſcribed, to be "a proſecution by any party, of their right, in order to a judicial "determination thereof:" and ſo it is begun by taking out a ſummons or brieve of courſe, or an application by bill for obtaining a ſummons, and is not terminate till a final ſentence be obtained, and execution thereupon, when the ſentence is condemnatory.

XXI. A proceſs is, "an action ſuſtained by a judge, that thereupon either an "act or definitive ſentence may follow;" for all dilatory exceptions are proponed in theſe terms, no proceſs for ſuch a cauſe; and therefore an action not ſuſtained cannot be a proceſs; though, in vulgar acceptance, any ſummons when but called by a clerk, and appointed to be ſeen, is called a proceſs.

XXII. An inſtance is, "that which may be inſiſted in at one diet or courſe of "probation," whether it be inſtantly verified at the firſt calling, or a term be aſſigned to prove: for, whatſoever cannot be proved at that term, cannot be in that inſtance, ſeeing there cannot be more acts of litiſconteſtation than one, for obtaining one decreet: and if there be in the ſame ſummons more points, which cannot be proved at the ſame diets, the libel doth contain many actions, upon which many acts and decreets will proceed at divers times.

XXIII. A plea contains more than one proceſs, *viz.* all that is done until the parties do fully acquieſce and inſiſt no further: therefore, if a decreet be ſuſpended, or reduction intented, the plea is not ended, but is ſtill depending from the firſt judicial act, where the defender doth, or ſhould appear, till the parties acquieſce. But a ſupplication or citation doth not make the dependence of a plea, but the intention thereof; and ſo an action is ſaid to be intented and depending.

XXIV. Actions before the Lords of Seſſion, are either in the firſt or ſecond inſtance. An action in the firſt inſtance, is either ſummary or ſolemn. A ſolemn action is that which proceeds expreſsly in the King's name, and hath no execution till parties be heard, or be contumacious. And ſo a ſummary action is that which wants theſe ſolemnities.

XXV. A ſummary action is of two ſorts; the firſt is that which paſſes by a bill and a citation thereupon by an order of the Lords, without paſſing the ſignet; ſuch are complaints againſt members of the College of Juſtice, eſpecially in that which concerns their employment and truſt. Such alſo are complaints upon contempt of the Lords authority; as when parties proceed to execution, where there is a ſtop or ſuſpenſion given, or where an inferior judge proceeds after an advocation duly intimated; or, when the Lords appoint reaſons of advocation, or the principal cauſe to be diſcuſſed upon the bill; or, when a cauſe is ordained to be diſcuſſed upon a bill of ſuſpenſion. Theſe, and generally all complaints *ſuper attentatis aut innovatis lite dependente*, proceed by bill and deliverance, without a ſignet ſummons, and go not to the roll; nor is there any further time to ſee, but, upon the ſight of the bill and deliverance, the party is to anſwer at the next calling; and ſo the matter is diſcuſſed by the ordinary upon the bills, or ſummarily *in præſentia*, if the matter be important or atrocious.

The other kind of ſummary actions, is, when a charge of horning is obtained upon a bill without citation or ſentence; ſuch are hornings granted ſummarily by ſtatute or cuſtom. By ſtatute, ſeveral acts of Parliament ordain letters of horning to be direct ſummarily; ſo horning is direct againſt liferenters, to uphold the liferent-lands and tenements, in the caſe they received them; ſo heritors of a pariſh are ſummarily charged to meet and ſtent themſelves for building or repairing kirks, or kirk-yard dykes. By cuſtom, charges of horning are granted in ſeveral caſes; as, 1. For the King's revenue of whatever kind. 2. For payment of the commiſſioners to Parliament. 3. For payment of the Lords of Seſſion their contribution-money out of the ſeveral benefices.

Theſe hornings are called general letters, becauſe the particular perſons which may be charged, are not particularly expreſſed *nominatim*, but under a general deſignation. But ſuch as are not authorized by ſtatute, or antient cuſtom, had no

no effect, but for obtaining caption, for thereby eſcheat did not fall. And becauſe too many of theſe general letters were ſurreptitiouſly obtained, they are diſcharged by ſeveral acts of Parliament, and moſt ſtrictly by the 13th act, 2d *Seſſ. Parl.* 1690: wherein the King's revenue, and miniſters ſtipends upon decreets of locality, are only excepted; and decreets of poinding the ground are left as before. Yet there may be letters of horning ſummarily granted for commiſſioners charges, upon production of the atteſt of the clerk-regiſter, of their attendance, and of the atteſt of the collectors of ſupply, of the valuation of the particular heritors and liferenters in the ſhire. Letters may be alſo ſummarily directed, for the contribution-money, againſt the particular perſons accuſtomed to pay the ſame [z]: neither can the late act annul the general letters, warranted by the particular ſtatutes, to which this late act bears no derogation.

XXVI. The ordinary ſolemn ſummonſes are ſuch as are intented before the Lords, in the firſt inſtance, and theſe are called ordinary actions, in diſtinction from the cauſes which come before the Lords, in the ſecond inſtance, by advocation from inferior courts, before decreets, or by ſuſpenſion or reduction, after decreets either of the Lords themſelves, or of inferior courts, or of cauſes firſt intented before the Parliament, and by them remitted to the Lords, or of actions remitted by the Privy Council to the Lords, which are found to concern the point of right, wherein the Lords of Council decline themſelves, and therefore oblige not the Lords to diſcuſs them; yet, where the Council in matters of riot doth demur, till the matter of right be firſt cleared, the Lords uſe ſummarily to diſcuſs the point of right, upon recommendation of the Council.

XXVII. Ordinary actions proceed not by brieves, but by larger ſummonſes, which therefore are called libels. They are called ſummonſes, *à ſummonendo*, becauſe the executions thereof advertiſe the defenders to appear, and anſwer thereto, at the terms therein preſcribed. Theſe executions are alſo called citations, *à citando*, becauſe they haſten the defender's appearance; which name ariſes from the antient Roman way of citing parties; when the complainer, without authority from a judge, required his party to appear before a judge, who might hear and determine their controverſy; and if he refuſed, he might compel him, if he had ſufficient ſtrength and aſſiſtance for that effect. But this courſe hath been long ſince laid aſide, as being apt to beget breaches of the peace; and, in place thereof, ſummonſes by aparitors have ſucceeded, wherein there muſt be ſome certification, which may rather induce the perſon ſummoned to appear, than to fall under theſe juſt penal conſequences upon their contumacy. Theſe penal conſequences being declared by the tenor of the ſummons, are therefore called certifications, becauſe the judge doth aſcertain the party called, and not compearing, what he will do in that caſe.

XXVIII. A certification is neceſſary in all ſummonſes, for it is the ſting that gives them efficacy, without which they would be eluſory; yet the certification is not alwiſe the equivalent of what is demanded by the ſummons, but is partly penal, exceeding what is demanded in this, that ſummonſes do alwiſe bear or import, that the party is cited to hear and ſee it found and declared, or ſufficiently inſtructed, or to be proved, what in fact is alledged, and whence the concluſion in law is inferred, but yet the certifications do oft-times proceed without any probation.

XXIX. The great certification in the Roman law, in real actions, was by their *primum decretum*, whereby the purſuer was put in poſſeſſion of the right he claimed, without any probation, and did enjoy the fruits thereof, till the contumacious party did recover the ſame by way of action; wherein if he ſuccumbed, the ſecond decreet excluded him for ever. The common certification in ſummonſes or brieves, by the cuſtom of England, is, that the party cited, and not compearing, ſhall be out-lawed, whereby he has no more benefit of law, till

[z] See above, III. 3. 13.

till the contumacy be purged: but no ſentence in the cauſe can proceed by their common law, till the party purſued be ſiſted in judgment before the judge and jury.

XXX. The courſe which our cuſtom did of old follow againſt contumacious parties, was this. By the firſt citation they were condemned in the purſuer's expences, and amerciated in a fine to the King: and by contumacy at the ſecond ſummons, they were again condemned in the purſuer's expences, and a greater unlaw to the King, *viz.* the double of the firſt. And if they continued contumacious at the third citation, they were condemned in the expences to the purſuer, and the quadruple of the firſt amerciament to the King: and then did the judge proceed in the cauſe to do juſtice, and the purſuer was put in poſſeſſion of the lands in queſtion, till he were ſatisfied of his expences, and the King's unlaws were paid; or in the poſſeſſion of moveable goods for year and day; but if the contumacious perſon had not land nor goods, he was to be out-lawed, and put to the horn, *Parl.* 1449, *cap.* 30. This hath been introduced in imitation of the cuſtom of England; but by the ſtatute it was only temporary.

XXXI. Our cuſtom, now paſt memory, hath come to a courſe far nearer material juſtice in civil cauſes; but the Secret Council and Juſticiary ſuſtain no proceſs againſt abſents, but do only grant certification againſt them, declaring them to be fugitives; whereupon they are denounced, and are to be taken by caption, and then the principal cauſe ceaſes, till they be brought perſonally to the bar. But the Seſſion proceeds to do juſtice againſt parties abſent [a], and determine the relevancy of ſummonſes or bills, and admits inſtructions thereof, or gives terms to prove the ſame by writ or witneſſes, and decerns, and puts the decreets to execution; whereby the purſuer enjoys the profits, till by reduction he be put *in mala fide*, by production of a clear probation of the contumacious party's right. But if probation be by oath, whatſoever point is referred to oath by the ſummons, if the contumacious party be cited by a meſſenger of arms, perſonally apprehended; or if latent, vagrant, or in a place where there is no ſafe acceſs, being cited at the market-croſs, and if out of the country, at the market-croſs of Edinburgh, and at the pier of Leith: in any of theſe caſes, if the party cited be abſent, and the days of compearance be paſſed, he is holden as confeſſed; that is, the law preſumes he is conſcious of the truth of the matter of fact referred to his oath, and therefore forbears to appear and depone; and ſo he is holden as if he did depone and confeſs that which is referred to his oath. Hence it appears that in theſe ſummonſes there are two certifications; the one is, that if the party cited appear not, the Lords will proceed to do juſtice, as if he did appear, which is underſtood when the ſummons bears with certification, and when there is no mention of certification it is implied; for it is rather an act of exact juſtice, than a penal certification. The other certification is ſpecial, according to the nature of the ſummons.

There is a third certification of great import, in ſummonſes of reduction and improbation, by which parties call for all writs whereby their rights may be queſtioned, with this certification, that if they be not produced, they ſhall be reputed and holden as falſe and feigned, upon this preſumption of law, that they are kept up fraudulently; for that if they were produced, they would be proved to be falſe and forged, which is *præſumptio juris et de jure*, and admits not of a contrary probation, that thereby men's rights may be ſecured, and an end put to pleas. But this certification operates only as to the effect ſuch writs may have againſt the purſuer's rights, whereupon the proceſs proceeded.

There is a fourth important certification, whereby when parties purſue, and do not inſiſt, the defenders take proteſtation againſt them, that no effect may follow upon that ſummons or charge, till a new citation or charge: but becauſe that would not ſopite the plea, therefore the defenders raiſe a proceſs againſt the former

[a] See below, IV. 38. 27. & 28.

former purſuers, to inſiſt; with certification never to be heard thereafter in that plea.

XXXII. The firſt diviſion of ſummonſes with us, is in privileged and not privileged. Privileged ſummonſes are accounted all ſuch, as require a bill to be paſſed by the Lords, upon ſome ſpeciality. All theſe ſummonſes bear at the end of them, *Ex deliberatione Dominorum Concilii.* The writers to the ſignet are comprehended in the inſtitution of the College of Juſtice, and are authoriſed to expede ſummonſes which had not the accuſtomed brieves of the chancery, wherein their ſtiles by cuſtom came to be known: and they are every year publickly called, and commanded to keep the accuſtomed ſtiles, and are cenſurable if they do it not, the matter and order being always the ſame, tho' they be not tied to particular words, as they are tied in the brieves of the chancery. But if any new caſe be propoſed to them, whereof they have not an accuſtomed ſtile, they ought to preſent the ſame by bill, that the Lords put not parties to trouble, upon grounds altogether irrelevant. Theſe ſummonſes are like the Roman actions, *præſcriptis verbis*, for which there was no name nor form acknowledged in the law, but from ſpecial matters of fact and circumſtances, inferences of law or equity, were deduced, altho' the ſame could be aſcribed to none of the titles of actions in that law; ſuch alſo were their *actiones extraordinariæ:* and therefore, in ſuch caſes, the writers ought always to begin with a deduction of the matter of fact, and thence infer the point of right, and thereto ſubjoin the authority and command. But in unprivileged ſummonſes, the writers ought to begin with the authority and command, as they do in all reductions, and many other ſummonſes. This is too much neglected by long deduction of writs, tho' the matter of fact be clear, and may be ſhort; as when there is a progreſs of aſſignations, intimations and tranſlations, whereby ſummonſes become ſo large, that it is troubleſome and expenſive to give full copies, much to the prejudice of defenders: for thereupon, and upon the defective relations and deductions, where fact is premiſed, ſummonſes come oft to be cut by the advocates, and altered before they be diſcuſſed; whereby the Lords are neceſſitate to admit ſhort copies, and to ſuſtain theſe alterations, which, in ſtrict law, ought not to be admitted *: and therefore advocates were accuſtomed, at the calling of proceſſes, to accept the ſame as proponed, proteſting againſt any alteration, as being either unneceſſary, or as making in effect a new ſummons, ſeeing, as to the alterations, defenders had not time to prepare their defences. But the Lords are ſo careful not to protract proceſſes, that they were accuſtomed to permit executions to be altered, if the alterers would bide by the ſame, as truly done, which now is not to be admitted, when the executors and witneſſes do ſubſcribe, and no alteration can be without all their ſubſcriptions: yea, the Lords do ſometimes turn ſummonſes from one ſtate to another; as actions of contravention are oft-times turned into actions of moleſtation, where the caſes inferring penalties of contravention are not clear: they do alſo ſuſtain charges defective in any formality, as ordinary ſummonſes.

The next ground of privileged ſummonſes paſſing by bill, is where the King hath intereſt; as in all gifts flowing from the King, and in improbations. But the chief ground of bills is, when the ordinary requiſites in ſummonſes, as to diets and tabling of them, conform to the times of the year and quarters of the kingdom, and the days of the week, upon which the ſeveral kinds of proceſſes did proceed, were craved to be diſpenſed with. There is now no neceſſity of a bill on that account, becauſe a new order is introduced by the act of regulation. By bill, warrants were craved for ſummonſes without continuation, and for fewer days than is ordinarily required; and ſeeing theſe bills paſſed of courſe, almoſt all ſummonſes came ſo to be paſſed, wherein the ſecretary's ſervants did concern themſelves, that many bills might remain at the ſignet, upon which ſummonſes were oft renewed.

* By act of Sederunt, *Feb.* 26. 1723, made perpetual by act of Sederunt, *Feb.* 19. 1742, ſummonſes, a few excepted, are appointed to be fully libelled before execution, and full copies to be given with the citation.

XXXIII. For remeding theſe inconveniencies, the Lords, by an act of Sederunt, *June* 21. 1672, did determine what ſummonſes were to be privileged as to the diets, declaring that none ſhould be privileged, either by the Lord's deliverance, or otherwiſe, excepting "removings, recent ſpuilzies, and recent ejections," where, by recent, is underſtood ſuch ſummonſes as are executed within fifteen days after committing of the deeds, "intruſions, and ſucceeding in the vice of perſons removed, cauſes alimentary, exhibitions, ſummonſes for making arreſted goods forthcoming, transferrings, poindings of the ground, wakenings, ſpecial declarators, ſuſpenſions, prevento's and tranſumpts." Of which recent ſpuilzies and ejections, intruſions and ſucceedings in the vice, (which indeed are all ſpuilzies, tho' not of moveables) are privileged on fifteen days warning, and the reſt on ſix days. But they did prohibit any ſhorter diet for the firſt citation, declaring that all other ſummonſes ſhould abide twenty one days warning. And further declared the ſecond ſummons to be always on ſix days, except in proceſſes againſt the inhabitants of Edinburgh and its ſuburbs, who may be ſummoned for the ſecond citation upon twenty four hours. And they declared all theſe to be privileged, whether there were any privilege contained in the ſummons or not; and declared all other privileges paſſing in courſe, *periculo petentium*, to be null.

Since this act, adjudications are by act of Parliament introduced in place of appriſings, which paſs upon one citation, and are privileged upon ſix days, where parties are near; as likewiſe the adjudication of the eſtates of bankrupts, to ſuch as upon roup, do buy the ſame; or to the creditors by diviſion, if buyers be not found to offer a competent price.

XXXIV. Before we come to ſpecial kinds of actions and ſummonſes, with their forms by our cuſtoms, it is fit to give a general view of the diviſions of actions by the Roman law, and their particular actions may come in, as they may confirm or clear the reaſonableneſs of ours. It will be needleſs to ſay any thing of their actions, which relate to ſuch rights as we have not; as the whole matter of ſervitude, libertiniſm, manumiſſion, and patronage, or other ſucceſſion, which was not by their law, but by the Prætor, whereby the ſucceſſors were not called heirs, but *bonorum poſſeſſores*; or of that irrational extention introduced by Juſtinian in the novels, whereby all cognates of the maternal line, were equally brought in with the agnates of the paternal; which, with the actions ariſing thereon, make a great part of the Roman law.

XXXV. The moſt general diviſion of actions by the Roman law, is expreſſed in theſe words, *Omnium actionum, quibus inter aliquos, apud judices arbitroſve, de quacunque re quæritur, ſumma diviſio in dua genera deducitur: aut enim in rem ſunt, aut in perſonam*, § 1. *inſt. de actionibus.* This diviſion is taken from the rights upon which actions are founded, which they divide into dominion and obligation. And to the ſame purpoſe they divide actions in vindication of things, and in condiction of what is due by obligations, *L.* 25. *ff. de obligat. et act.*

XXXVI. They have another diviſion of actions from the authority whence they are allowed or inſtitute: and ſo all actions are either civil or Prætorian. Civil actions are theſe, which ariſe from their civil law, as diſtinct from the Prætorian law. The civil law was the law of the twelve tables; and their *actiones legis* had all exact forms, and there could be no other action but under theſe forms. But theſe were very defective of what was neceſſary, and therefore the Prætor ſupplied the ſame by addition of new actions, which were eſtabliſhed by the *edictum perpetuum*; yet the forms continued both of the old and new actions, until at laſt they were aboliſhed, *Cod. lib.* 2. *tit.* 58. Yet tho' the rigour of words was removed, the ſpecies and tenor of the actions remained, and have particular titles and names, except the action *præſcriptis verbis*, which is a general name.

XXXVII. But becauſe both the civil and Prætorian actions were too narrow; another diſtinction aroſe *inter actiones directas et utiles:* theſe *actiones utiles* aroſe from the parity of reaſon, and were founded upon the reaſon of the law, but not upon the words of it; ſuch are all the *actiones contrariæ*; for inſtance, *actio tutelæ*

tutelæ is *directa*, againſt the tutor, to compt and pay, but *actio contraria tutelæ* is for the tutor, againſt him who was his pupil, for his neceſſary and profitable expences.

XXXVIII. They had alſo another diviſion of actions, *viz.* into thoſe which are *rei perſecutoriæ*, and thoſe which were *pœnales*: The former reached only to the true intereſt of the purſuer, but the latter extended it above the true intereſt, ſuch as are the actions *in quibus inficiando l s creſcit*, in which the double value, and others in which the quadruple value of the true intereſt is decerned.

XXXIX. They have another diviſion of actions into temporary and perpetual; and into thoſe which are competent to heirs, and not competent to heirs, and into thoſe which are competent againſt heirs, and not competent againſt them. They have alſo a diſtinction of actions in ordinary and extraordinary. They diſtinguiſh alſo between ordinary actions, and interdicts which concern poſſeſſion only, and do not proceed wholly upon citation and cognition, but by way of command or prohibition, the diſobedience whereof infers contempt and puniſhment, and the deeds done contrary thereto are annullable.

XL. Of all theſe diviſions and diſtinctions of actions, there is very little uſe by our cuſtoms, except the firſt; and that ſome actions which are of a criminal nature, reach no further than the actors, as vitious intromiſſion which is a general paſſive title, or behaving as heir by intromiſſion with heirſhip-moveables, or with the rents of lands, whereunto the *intromitter* might have ſucceeded, and which are to be proved by witneſſes, ſhould not give action againſt the intromitter's heirs or ſucceſſors, any further than in what the defunct was profited.

XLI. The Romans had another diſtinction of actions, into thoſe which are *bonæ fidei*, and thoſe which are *ſtricti juris*. *Actiones bonæ fidei verſantur in tutelis, fiduciis, mandatis, rebus emptis venditis, actionibus locati conducti, negotiis geſtis, actione depoſiti, commodati, ſignoratitiâ, familiæ erciſcundæ, communi dividundo, præſcriptis verbis quæ de æſtimato proponitur et eâ quæ ex permutatione competit, et in hæreditatis petitione.* The reſt are *ſtricti juris*. The riſe of this diſtinction was from the *formulæ*; all actions which had an exact *formula*, were *ſtricti juris*, and thoſe which had not, were *bonæ fidei*, according to the account given by *Seneca* and *Cicero*. But afterward the *formulæ* being taken away, it was much queſtioned wherein the difference then ſtood. It was clear, that in *actionibus ſtricti juris*, no exception was competent, but that which was proponed in litiſconteſtation; but in *actionibus bonæ fidei*, exceptions were competent thereafter, and might be ſupplied by the judge; thereby alſo annualrent was due from delay, but *in actionibus ſtricti juris*, only from litiſconteſtation. Yet the controverſy remained in the other differences, which is commonly determined, that *in bonæ fidei judiciis*, there are mutual preſtations between both parties, and therefore either party ought ſo to inſiſt, as he would allow his party in the oppoſite action, whereof the judge acted *ex bono et æquo*, as an arbiter; and therefore theſe actions were alſo called arbitrary actions; but he could not ſo proceed *in actionibus ſtricti juris*, which agrees with all the former actions, except *in petitione hæreditatis*, where there are no mutual preſtations, ſave *in familia erciſcunda*; yet *Juſtinian* added that action generally rather by his authority, than by the ſuitableneſs of the nature of the action.

XLII. The Romans had another ſpecial kind of actions, which they called prejudicial actions, whereby queſtions were moved and determined, whether any perſon was free, or a ſervant, or a libertine; or when the queſtion was, who was the father or mother of a child, as when a huſband denies the child born by his wife, to be his, or denies her to have been his wife; or contrarywiſe, when a woman contends her birth to be lawful, gotten of her huſband; wherein, if the woman made intimation that ſhe was with child, and the huſband, nor any other in his name, denied not that it was by him, the huſband could not thereafter refute the ſame; or, if after divorce, the queſtion ſo aroſe, which was only competent to the huſband, denying the divorced wife was with child by him;

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in that caſe, unleſs the woman had intimated, the huſband might have action to prove the child was not his. The like action is betwixt a child claiming to be the child, or lawful child of a father; and a father, contending the child not to be his child, or lawful child. It is alſo competent to the mother, or other relations of the child, in name of the child. Theſe actions were called prejudicial, becauſe they were not contravertable by any other perſons, and therefore no collateral intereſt could give ground to alledge a perſon to be a ſervant, a libertine, or a wife, or a child, albeit the conſequence thereof were prejudical to them, becauſe the law allowed them not to be lawful contradictors in theſe points; but what was holden and reputed was ſufficient. But, in many caſes, one action or queſtion may be prejudicial to another, that is, may be firſt determined; but all parties having intereſt may controvert the ſame.

Albeit theſe prejudical actions have not, by our cuſtom, been brought in queſtion; yet there is no ground to doubt but they would be followed for their equity and expediency. And albeit we allow no annualrent, but where it is ſpecially appointed by ſtatute, or by conſent of parties, or in way of penalty, neither make we difference of exceptions, as to the time of proponing the ſame; yet judges ſhould have a greater latitude, and the Lords may the more exerce their *officium nobile*, in actions *bonæ fidei*, than in thoſe which are *ſtricti juris*.

XLIII. To come now to the kinds of actions competent by law and cuſtom with us, they are very few which have ſpecial names, when compared with actions in the Roman law: for even, after the taking away of the ſtrict terms of the *formulæ*, all their ordinary actions had known names, many whereof aroſe from the rights whereon they were founded, as *rei vindicatio* in property; *actio confeſſoria et negatoria* in ſervitudes; and upon obligations and contracts, as *actio ex ſtipulatu*, *empti et venditi*, *locati et conducti*, *mandati et contra*, *depoſiti et contra*, *pro ſocio*, *actio tutelæ*, *&c.* Alſo many peculiar forms of actions were denominate from their authors, as *actio ex lege aquilia*, *actio publiciana*, *Pauliana*, *ex Senatus-Conſulto Macedoniano*; and ſeverals had their names from the name or initial words of the *edictum perpetuum*; yet we have actions ſufficient for attaining the ſame ends.

XLIV. It were to be wiſhed, and not difficult to be obtained, that ſummonſes did more expreſsly relate unto the rights whereupon they are founded, under their legal names and titles; and that the ſtiles were accommodated thereto, whereby they needed not ſo long narrations of matter of fact, but the very mention of the right would give ground for inferring the concluſions deſired, which hath not been accuſtomed in perſonal actions, but thoſe generally have been libelled as *actiones præſcriptis verbis*, wherein the matter of fact is firſt deduced, and then the matter of right is thence inferred; after which follows the will of authority, commanding the parties purſued to appear, to hear and ſee the premiſes verified and proved, and then decerned, conform to the points of right inferred.

XLV. The firſt diſtinction of actions with us, is in perſonal and real, but not as theſe terms are taken in the Roman law, for that diviſion, as is before expreſsed, is ſtretched to all actions; but with us, real actions are only ſuch, wherein the ground of lands, or the profit of teinds are craved to be pointed; ſuch as actions for pointing of the ground upon infeftments of annualrents, for feu-duties, for nonentry-duties in general declarators, or for avails of marriages, or upon eccleſiaſtick penſions, for affecting teinds and benefices. But we make not uſe of the name or nature of vindication, whereby the proprietor purſues the poſſeſſor, or him who, by fraud, ceaſes to poſſeſs, to ſuffer the proprietor to take poſſeſſion of his own, or to make up his damage by his fraud. This part of the action, for reparation of the damage by the fraudulent quitting poſſeſſion, is rather perſonal than real; yea, the concluſion of delivery, doth not properly ariſe from vindication, which concludes no ſuch obligement on the haver, but only to be paſſive, and not to hinder the proprietor to take poſſeſſion of his own; where-

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in the Romans were ſo preciſe, that none could vindicate, but he who proved his right of property; and it was not ſufficient to recover his poſſeſſion, till the Prætor gave action to him that pretended that he had acquired by uſucapion, though the time was not compleat: but they did not own any perſonal obligation upon the haver. We have ſhown before (*lib.* 1. title *reſtitution*) that there is a real obligation upon poſſeſſors, not having a title ſufficient to defend their poſſeſſion, to reſtore or re-deliver, not only to the proprietor, but to the lawful poſſeſſor, which is alſo conſonant to that common principle of the Roman law, *ſuum cuique*. Yet in our real actions by poinding of the ground, there is nothing decerned againſt the poſſeſſors perſonally, but only not to impede the poinding of the ground; therefore, in all other caſes, we proceed upon the perſonal obligation. But we have other actions, which we neither account perſonal nor real, ſuch as are all declarators, wherein there is nothing concluded, inferring any poſitive deed of the defenders, but only declaring the right to the purſuer, upon which he may inſiſt by petitory or poſſeſſory judgments.

XLVI. There is alſo a diviſion of actions, in principal actions, and actions acceſſory. Of the laſt ſort, are exhibitions, transferrings, tranſumpts, actions for diviſion of what is common.

XLVII. The more full diviſion of actions with us, is in actions declaratory, petitory, and poſſeſſory. Declaratory actions are thoſe, wherein the right of the purſuer is craved to be declared, but nothing is claimed to be done by the defender; but the effect is, that in petitory or poſſeſſory actions, the defender is excluded from any defence that might have been proponed in the declaratory action. Petitory actions are thoſe which proceed without a declarator for eſtabliſhing an intire right in the purſuer, whether it be real or perſonal; ſuch as the reſtitution or delivery of moveables, and all poindings of the ground. Theſe actions are alſo called petitory judgments, not from this, that ſomething is claimed from the judge, but that ſomething is claimed to be done or permitted by the defenders; and they extend to all perſonal actions upon contracts and obligations of all ſorts, wherein no regard is had to poſſeſſion. Poſſeſſory actions or judgments are thoſe, wherein an abſolute right is not inſiſted for, but poſſeſſion is claimed to be attained, retained, or recovered; ſuch as actions of ſpuilzie, or wrongous intromiſſion with moveables; where the purſuer needs not prove an abſolute right, but a lawful poſſeſſion; or, though the poſſeſſion at the firſt was *vi*, *clam*, or *precario*, yet it is a good title againſt any diſpoſſeſſion, except by law or conſent; ſuch alſo are actions for mails and duties by perſons infeft; or by diſpoſitions, aſſignations, appriſings or adjudications without infeftment, or upon arreſtment: for all theſe proceed upon the right of the perſon infeft; but actions for making arreſted goods forthcoming, affecting perſonal debts, are not poſſeſſory, but petitory. Theſe poſſeſſory actions require a title in writ; but there are others that require no title, but only poſſeſſion, ſuch as ejection, intruſion, and ſucceeding in the vice of parties removed.

The ſummons on actions declaratory are called declarators; and ſuch actions may be purſued for inſtructing and clearing any kind of right relating to liberty, dominion, or obligation; but they uſe not to be raiſed or inſiſted on, where there is no competition or pretence of any other right; yet parties may call any whom they pleaſe, the concluſion being to hear and ſee it found and declared, that the party had ſuch a right; and if the parties cited pleaſe, they need not appear, if they conceive not themſelves to have any pretence of right; for they will have no other prejudice, than that they cannot pretend to have had any right to the matter in queſtion at that time, till they reduce the declarator, which they may eaſily do if they had lawful defences, the declarator being in abſence.

As declarators may be in all points of right or poſſeſſion; ſo, in ſome caſes, they muſt be before poſſeſſory judgments can proceed, as declarators of right of property, or declarators of redemption of wadſets, *&c.*

In all declarators, the purſuer's title muſt be libelled and inſtructed before proceſs, if it be in writ, even though the writs were in the defender's hands: for regularly the purſuer ſhould have firſt purſued exhibition of the writs, on which he was to found, if in the hands of a third party, or even in the hands of the defender in a principal cauſe: yet, if he libel that the writs are in the defender's hands, and cite him perſonally by a meſſenger, or inſtruct his having, by writ, the Lords may ſuſtain the ſame. Amongſt declaratory actions, reſciſſory actions are comprehended, by reduction, not of decreets, for theſe are not ordinary actions, but come in only in the ſecond inſtance.

We ſhall not here inſiſt in the nature or tenor of all theſe declaratory actions, but ſhall only touch thoſe that are of a more ſimple nature and common ſtile. This is to be obſerved of all declaratory and reſciſſory actions, that the will of authority, commanding the appearance of the defenders, and the title of the purſuer ought to be in the firſt place, without premiſing relations of fact.

XLVIII. There are other ſummonſes that vulgarly are called ſpecial declarators, which are not declaratory, but petitory, *viz.* ſpecial declarators of eſcheat, or non-entry; becauſe the denunciation of the defender having been inſtructed in the general declarator, all his moveable rights are thereby declared to belong to the King or his donatar; after which he may purſue for exhibition and delivery of moveable goods, or of the writs inſtructing the ſame, or of other moveable rights, or for payment of the moveable ſums falling under eſcheat, before any judge competent. And likewiſe after general declarator of non-entry, the ſuperior or his donatar may purſue in all poſſeſſory judgments, as if he were proprietor, until the heir be entred, in all which there is nothing declaratory.

TITLE IV.

Declarators of Property and Superiority.

DEclarators of right proceeded of old by the brieve of right, which is now out of uſe: and even the actions of declarator of right or property of lands, is little in uſe; but, in place thereof, reductions and improbations are accuſtomed, wherein it is not only declared, that the purſuer hath right, but alſo that the defender hath no right, and any pretence he hath is reſcinded and declared null or falſe. The difference of which is, that in declarators of right, terms are competent to the defenders, upon anterior or more formal rights than the purſuers, which may bring the cauſe as ſoon to a concluſion, as by reduction: but in reductions containing improbation, all the defenders rights muſt be produced, and there is ordinarily no litiſconteſtation, but only a diſcuſſion and determination of the rights produced by both parties: for there is in the ſummons of improbation a certification, that whatever rights are called for, againſt which there is a reaſon libelled, are to be declared falſe and forged, if they be not produced at the terms aſſigned for production thereof; which certification by our conſtant cuſtom is ſo ſtrong, that though the defenders be abſent, it cannot be recalled; and thereby it is much preferable to a declarator, againſt which parties abſent are eaſily reponed; and though they do compear and be decerned, yet upon new evidence without fraud, the decreet of declarator may be reduced.

II. In this ſummons of declarator of property, the purſuer's title muſt be libelled; and albeit a charter and ſeiſin cled with poſſeſſion will be ſufficient; yet the eldeſt progreſs the purſuer hath is moſt convenient to be libelled; and if the progreſs be not full and ſufficient of itſelf, if the purſuer or his author's poſſeſſion have continued forty years, by virtue of the titles required by the act of preſcription, the ſame muſt be libelled accordingly, and the continuance of poſſeſſion by the purſuer, his predeceſſors and authors muſt, in that caſe, be particularly libelled,

belled, *viz.* that it is either by labouring or paſturing, or by uplifting of mails and duties, which muſt be accordingly proved; and a citation muſt be at the market-croſs, againſt all and ſundry having, or pretending to have intereſt, and any that are ſuſpect to have pretence of intereſt, muſt be particularly cited, or elſe a declarator will operate nothing againſt them. Albeit the poſſeſſion be libelled to be without interruption, yet that being negative, is preſumed, unleſs the contrary be proved, and therefore needs no other probation, but yearly poſſeſſion of the fruits or rents by virtue of the titles libelled.

III. This declarator is very plain, and the ſtile obvious, if the purſuer's infeftments, and the infeftments of his predeceſſors and authors be holden of the King, and be in the purſuer's own hands, needing no aſſiſtance by poſſeſſion: for then the will is premiſed, and the rights are deduced as the purſuer's title, and the concluſion thence deduced, "That the purſuer hath the only and irredeemable "right of property." But if the purſuer's right be holden of a ſubject, the title muſt only be the infeftment he produceth; and it muſt be added, "That he or "his authors were in poſſeſſion, by virtue thereof, and that thereby it became a "compleat right of property." And it muſt be added, "That thereby he hath "good right to prove, that he, his predeceſſors and authors, from whom he de"rives right, had the heritable and irredeemable right of the lands and others "in queſtion, anterior to any right the defenders could pretend;" whereby the purſuer will get a term to prove, and incident diligence againſt his authors and others, havers of the evidents.

IV. Declarators of the right of ſuperiority differ nothing from declarators of property, but in ſo far as concerns the vaſſals; againſt whom alſo it will proceed, whereby they will be obliged to produce their rights. Theſe declarators being ſo clear, and yet ſo rare, for the reaſon mentioned, there needs no ſtile thereof.

V. The defences competent, beſide the objections of the informality of the purſuer's rights, are the defender's prior or more formal rights, or upon any diſpoſition or perſonal right granted by the purſuer or his predeceſſors, to whom he is heir or apparent heir, or that the purſuer's rights proceeded *à non habentibus poteſtatem*, as being inhibited or interdicted, or being fraudulent, or *in curſu diligentiæ* of the defenders their predeceſſors and authors; all which are competent by exception, altho' they would not all be competent in a poſſeſſory judgment. Replies and duplies are competent on the ſame grounds.

TITLE V.

Declarators of Redemption.

DEclarators of redemption are founded upon the right of reverſion, legal or conventional, and the order of redemption; which in conventional redemptions is by an inſtrument of premonition, premoniſhing the wadſetter to receive the money at a certain time and place, conform to the reverſion, which is *ſtricti juris*, and muſt be punctually obſerved, whether the ſame be done by the reverſer or his procurator, whoſe procuratory muſt be known to the nottar, and ſhown to the party if required, which muſt be inſert in the inſtrument of premonition. And the inſtrument of conſignation muſt be exactly according to the premonition, and the procuratory known, and ſhown if called for; wherein the liquid ſums of the reverſion muſt be offered; and if the wadſetter appear not, he muſt be waited for, from mid-day to ſun-ſet; for one hour is too punctual a term for conſignation; and whether he compear or not, the liquid ſums muſt be ſhown to be in bags, which, at the view, may carry ſome proportion to the reverſion: but it is ſafeſt to ſort and place the money on a table, that it may quickly be told, leſt the wadſetter come not till ſun-ſet. If any thing in the reverſion be not liquid, an obligement to fulfil the ſame, at the ſight of the Lords,

Lords, muſt be offered with the money, upon a renunciation ſufficient to denude the wadſetter, and to re-inveſt the reverſer; which renunciation the wadſetter muſt offer, becauſe it is his deed; and he is obliged for no more than what is ſufficient: and if the wadſetter have not the renunciation, and grant of redemption ready before ſun-ſet, or if he refuſe to deliver it, or to accept the money and obligement for what is illiquid, the liquid ſum muſt then be numerate and conſigned, and thereupon inſtruments muſt be taken, relating to the reverſions, the premonition, and all the points foreſaid at the conſignation.

II. The tenor of a ſummons of declarator of redemption of a wadſet may be thus: "Our will is, and We charge you, that ye lawfully ſummon *B.* to com- "pear before the Lords of Our Council and Seſſion, upon the———day of "—— next to come, in the hour of cauſe, with continuation of days, to anſwer "at the inſtance of *A*, as having right to redeem the lands of, *&c.* by virtue of "a letter of reverſion granted to him, or whereto he has right by progreſs; where- "by the ſaids lands are provided to be redeemed upon payment or conſignation "of, *&c.* in the hands of, *&c.* upon the peril of, *&c.* and upon performance of the "other conditions contained in the ſaid reverſion, *viz. &c.* as the ſaid reverſion "dated, *&c.* more fully imports: That is to ſay, the ſaid defender to hear and ſee "it found and declared, That the ſaid lands, *&c.* were lawfully redeemed, looſed, "and out-quit from the ſaid defender, by offer made to him by the ſaid purſuer, of "the liquid ſums contained in the ſaid reverſion, and of a bond for performance "of the conditions and proviſions contained in the ſaid reverſion, which are not "liquid and ſpecial, but general or penal, as the ſame ſhould be liquidate and "determined by the ſaids Lords, ſummarily upon ſupplication made to them by "either party, upon the———day of ——— next to come; he always ſub- "ſcribing and delivering a valid grant of redemption and renunciation containing "procuratory of reſignation, for re-ſeiſing the ſaid purſuer: and becauſe the ſaid "defender did not accept the ſaid offer, and reſign accordingly, therefore the ſaid li- "quid ſums and bond aforeſaid, were conſigned in the hands of *C*, for the uſe "of, and to be forthcoming to the ſaid defender, as appears by authentick inſtru- "ments taken thereupon in the hands of *N*, nottar-publick, dated, *&c.* and that "conform to the ſaid reverſion, and conform to lawful premonition made to the "ſaid defender, according to the ſaid reverſion, at the time and place contained "in an inſtrument of premonition, bearing certification, that if the ſaid defender "compeared not, or delivered not the ſaid renunciation, and received not the "ſaids ſums contained in the reverſion, the ſamine ſhould be conſigned in manner "foreſaid; which inſtrment of premonition is under the hand of *N*, notar-pu- "blick, and is dated, *&c.* And therefore the ſaid defender ought to be decern- "ed to ſubſcribe the ſaid grant of redemption, whereof the tenor is herewith pro- "duced and repeated, as a part of this libel *brevitatis cauſa*; and ought to be de- "cerned to remove himſelf, his wife, bairns, cottars and ſervants, forth and from "the ſaids lands, and to enter the ſaid purſuer in the peaceable poſſeſſion there- "of, conform to the laws and daily practique of this realm, in all points, *&c.* Ac- "cording to juſtice, *&c.*"

This form contains all that is neceſſary for a decreet of redemption: and the ſummons being of a fixed order, requiring no relation of circumſtances, ſhould not be libelled as a circumſtantiate action *præſcriptis verbis*, firſt deducing a long narration of writs, and then repeating the concluſion both before and after the will. There uſes to be added in ſummonſes commonly theſe words, "That ye "ſummon, warn, and charge the defenders, perſonally, or at their dwelling-pla- "ces; and in caſe they be forth of the kingdom, at the market-croſs of Edinburgh, "pier and ſhore of Leith; and the tutors and curators of ſuch of them as are mi- "nors, at the market-croſs, *&c.*" But the firſt words are ſuperfluous and improper, and the remanent words are not neceſſary, becauſe, to lawfully ſummon comprends them all; ſo that the adjection thereof is only to direct the meſſen-

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ger how to ſummon lawfully, in caſe he be ignorant; and therefore they ſhall not be repeated in the ſubſequent forms.

III. If this declarator be againſt a ſingular ſucceſſor in the wadſet right, then to the tenor of the reverſion muſt be added, either that it is contained in the body of the wadſet, or that it is duly regiſtrate in the regiſter of ſeiſins and reverſions, expreſſing the place of regiſtration in the general or ſpecial regiſter, and the date thereof; otherwiſe the reverſion is but perſonal, and will not be effectual againſt a ſingular ſucceſſor; but will ſtill be effectual againſt the granter and his heirs, or lucrative ſucceſſors after the date of the reverſion, being infeft upon their lucrative title: and the declarator may proceed againſt apparent heirs, without a charge to enter heir, which is not neceſſary in declaratory actions, unleſs they contain a petitory or poſſeſſory concluſion [i], or that the wadſetter was not infeft, or heir to him that granted the reverſion *; for, in that caſe, the apparent heir muſt be charged, and decerned to grant redemption, renunciation and reſignation, and to remove and enter the reverſer to the poſſeſſion: or if the wadſetter was infeft upon a diſpoſition from his author, holden *a ſe* of his ſuperior; for then he muſt be decerned to deliver a grant of redemption, with a procuratory of reſignation; yet if this ſuperior have granted a regreſs, he may thereupon be compelled to enter the reverſer, either by a ſeparate petitory action, or by a concluſion in the ſummons of declarator; in which caſe the ſuperior muſt be cited.

IV. No exception will be competent againſt this declarator, upon any right of the defender's, if the reverſion be in the body of the wadſet, or duly regiſtrate, as aforeſaid; becauſe the concluſion of re-poſſeſſion is a poſſeſſory judgment, and therefore the wadſetter muſt reſtore the poſſeſſion, reſerving any other right competent to the wadſetter, by way of action in a petitory judgment; even tho' the right he pretends to were prior to the reverſion: but if the reverſion be meerly perſonal, a ſingular ſucceſſor may defend himſelf by any real right.

V. If the wadſetter hath continued in poſſeſſion after the order, there uſes a concluſion to be added for payment of the mails and duties, ſo far as poſſeſſed or intromitted with by the wadſetter: but unleſs the quantities be proved by writ, or referred to the wadſetter's oath, it muſt abide terms of probation, which delays the decreet of declarator: and therefore it is much more formal to have a diſtinct ſummons of mails and duties going on with the declarator; for incongruous actions ſhould not both be contained in one libel, to the prejudice of the writers, and of the ſignet.

VI. This declarator is competent, either for redeeming of lands, annualrents, fiſhings, or any caſuality: and it is competent, not only upon a written reverſion, but upon a bond or condition of reverſion in writ, or a promiſe of reverſion; and in either of theſe caſes, the title muſt be deduced accordingly.

VII. Exceptions upon clauſes irritant in reverſions, which in the Roman law are called, *Pacta legis commiſſoriæ in pignoribus*, and which by that law are reprobated and void, do not impede conſignation with us [k]: yet of old they were not found null, but being penal, they were reduced to the juſt intereſt, and commonly a term was granted to inſtruct the damage through the not punctual performance. But ſince, there hath been little regard to theſe clauſes in wadſets, albeit they do bear to be of conſent, and renouncing all exceptions and objections in the contrary, and to be valid *ipſo facto*, without declarator; for ſtill theſe are exorbitant penalties, which neceſſitous debtors yield to. But if the reverſion were gratuitous, ſuch clauſes irritant, of whatever tenor, are not penal; and therefore are valid exceptions againſt the redemption: or if there be not a real impigno-

* This paſſage ſeems to relate to the doctrine treated above, II. 10. 13. and ought to be read thus: "Or "that the *reverſer* was not infeft, or heir to him who granted the *wadſet*."

[i] See above, III. 5. 23. *fin.* [k] See above, II. 10. 6. Below, IV. 18. 3.—5.

ration, but a true ſale for a competent price, clauſes irritant are alſo valid, albeit there be a reverſion. And if there be a true impignoration, a temporary reverſion imports a clauſe irritant; and being penal, the Lords will prorogate the ſame. But if the reverſion be granted only to the reverſer during his life, cuſtom hath ſuſtained the ſame; and if he uſe the order of redemption, tho' he obtain not declarator in his life, his heirs have right to obtain the ſame, becauſe the order did extinguiſh the wadſet, and the declarator doth only declare that it was extinct by the order; ſo that whoſoever would have been heir to the reverſer before he granted the wadſet, hath the title and right of the declarator.

VIII. Reverſions being *ſtricti juris*, ſhould only be performed *in forma ſpecifica*; and therefore conſignation ſhould only be in current money, and not in conſignation of aſſignations, or the equivalent ſums upon like wadſets, which require an order; nor even upon perſonal ſums, tho' the Lords, *ex nobili officio*, have ſometimes ſuſtained compenſation, when the reverſer uplifted the conſigned ſums: and likewiſe they have ſometimes ſuſtained the order, againſt the defence of ſimulate conſignation, when the ſum conſigned was not numerate; or being made in the hands of an inſolvent perſon, when the reverſion did bear the conſignation to be upon the peril of the conſigner, providing the reverſer produce the money at the bar, with the annualrent ſince the conſignation; and the deeds which are not liquid or penal, being modified by the Lords, or determined *in forma ſpecifica*.

IX. If the conſignation was made through the abſence, or faulty refuſal of the wadſetter, and if the ſum conſigned was put in the hands of the clerk of the bills, or was put in the hands of the clerk of the proceſs, the expence due to the clerk for the cuſtody and delivery muſt be upon him: but if any favour be *ex officio* granted to the reverſer, he muſt bear the expence. If the reverſion bear a particular perſon, in whoſe hands conſignation ſhould be made, the reverſer is not obliged to produce the money at the bar; but the Lords grant letters of horning upon the inſtrument of conſignation, againſt the conſignatar, to produce the ſum, (altho' there be nothing under his hand to acknowledge the receipt of the money) in reſpect of the inſtrument adminiculated by the reverſion, which therefore proves unleſs the contrary be proved, wherein the oath of the conſignatar will take off the probation by the inſtrument of conſignation; but his ſucceſſor will not be burdened thereby, unleſs the truth of the inſtrument be further inſtructed; yet it fully proves the uſing of the order: but if the conſignatar do on oath deny, the reverſer muſt produce the conſigned money at the bar.

X. Declarators of redemption of appriſings, have been much aſſiſted by the Lords *ex officio*, in reſpect of the exorbitant advantage appriſings had. And therefore, if the appriſer entered in poſſeſſion before the legal expired, the rents of the land are imputed in his annualrent in the firſt place, and his principal ſum in the next; unleſs he be impeded by law or force, or by the debtor's own intromiſſion: and therefore, if an action of compt and reckoning of the intromiſſion, be raiſed and executed before the legal expire; the Lords ſuſtain the redemption, upon conſignation of what is found due after compt and reckoning, albeit there be no order uſed; and if there be no intromiſſion, yet if the appriſer do within the legal diſpone a part of the appriſed lands, the price will be imputed in his ſum, ſeeing his ſum is thereby truly paid, although he could communicate no more right than what he then had, and the legal cannot expire as to the reſt, but it may expire as to that part of the lands or others diſponed; and therefore in the declarator, the ſingular ſucceſſors muſt be called, yet a ſummons of compt and reckoning will be ſufficient againſt them, becauſe it is not clear how much was paid. The compt and reckoning may be elided by proteſtation for not inſiſting, or by ſentence upon a ſummons to inſiſt, with certification not to be heard thereafter; or upon an oppoſite declarator of right upon the appriſing: for by no

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compt of intromiſſion with the rents or price, doth the appriſing become alwiſe redeemable; but the Lords will aſſign a ſhort time to produce the remainder of the ſum at the bar.

If the appriſer have intromitted with no part of the rents, or price of the lands appriſed; an order muſt be uſed, and a declarator thereupon, of the like tenor with the former: but ſeeing there is no conſignatar, nor time or place of premonition (*or conſignation*) as there is in conventional reverſions; therefore the premonition may be upon any days ſufficient for the appriſer or his ſucceſſor's attendance, and in any publick place: and in caſe of abſence or refuſal, conſignation may be made in the hands of any perſon, upon the peril of the conſigner.

XI. Declarators of redemption of infeftments granted for ſatisfaction of ſums, or for relief of cautionries or other diſtreſſes, whereby the perſon infeft hath right to the whole duties, though they exceed his annualrent, to be imputed in his annualrent in the firſt place, and his principal ſums in the next, do proceed in the ſame way, as in redeeming of appriſings.

XII. Adjudications which proceed upon renunciations of heirs, are redeemable by creditors, in the ſame way as appriſings.

XIII. Adjudications ſince the act of Parliament, ſtating them in place of appriſings, when they are general, are redeemable in the ſame way as appriſings. Special adjudications redeemable within five years, are redeemable in the ſame way as wadſets; for there is no account of intromiſſion therein, more than in any wadſet, and therefore there muſt ſtill be an order: but the time of premonition, and place of conſignation, and the conſignatar, and hazard of his ſufficiency, is the ſame as in appriſings. Both theſe adjudications have effect ſince the act of Parliament introducing the ſame, which is dated *September* 6. 1672.

TITLE VI.

Declarator of Truſt.

DEclarators of redemption have been ſubjoined to declarators of property, becauſe they relate to property redeemable, and are ſeldom under the terms or tenor of impignoration; and therewith there are *conjoined* [g] all declarators, which are under reverſions or obligements to denude, whereby the creditor may declare his right to the ſubject in queſtion, and may render it litigious, that albeit the obligement be but perſonal, yet ſingular ſucceſſors thereafter cannot exclude the effect thereof. And for the like reaſon, declarators of truſt are next conſidered, which differ from declarators of redemption, or declarators on bonds to denude, that, in proper truſt, there is neither bond, condition, nor promiſe of reverſion, or obligement to denude.

II. Truſt in the vulgar acceptation, comprehends all perſonal obligations for paying, delivering, or performing any thing, where the creditor hath no real right in ſecurity; for thereby he truſts more to the faithfulneſs of his debtors, that they did not engage to what they were not able to perform, and that they would not diſappoint their performance, by diſpoſing of their means in the creditors prejudice. There are in the Roman law, ſeveral titles *de rebus creditis*: but truſt properly ſo called, and here meaned, is the "ſtating a right ſo far in "the perſon of the truſtee, as it can hardly be recovered from him, but by his "faithfulneſs in following that, which he knows to be the true deſign of the "truſter." Such were the *fidei commiſſa* at firſt amongſt the Romans, eſpecially in teſtaments, when heirs or legatars were named to the behoof of others, by the expreſs or preſumptive will of the teſtator, yet without any efficacious obligement

[g] F. conſigned.

ment to apply the ſame, according as was deſigned; and oft-times even without ſo much as a naked paction.

III. Truſt is ſometimes taken for the act of the truſter, whereby he commits that which is his own to another, in confidence that he will reſtore the ſame, or diſpoſe thereof, as the truſter requires. And this is a kind of faith or confidence in the perſon truſted. But more properly, truſt ſignifies the faithfulneſs of the truſtee, to perform that which is intruſted to him. And the acts of both, make up a tacit mandate or *depoſitum*, whereby they mutually agree, that the thing intruſted, ſhall be kept and preſerved by the truſtee, and ſhall be diſpoſed of at the pleaſure of the truſter. The deſign of the truſter may be either expreſs, when he ſo declares by word or writ to the truſtee; or it may be, when his meaning and deſign appeareth from the deed done, whereof there have been many examples, and may be many more; as when a creditor takes a bond from his debtor, in name of a third party, but doth not deliver to him the bond, if that third party ſhould purſue exhibition and delivery of the bond, as being his, the truſter behoved to prove that he procured the bond by his own money and means; ſeeing, by our cuſtom, there is no neceſſity to prove the delivery of writs, but that is preſumed to have been done to, or for the perſon in whoſe favour the writ bears to be granted; but this preſumption may be elided by the debtor and witneſſes, unleſs he in whoſe name it is, adduce ſtronger evidences for it; or if a party ſhould diſpone his eſtate to another, who is not his apparent heir, or of near relation of blood, although the diſpoſition were delivered, yea, though it did bear a pure donation for love and favour, or for onerous cauſes; yet, if it did appear that he, in whoſe name it was granted, had no means nor credit to purchaſe it, not only his oath acknowledging that he paid no money for it, nor performed any cauſe onerous ſuitable to it, but even witneſſes *ex officio*, and other evidences * might inſtruct, that it was to the behoof of the diſponer, or ſome third pary. There are many examples of proving truſt, amongſt mandates, *lib.* 1. *title* 12. § 17.

IV. Truſt may be of any kind of right, whether of things moveable, or heritable. And therefore the delivery of goods, or diſponing or aſſigning of moveable rights on deathbed, where the receiver cannot inſtruct a reaſonable cauſe, are interpreted as in truſt, to be retained if the diſponer die, but to be reſtored if he recover; for ſuch deeds uſe not to be done, but when there is little hope of life.

V. The proper way to recover ſuch rights given in truſt, or to apply them to the deſign of the truſter, is by a declarator of truſt: this declarator, tho' it may be libelled as an action *præſcriptis verbis*, by premiſing the whole matter of fact, and all the circumſtances and evidences to infer the truſt; yet, in effect, it is a reduction of the pretended right of the unfaithful truſtee, and a declarator of the right that the truſter had; and therefore ought rather to be libelled as other declarators or reductions, premiſing the will or command of authority, and may be in theſe terms: "Our will is, and we charge you, that ye lawfully ſummon "*B.* to compear, *&c.* to anſwer at the inſtance of *A.* as he who did intruſt the "defender, and took the right underwritten in his name, to the behoof of *E.* "and the defender knew, or might know, that the deſign and purpoſe of the "purſuer was not to alienate or gift the ſaid right, but that he might make the "ſame forthcoming to the behoof of the ſaid *E*, *viz.* (here inſert the right in-"truſted) that is to ſay, the ſaid defender to hear and ſee himſelf decerned to "exhibit and produce before the ſaids Lords, the ſaid right granted in his name "by the ſaid purſuer: and to hear and ſee it found and declared, by decreet of "the ſaids Lords, that the ſaid right was granted in truſt to the behoof of the "ſaid *E*, for the reaſons and cauſes after following, *viz.* *&c.* And therefore the "ſaid defender to hear and ſee himſelf decerned to denude himſelf of the fore-"ſaid right, in the terms and tenor of the deed herewith repeated and produced,

* Truſt can now be proved only by writ or oath of party, *P.* 1696, *c.* 25.

« ced, as a part of the libel; and decerned to ſubſcribe before famous witneſſes, « the foreſaid deed, and to deliver the ſame with the foreſaid intruſted right, « with all that has followed thereupon, to be uſed and diſpoſed upon by him as « his own proper evidents in all time coming. And als the ſaid defender, to « hear and ſee himſelf decerned, to make compt, reckoning, and payment of « all profit and benefit received by him, or any deriving right or warrant from « him, by virtue of the ſaid intruſted right, or which he might have received « by doing the diligence of a faithful truſtee, conform to a particular account « thereof produced herewith, and repeated as a part hereof. Conform to the « laws and daily practick of this our realm, *&c.* According to Juſtice, *&c.*"

If the purſuer's title be not granted to himſelf, but to others, from whom he hath right thereto by progreſs, the ſame muſt be libelled accordingly; or if the purſuit be againſt a ſingular ſucceſſor of the truſtee, it muſt be libelled, that he was conſcious that the right acquired by him, was truly to the behoof of the party libelled, the ſamine having been ſo declared to him by his author, or appearing by the matter of fact, whereby he was partaker of the fraud of the truſtee aſſigning or diſponing fraudulently, contrary to his truſt.

VI. The proper exception in this declarator, is, on the expences wared out neceſſarily or profitably upon occaſion of the truſt, which is competent, albeit the truſtee were denuded before intenting of the declarator of truſt, and is not excluded, but falls into the accompt, albeit he was fraudulently denuded, whereby the performance of his truſt was impreſtable *in forma ſpecifica*, but by damage and intereſt; in reſpect that, by the neceſſary or profitable expence, the truſter was *lucratus*, which, in all caſes, is effectual, by action, or exception, unleſs as a penalty, it be expreſsly excluded by ſtatute.

TITLE VII.

Declarator of the Superior's Tinſel of Non-entry, by failing to receive his Vaſſal.

WE come now to declarators relating to ſuperiority, and its caſualities. The firſt of which is, the declarator of the ſuperior's loſing the benefit of the ſuperiority during his life, in caſe he obey not the precepts directed out of the chancery, for infefting his vaſſal. For, by our feudal cuſtom, the infeftments of vaſſals heirs are to be renewed at the death of every heir, but not at the death or change of the ſuperior: and the ſuperior cannot compel the vaſſal to enter, but hath the benefit of Non-entry until he enter. And, on the other part, if the ſuperior receive not his vaſſal, he loſes the benefit of his non-entry; which falls in two caſes. The one is, when the ſuperior is infeft in the ſuperiority: for then the vaſſal being retoured ſpecial heir, holding of ſuch a ſuperior, he gets, of courſe, precepts out of the chancery, to charge that ſuperior to infeft him as heir, and upon the diſobedience of that precept, he gets a ſecond, and a third; and if all be diſobeyed by the ſuperior, the Lords give horning againſt that ſuperior's immediate ſuperior, to ſupply his place, and receive the vaſſal, whereby the ſuperior loſeth the non-entry of that vaſſal during his life: to evite which, ſuperiors uſe to obtain from the Lords ſuſpenſions of theſe precepts; wherein, if the ſuperior ſuccumb, he loſes the non-entry, and is liable for the vaſſal's damage, which is modified by the Lords. The other caſe is, when the the ſuperior himſelf is not infeft, for which there is *a* remedy provided, *Parl.* 1474, *cap.* 57. « Whereby the ſuperior is ordained to do diligence to enter to « the ſuperiority, within forty days after requiſition made by the vaſſal, and if « he fail, incontinent thereafter the vaſſal is to be entered by the King, or by

" that ſuperior's ſuperior, and ſhall hold of him: and the vaſſal's immediate ſu-
" perior ſhall tine the tenant for his lifetime, and ſatisfy the vaſſal's ſkaith."
Whereupon the Lords ought to give a ſummary charge againſt the ſuperior's ſu-
perior, if a ſubject, or a warrant to the director of the chancery, if the ſuperior
hold of the King; but, in neither caſe, doth the ſuperior loſe any more but the
non-entry during that vaſſal's life, and no other caſuality of the ſuperiority.

II. The tinſel of the non-entry by the ſuperior's diſobedience, is competent by
way of exception againſt the ſuperior, or his donatar, purſuing for non-entry.
And it may be purſued by way of action and declarator againſt the ſuperior, his
heirs, or ſucceſſors in the ſuperiority, for freeing that vaſſal or his ſingular ſuc-
ceſſors from non-entry, upon the ſuperior's diſobedience. This action is neceſſa-
ry, becauſe the precepts out of the chancery have not the effect of charges of
horning, either for caption, or eſcheat, and therefore the ſuperior was to be con-
veened by way of action, to hear and ſee it found and declared, that he had loſt
the benefit of non-entry; and that the vaſſal ought to be received by his ſupe-
rior, ſupplying his place for that time. In which declarator his ſuperior is to be
called, that it may be declared againſt him, that he ought to ſupply the place of
the immediate ſuperior, if he be a ſubject. But now, when actions muſt abide
the courſe of the roll, and the proceſs having been ſo tedious againſt the ſuperi-
or by the three precepts, letters of horning ſhould not be denied, to charge the
ſuperior's ſuperior, if a ſubject, to ſupply, by receiving the vaſſal, unleſs the im-
mediate ſuperior have ſuſpended the precepts, in which caſe he would be char-
ged upon the decreet of ſuſpenſion *.

III. The proper exception in this declarator, or reaſon of ſuſpenſion of the
charge is, either a reduction of the retour, thereby excluding the pretended vaſ-
ſal from being a true vaſſal, which is receivable by way of exception, or reaſon
of ſuſpenſion, becauſe the ſervice paſſeth without citation of parties; or other-
wiſe the competent exception is, that the non-entry-duties preceeding the pre-
cepts, were not paid, nor offered and conſigned; but this will not be ſuſtained
further than for the retoured duties: for if a general declarator have paſſed, the
vaſſal will not be excluded upon non-payment of the full duties, becauſe they
are not *debita fundi*, and therefore the vaſſal is no further obliged than any other
intromitter. But the exception will be relevant for the relief, not exceeding the
retoured duty, which only occurs in ward-holdings.

IV. But ſeeing it is like, that the Lords will not put vaſſals to an action, but
will grant ſummary charges; it is not neceſſary to propoſe the tenor of this de-
clarator.

V. If the fee be holden feu, it hath been controverted, and not yet clearly de-
termined, whether, during the non-entry before ſummons of declarator, the ſu-
perior ſhould have no benefit by the non-entry? (For if the feu-duty ſerve for the
non-entry duty, he can have no benefit before the citation in the general declara-
tor) or whether the feu-duty ſhould be doubled, the one half being ſuperadded
in place of the retoured duty? If the feu-duty ſerve for both, the contumacious
ſuperior ſhould loſe it during the vaſſal's life: but if the ſuperior have purſued
for the non-entry, whereby the vaſſal became contumacious in not entering; it
affords a relevant defence or reaſon of ſuſpenſion, againſt loſing of the non-entry-
duties; unleſs the vaſſal had not a competent time to be ſerved and retoured.

VI. I have not known it determined, whether the *annus deliberandi* be compe-
tent to vaſſals, before they be obliged to raiſe brieves, for their ſervice? For which
there appears to be the ſame reaſon, as to defend them againſt creditors; in which
caſe they cannot be contumacious for not entering, till they have a competent
time after their year of deliberation. But there is no doubt, that if then they be
negligent, the ſuperior's contumacy will not exclude him from the non-entry,
for all the terms from the defunct's death. It is alſo a competent exception or
reaſon

* By act 20. *Geo.* II. *c.* 50. ſubject ſuperiors may be charged with horning, by warrant of the Lord Ordi-
nary on the bills, to give infeftment to the heirs of vaſſals retoured, or to diſponees who have procuratories of
reſignation. See above, II. 3. 29.

reaſon of ſuſpenſion againſt the entry of vaſſals, that they have not fulfilled that article of the precept, *capiendo ſecuritatem, &c.*

TITLE VIII.

Declatraor of Non-entry.

WE come now to the caſualities of ſuperiority. The firſt whereof is the non-entry duties of the fee, while it is void, the vaſſal not being infeſt therein; which occurs in divers ways (as hath been explicated, *lib.* 2. *tit.* 4. 18. *et ſq.*) For the ſuperior having the *dominium directum* of the fee, nothing excludes him from the full benefit thereof, but the right of the vaſſal, which is not compleat until he be infeft, *nulla ſaſina, nulla terra:* yet, while the vaſſal is not contumacious in lying out uninfeſt wilfully, the ſuperior or donatar hath only the rent by the favourable account, by the new retoured duties, which was the old rent, by a valuation of the whole temporal lands of the kingdom, as they were then eſteemed worth, all burdens deduced; which retoured duties are *debita fundi*, and thereupon the ground may be poinded, which cannot proceed till there precede a declarator of non-entry: and though a poinding of the ground be not a declaratory, but a petitory action, and it is more formal that they ſhould be in two ſeveral ſummonſes, going on together, that ſo ſoon as the declarator is decerned, the poinding of the ground may immediately be alſo decerned, ſeeing there is nothing more to be proved, but what is contained in the declarator, yet both uſe to be ſuſtained in the ſame libel, whereby it is a complex action. It is not proper to ſay any thing here of the nature or tenor of poinding of the ground, till its proper place amongſt petitory actions [a].

II. The declarator of non-entry may and doth proceed, either at the inſtance of the ſuperior, or at the inſtance of his donatar, who in effect is his aſſigny, and therefore the action proceeds in the name, and upon the right of the ſuperior; yet there is no neceſſity to expreſs the ſuperior's right, unleſs it be a life-renter in conjunct-fee who purſues, and whoſe right the vaſſal is not obliged to know: yet it is more convenient and effectual, that in the purſuer's title both the ſuperior's right, and the donatar's be libelled, and at leaſt the ſuperior's ſeiſin and the donatar's gift be produced: for without the gift no proceſs will be ſuſtained. And albeit the vaſſal may deny the ſuperior's right, which would infer diſclamation, and loſs of the property, yet the ſuperior cannot make uſe of both; and therefore, if he make uſe of the diſclamation, the non-entry muſt ceaſe: for no man can be both ſuperior and proprietor at once of the ſame fee; yea, diſclamation will not follow, if the vaſſal had juſt ground of doubting, whether the party claiming the ſuperiority was truly ſuperior, even tho' he might find his ſeiſin in the regiſter; as if the vaſſal were infeft upon appriſing or adjudication, and had not recovered his author's infeftment, whereby he might know of whom he held; or if his predeceſſor's or author's ſeiſin were held of another kind of heir than he who now claims it, ſeeing the ſervice of heirs proceeds without calling of parties, and thereby if a wrong heir were ſerved, the vaſſal owning him might hazard diſclamation: or if the ſuperior had acquired right by appriſing or adjudication, he were obliged to produce a compleat title, and not his ſeiſin only.

III. Non-entry alſo uſes to be purſued, for declaring that the ſuperior or his donatar has right to the full rents and duties. But it is not convenient ſo to libel it: for altho' the vaſſal were abſent, he will eaſily recover in the ſecond inſtance, *the* [b] reſtricting to retoured duties. If there be not a ſpecial retour, but the right of a part of a barony, which hath one retour for the whole, yet the non-entry may proceed; but in the poinding of the ground the purſuer muſt libel and prove the rent of the whole barony, that the retour of the whole may be

[a] Below, IV. 23. [b] F. by.

be divided proportionally. And albeit the declarator will be ſuſtained, tho' it bear not that the lands are holden ward, becauſe that is preſumed, as being the nature of a proper fee; yet it is ſafeſt to libel, that the fee was holden ward or blench. Kirk-lands were not retoured; and therefore the retoured duty is the feu-duty. Annualrents had no retour; and therefore the whole annualrent was carried by the general declarator, till the late act of Parliament 1690, *cap.* 42. ordaining, that in time thereafter general declarators ſhould only carry the *reddendo* of the annualrent.

IV. The tenor of the moſt ordinary declarator of non-entry is at the inſtance of a donatar; and therefore it is fitteſt to expreſs the ſame: for there is no difference when it is at the inſtance of a ſuperior, but that the donatar's intereſt is left out. And if the King be ſuperior, the treaſurer, or commiſſioners of treaſury, or the advocate, are purſuers. And in the King's non-entry the advocate muſt be libelled, as concurring for the King's intereſt. The tenor of ſuch a declarator of non-entry may be as follows: "Our will is, and We charge you, that ye "lawfully ſummon *C*, heir to *B* of, *&c.* and alſo *O*, *P*, *Q*, *R*, tenants and poſ- "ſeſſors of the ſaids lands, to compear, *&c.* to anſwer at the inſtance of *A*, donatar "to the non-entry of the ſaid defender, by a gift of non-entry, granted by *S*, "immediate lawful ſuperior thereof, by virtue of his infeftment of the ſamine, "by charter or precept, dated, *&c.* and ſeiſin following thereupon, under the "hand and ſubſcription of *N*, notar-publick, dated, *&c.* duly regiſtate in the regi- "ſter of ſeiſins, *&c.* upon the —— day of ———, *&c.* which gift of non-entry "is dated the——day of, *&c.* That is to ſay, the ſaid defender to hear and ſee it "found and declared, that the ſaids, *&c.* have been in non-entry in the hands "of the ſaid ſuperior thereof, ſince the death of the ſaid *B*, who died laſt veſt "and ſeiſed of the ſamine, and who deceas'd in the month of———, *anno*, *&c.* "or by a nullity of the heir's infeftment; or by the acquirer's neglect to inſiſt for "infeftment, upon the reſignation of his author; or by the vaſſal's neglect to re- "new his infeftment, upon his own reſignation: and that the retour-mails, or feu- "duties of the ſame, yearly and termly ſince the time foreſaid, did belong and "pertain to the ſaid purſuer as donatar, and in time coming, ay and while the "entry of the righteous heir or heirs: and that the ſaid donatar, by virtue of "his ſaid gift, hath good and undoubted right to poind the ground of the ſaids "lands, *&c.* for the ſaids non-entry duties, bygone and in time coming, until "entry of the righteous heir to the ſamine; together with a year's duty fore- "ſaid, for the relief of the ſamine, after the entry of the ſaids heirs, conform to "the ſaid gift, laws and practiques of this realm in all points, *&c.* with certifi- "cation, *&c.* According to juſtice, *&c.*"

V. The effect of this declarator is, not only the poinding of the ground, if the fee be of land, by poinding the goods on the ground, not exceeding the tenants their term's mail, as the ſamine ſhall be declared by them upon oath; but alſo the full rents from the citation in the general declarator, become due. But if the fee be an annualrent, a mill or a fiſhing, that hath not goods on the ground, the ground-right and property thereof (and alſo of the land, failing goods thereon) is to be appriſed or adjudged; and the full annualrent or profit of the mill or fiſhing, is to belong to the donatar, until the entry of the lawful heir, which needs no other declarator, but an ordinary action before any judge competent, ſuperior or inferior, which is improperly called a ſpecial declarator.

VI. But ſeeing heirs have a year to deliberate after the defunct's death, albeit during that year the declarator may proceed; yet neither the action for poinding of the ground, nor for the full profits, ought to proceed till the year of deliberation be ended: yet the citation may be within the year, ſo that the day of compearance be after it.

VII. Beſide the objections againſt this declarator, and the general exceptions againſt this and other rights, there are ſeveral ſpecial exceptions againſt non-

entry.

entry [c]; as first, that the fee is full by a conjunct-fiar, or by the reserved liferent of the fiar: but any other liferent will not afford a relevant defence. The second exception is, that the heir himself is infeft. But neither of these exceptions will exclude the non-entry, for any terms after the defunct's death, and before the infeftment, unless the heir be infeft with a *novodamus*, renouncing all casualities of superiority in general, or in particular non-entry: the heir's entry also must be voluntary, as by precepts of *clare constat*: for if the heir be entered upon obedience, there is yet place for the donatar to reply upon any relevant ground, that in an ordinary action might have excluded the entry of the heir; as that the heir did not give caution, conform to the clause *capiendo securitatem*; or that being required, he did not pay the retoured duties, feu-duties, or blench-duties of annualrents due before the charge: and therefore these or the like may be repeated as replies, to *support* [d] the declarator, or to exclude the exception, until the famine be satisfied. The third exception is, upon the consent of the superior, by confirmation of infeftment granted by the defunct vassal, confirmed by the superior, which is effectual from the date of the charter confirmed: but the superior's confirmation of a charter to be holden of his vassal, doth not exclude the non-entry of his vassal's heir. The fourth exception is, upon three subsequent seisins voluntarily given, as having the same effect with three subsequent discharges, importing a liberation from any thing prior. The fifth exception is, if the superior or his donatar have not insisted for his non-entry, for the space of forty years, during which time the fee hath been full, in whatever way; for thereby not only the duties preceeding the forty years are excluded by common prescription, but the non-entry itself is understood to be past from, tho' the infeftments, whereby the fee was full, were not voluntary, but upon obedience. *Craig* (II. 19. 17.) holds this exception sufficient, tho' the fee were but full for thirty six years which is not a legal term. He doth also hold, (*ibid.* § 19.) with very good reason, that if the vassal died in the service of his superior *, he ought to receive his heir *gratis*, unless contempt appear by not taking infeftment, when cited by a declarator of non-entry: for tho' the superior give a precept with warrandice, yet if the vassal neglect to take seisin, the fee is in non-entry from the date of the precept. The sixth exception is, the superior's contumacy, in not infefting the vassal's heir, upon the precepts out of the chancery, or if being required himself to enter to the superiority, he did not the same. The seventh exception is, upon the preference of real burdens on the fee, such as terces of relicts, or the liferent of the husbands of heiresses by the courtesy of Scotland, or any other feu-duty, annualrent, or real burden.

VIII. The minority of the heir affords no defence against the retoured duties, or full duties; because this casuality arises from the nature of the fee; yea, the non-entry takes place for the terms after the defunct vassal's death, tho' his apparent heir was not born, or tho' he was only in hope; as it may occur in several branches of tailzies, if the entry of the neareſt heir existent be suspended, in hope of the existence of an heir of the body of a prior branch, tho' not yet begotten. But all things that excuse the contumacy, or contempt of the apparent heir, do exclude the full duties.

IX. Gifts of ward and non-entry by the King, passing in exchequer, do bear as the common style, the non-entry "ay and while the entry of the lawful heir;" but tho' the style be continued, yet custom hath restricted it to three terms after the expiry of the ward, which doth also comprehend the year of relief; which would not so hold in the gifts of subjects: for these would be extended according to their tenor. It were a rigorous extension of non-entry subsequent to a ward, to extend it to the full duties, even tho' the superior or his donatar were in possession; seeing in that time the heir may be retoured, and the superior charged

* Si prædeceſſor in acie pro reipublicæ ſalute aut dignitate pugnans occubuerit.

[c] See above, II. 4. 23. [d] F. ſtop.

ged by precepts out of the chancery: and therefore the ſuperior could not juſtly refuſe to enter the vaſſal's heir, even tho' his year of deliberation were running, *and* he could not be ſaid to be contumacious, or to contemn his ſuperior, having that privilege by the law *.

TITLE IX.

Declarator of Liferent-Eſcheat.

DEclarator of liferent-eſcheat is con-generous with declarator of non-entry; and therefore is ſubjoined thereto. For the vaſſals being denounced rebels, and at the horn, they have not perſon to ſtand in judgment, and are as *civiliter mortui*, whereby their fees are open, and in the hands of their ſeveral ſuperiors. And tho' it is called liferent-eſcheat, as being confiſcated as a penalty of that civil rebellion, yet the true original of it is the fee's being void, through the incapacity of the vaſſal to enjoy it, otherwiſe all liferent-eſcheats would belong to the King, as do the liferents of forfeited perſons, as being truly penal for the crime of treaſon; but other liferents belong to the ſeveral ſuperiors, and are amongſt the caſualities of ſuperiority: yet when a liferent is not by infeftment, but by perſonal obligement, as is the annualrent of an heritable ſum, where infeftment has not followed, the ſame belongs to the King, and alſo liferent-tacks; neither of which are caſualities of ſuperiority, or belonging to vaſſals as ſuch. Liferent-eſcheat is rather *inter bona vacantia*, through the vaſſal's incapacity, than amongſt thoſe which are properly called eſcheat.

II. Liferent-eſcheat doth not ariſe from the nature of fees, or from the general feudal cuſtoms, but by our particular ſtatutes and cuſtoms **; and therefore it befals to the ſeveral ſuperiors *cum ſuo onere*; whereby whatſoever did affect the ſame, while in the hands of the vaſſal, the ſame doth affect it in the hands of the ſuperior [e]: in which it differs from the common caſualities of ſuperiority, as ward and non-entry; for theſe return to the ſuperior as he gave them, with ſuch burdens only as he gave it with, or whereunto he conſented, or ſuch as were introduced by ſtatute, as terces of relicts, and liferents of huſbands by the courteſy.

III. Declarator of liferent may either proceed in name of the King or other ſuperior, or at the inſtance of their donatars, as being their aſſignies. If it be at the inſtance of the King or his donatar, it muſt contain the concourſe of his advocate. But the moſt ſimple declarator is at the inſtance of the ſuperior, being a ſubject, wherein all the neceſſary requiſites muſt be libelled: and tho' the ſuperior's title be ſometimes omitted to be libelled or produced, becauſe, if the vaſſal deny the ſame, it may infer diſclamation; yet it is ſafeſt to libel his title, for the reaſons given in the declarator of non-entry, which hold alike in this caſe.

IV. This declarator ſhould not be libelled as an action *præſcriptis verbis*, not falling into a known ſtyle; but the will ſhould be premiſed, and the tenor may be as follows: "Our will is, and We charge you, that ye lawfully ſummon *B* "to compear, *&c.* to anſwer at the inſtance of *A*, who ſtands infeft in the lands "of, *&c.* by precept, charter or diſpoſition, and ſeiſin following thereupon, da-"ted, *&c.* and thereby having right of property of the ſamine, at leaſt of the "ſuperiority thereof, and thereby hath right to the rents, duties, and profits of "the ſamine; That is to ſay, (in caſe the ſaid *B* ſhall produce and inſtruſt his "right

* By act 20th *Geo.* II. *c.* 50. the non-entry duty payable before declarator, for lands which held ward of the Crown, is declared to be for hereafter one pound Scots for every L. 100 of valuation.

** See the riſe of this caſuality explained, Hiſt. notes ſubjoined to Lord *Kaims*'s abridgement of Scots ſtatutes, No. 6.

[e] See above, III. 3. 26.

" right to the property or liferent of the ſaids lands, as vaſſal therein) to hear " and ſee it found and declared, That the ſaid defender was lawfully denoun- " ced upon letters of horning, raiſed at the inſtance of-----for the cauſes therein " contained, which letters are dated, *&c.* and the denunciation thereupon is " dated, *&c.* duly regiſtrate in the regiſter of hornings, at *E*, conform to the " act of Parliament; and that he hath contemptuouſly remained unrelaxed there- " from, for the ſpace of year and day, from the time of the foreſaid denuncia- " tion. And that thereby the ſaids lands are become in the hands of the ſaid " purſuer, as lawful ſuperior thereof; and that the rents, profits and emoluments " of the ſamine belong to the ſaid purſuer, and that of all years and terms ſince " the ſaid denunciation, and yearly and termly in time coming, ay and while " the ſaid defender be lawfully relaxed from the horn, conform to the laws and " daily practick of this our realm, in all points. Or elſe to alledge a reaſonable " cauſe in the contrary, with certification, *&c.* According to juſtice, *&c.*"

V. With this declarator, the petitory part of the mails and duties uſes ſometimes to be joined; and then the tenants and poſſeſſors muſt be called, and the quantities muſt be proved, and ſo the ſummons muſt have double diets. But this is not the regular way; yet, for ſpeedy attaining to poſſeſſion, the ſummons of mails and duties may be raiſed with the declarator, and proceed therewith; and ſo ſoon as the ſaid declarator is extracted, the poſſeſſors will be obliged to anſwer in the action of mails and duties.

VI. The proper exceptions againſt this declarator, are founded upon the burdens affecting the liferent, or the eſtate liferented, while it was in the vaſſal's hand [f]; whereby, not only infeſtments of annualrent, but even tacks cled with poſſeſſion, are relevant exceptions; yea, arreſtments, if diligence have followed, but all muſt be prior to the denunciation. 2. There is another kind of exceptions more proper, that where vaſſals were obliged to grant infeftments, or other rights before the denunciation, if they be perfected within year and day after the denunciation, the ſame are relevant againſt the declarator; whether the obligement be expreſs by bond, or by diſpoſition importing an obligement to infeft. But a baſe infeftment, though before denunciation, will not be effectual, unleſs it obtain poſſeſſion within that year. Neither hath inhibition any effect againſt this declarator, though prior to the denunciation, unleſs infeſtment be upon the ground of the inhibition within the year. Neither is appriſing or adjudication relevant, though prior to the denunciation, unleſs infeftment follow thereupon within year and day thereafter.

VII. The law has indulged a year and day after denunciation to relax; but the rents and duties from the denunciation are due, in ſo far as they are not exhauſted by the burdens aforeſaid; yet the rents within the year have been found to fall to the donatar of ſingle eſcheat. Defences upon objections againſt the horning, are not receivable by exception, becauſe the King being concerned in the effect of horning, as to the ſingle eſcheat, it cannot be taken away, until the Officers of State be called by way of action; and therefore, if there be any ground of reduction, the vaſſal, ſo ſoon as he is cited, may raiſe reduction, which thereby may be brought in by way of exception, if the production be ſatisfied *.

TITLE

* By act 20. *Geo.* II. *c.* 50. the caſualities of liferent and ſingle eſcheat are diſcharged for ever.
[f] See above, II. 4. 65. III. 3. 26.

TITLE X.

Declarator of Single eſcheat.

DEclarator of ſingle eſcheat hath the neareſt reſemblance to the declarator of liferent-eſcheat, ſo that the differences only betwixt the two are neceſſary to be obſerved. As that, ſingle eſcheat belongs only to the King, or to his donatars; amongſt which are the Lords of regality, or the heritable bailies thereof, having the benefit of eſcheat in their charters. And this declarator of eſcheat is always at the inſtance of theſe, or of other donatars, all being the King's aſſignies, with whom the King's Advocate concurs for his Majeſty's intereſt. But liferent-eſcheats belong to all ſuperiors, and uſe to be declared in their names, as well as in the names of donatars.

II. Liferent-eſcheat is only burdened with real burdens affecting the ſame before denunciation, or for which there was an anterior obligement, or inchoate right perfected within year and day, by infeftment or charge. But ſingle eſcheat is burdened with the debt in the horning whereupon it fell, *Parl.* 1592, *cap.* 145[z]. Which therefore is proper to the firſt horning; but any horning produced is preſumed to be the firſt, if a prior be not ſhown: and therefore the gift given upon any horning, if it bear with the burden of the ground of that horning, doth become ſo burdened by the tenor of the gift.

III. Single eſcheat is alſo burdened with the preference of lawful creditors, whoſe debts are before denunciation, and who have obtained payment *bona fide* from the party denounced, or by poinding, arreſtment and decreet for making forthcoming, before decreet of declarator obtained by the donatar, whereby the eſcheat-goods and rights are eſtabliſhed in his perſon, and the King is denuded of the right thereof: for, till then, the King allows preference to lawful creditors for moveable debts. But there is no limited time in that prefere ce, as in liferent-eſcheat: for the decreet of declarator, whenſoever obtained, terminates the preference. Creditors obtaining ſatisfaction of debts due before denunciation, by aſſignations or diſpoſitions of moveables, albeit voluntarily granted by the rebel, and ſatisfaction being obtained before declarator, are ſecure againſt gratuitous donatars, but not againſt donatars, who, upon their own horning, obtain gifts, as to the debt in the horning, becauſe that is a legal diligence for payment of that debt, but it will not be ſo extended to other debts due to the donatar. There is no neceſſity here to determine what falls under ſingle eſcheat, or what are the ſpecialities in the preference of creditors, becauſe this declarator is only general, declaring the party to be duly denounced, and thereby all his eſcheatable goods and rights to belong to the King and his donatar. And thereupon the donatar having declared his right, hath intereſt to purſue for, and intromit with all his eſcheatable goods and rights, before whatever judge competent; and theſe actions are called ſpecial declarators, but very improperly. The particulars both of the right and burden of ſingle eſcheat are handled amongſt confiſcations, *lib.* 3. *tit.* 3.

IV. The tenor of this declarator may be thus: "Our will is, and We charge "you, that ye lawfully ſummon *B*, or his wife, bairns, and neareſt of kin, he "being deceaſed, to compear, *&c.* to anſwer at the inſtance of *A*, Lord or bailie of the regality of----or our or their donatar, by virtue of our or their gift "of ſingle eſcheat, dated, *&c.* That is to ſay, the ſaid defender to hear and ſee "it found and declared, That he was lawfully denounced rebel, and put to the "horn, upon a decreet obtained againſt him at the inſtance of *E*, by virtue of "letters of horning duly executed againſt him, which denunciation is of the "date,

[z] See above, III. 3. 16.

« date, *&c.* And that there through all moveable goods, and all other moveable « and eſcheatable rights, which did belong to the ſaid defender, the time of his « denunciation, or that accreſced, were acquired, or did belong to him, at any « time thereafter, before he be duly relaxed from the horn, doth belong and « appertain to the complainer, as his own proper goods and rights, to be intro- « mitted with, and diſpoſed upon at his pleaſure, conform to the laws and pra- « ctick of this our realm, in all points, *&c.*" Note, The King's advocates concourſe muſt be mentioned, if the action proceeds upon the King's gift.

V. No defence is receivable againſt this declarator, on any objection againſt the horning, which is only competent by way of reduction, albeit the advocate be purſuer; becauſe, in the ſame horning, the King's intereſt in the liferent-eſcheat may be concerned *.

TITLE XI.

Declarator of the Avail of Marriage.

THERE uſes to be no declarator of ward; becauſe the vaſſal, during the ward, was in the cuſtody of the ſuperior of old, and was educated and alimented by him; and therefore he needed no more declare his right, than any tutor, but did immediately enter to the poſſeſſion of his vaſſal's ward-fees.

II. But the caſuality of the avail of his vaſſal's marriage, hath no effect, till the ward be ended. And the avail not being liquid, it muſt be declared what the true avail is, whether the marriage be due in ward-holding by the nature of the fee, or in feus *cum maritagio* by the tenor of the inveſtiture, which is regulated according to the marriage in ward-holdings, unleſs the infeftment bear any expreſs alteration; and that, albeit the nature of the rights be very much different; for, in ward-holdings, the vaſſal hath no benefit but his aliment, till the ward be ended; but, in feu-holdings, the vaſſal hath the full benefit from his predeceſſor's death, if he timeouſly enter.

III. The avail of the marriage of a ward-vaſſal, is introduced by our feudal cuſtoms, and not by expreſs paction, and had its riſe from the nature of proper fees granted for military ſervice; and therefore, while the vaſſal was minor, and was accounted unfit for that ſervice, the ſuperior enjoyed his military fee fully; and thereby the vaſſal's apparent heir, if he had no other eſtate, was in diſtreſs: and therefore our cuſtom introduced a mutual obligement upon the ſuperior and the vaſſal, to this effect, that the ſuperior ſhould ſupply the vaſſal's aliment, ſo far as he had no other eſtate, during the ward; and that he ſhould have the vaſſal's tocher, as a real burden affecting the fee, after the ward, and that *optima fide:* and therefore, if the *vaſſal* did by any precipitation, or colluſion, diminiſh the value of his marriage, or exclude it, the ſuperior ſhould have ſuch an avail of his marriage, as were ſuitable to his eſtate when he married; or at leaſt that he ſhould not forbear to marry till the ward ended, to delay his ſuperior's caſuality; and therefore the ſuperior was allowed to declare the value of his marriage when he married, or at any time after he became marriageable during the ward; his marriageable age being accounted fourteen years compleat; ſo that, if he (*even*) married before that age, and died before he attained to it, his fee ſhould be free of the marriage.

IV. Though the avail of a marriage doth not burden the apparent heir perſonally, nor his other rights, but only the fee, by poinding of the ground [h], yet it is modified with reſpect to all his free eſtate, and is ordinarily modified to two

* This caſuality is diſcharged for ever, 20. *Geo.* II. *c.* 50.
[h] See above, II. 4. 41. & 48.

years free rent, or thereby. But if the ſuperior offer him a ſuitable match, keeping the formalities appointed, and he refuſe the ſame; in that caſe, the avail is heightened a year further, and is therefore called the double avail. Both have been explicated amongſt the caſualities of ſuperiority, *lib.* 2. *tit.* 4. the petitory part for poinding of the ground, uſes to be joined with the declarator, in the ſame libel; but it may be more regularly carried on with it, in a diſtinct libel.

V. The tenor of this declarator may be thus: "Our will is, and We charge "you, That ye lawfully ſummon *B*, as holding the lands of----of *C*, at the leaſt "heir apparent in the ſaids lands, holden ward, or feu *cum maritagio*, to com- "pear, *&c.* to anſwer at the inſtance of the ſaid *C*, or at the inſtance of *B*, his "donatar, by virtue of his gift of the avail of the marriage, of the neareſt law- "ful heir of the laſt deceaſed vaſſal, which gift is dated, *&c.* That is to ſay, "the ſaid defender to hear and ſee it found and declared, That the avail of a "marriage is due out of the ſaids lands, to the ſaid ſuperior or his donatar, by "modification of the Lords of our Council and Seſſion, according to the condi- "tion of the eſtate of the heir, or apparent heir: and that the ſaid defender is "apparent heir in the ſaid eſtate, and that he is of age marriageable, being paſt "fourteen compleat; and that the ſaids lands ought to be pointed for the avail "of the marriage, at the expiring of the ward. And to hear and ſee it verified "and proved, that the defender hath an eſtate, whereof the particular lands, an- "nualrents and ſums of money, render of rent and profit, the ſum of—— "yearly, conform to a particular account thereof produced herewith, and re- "peated as a part of this libel *brevitatis cauſa*, according to which rent the avail "of the ſaid marriage ought to be modified, conform to the laws and daily pra- "ctick of this our realm, *&c.*" According to juſtice, *&c.*

VI. The proper exceptions to be proponed here, are, the burdens upon the eſtate of the vaſſal, at the time he is purſued for declaring the avail, for which the ſame term that is to be aſſigned for proving of his rent and annualrent, will be aſſigned to the defender to prove the debt and burdens, that the free rent may appear. Defences are alſo competent againſt the inſtruments of offer of a match without diſparagement, which have been ſpoken to in the fore-mentioned place, with the other exceptions, which have been ſuſtained or repelled in this declarator.

VII. This declarator requiring probation of the free eſtate of the vaſſal, by witneſſes, or oath of party, muſt have a double diet of compearance *.

TITLE XII.

Declarator of Baſtardy.

BAſtards are accounted *vulgo quæſiti*, where poligamy or concubinate are not allowed; and therefore they are eſteemed to be *incerto patre*, which no contrary probation can avoid, ſo that it is *præſumptio juris et de jure*; therefore baſtards have no agnates, and neither can have heirs, nor can be heirs to any other agnates, unleſs it be by a tailzie, in which the baſtard is named as a branch of the tailzie. I have not obſerved it controverted, whether they may be heirs to their mothers, or cognates of her line; but, unleſs ſtatute or cuſtom have otherwiſe determined, in favour of lawful marriage, there is no ground to ſeclude them from their mother's ſucceſſion, or thoſe of her line; but as to the paternal line, they can neither be heirs, nor have heirs, except thoſe of their own bodies by lawful

* By act 20. *Geo.* II. *c.* 50. and act of Sederunt, 8th *Feb.* 1749, the caſuality of marriage is taken away, and, in place thereof, ſubject-ſuperiors are allowed a feu-duty yearly, equal to one *per cent.* of the conſtant yearly rent of the lands held ward, or feu *cum maritagio*, and one *per cent.* more, for all the other caſualities conſequent upon the tenor of ward-holding.

lawful marriage; and therefore all their means and eſtate, are *bona vacantia nullius*; and yet they do not fall to the firſt poſſeſſor, but do belong to the King, as Sovereign, or to any other Sovereign power, as a part of the publick revenue. But the King's officers, or his donatars, have no petitory action for meddling therewith, till firſt declarator of the baſtardy precede.

II. In this declarator, there is no neceſſity to call any perſon ſpecially, becauſe none do repreſent baſtards, but the lawful iſſue of their own bodies; if any ſuch be, this declarator hath no place, ſo long as they or their lawful iſſue continue; but, whenever they fail, the King has action to declare their eſtates real and perſonal, to belong to him or his donatar, which extends not only to that perſon (*of the baſtard's iſſue*) who had no ſucceſſion, but to the means of any of his predeceſſors, interveening betwixt him and the baſtard [i].

III. The means and eſtate of baſtards comes to the King *cum ſuo onere*, with the burden of all that could have affected the ſame in the baſtard's hands, as the terce and third of the baſtard's relict, whereby ſhe may be ſerved to a terce, and may recover the half of the free goods, from the donatar or any intromitter, and may defend her poſſeſſion thereof, without hazard of being vitious intromitter: for a baſtard can have no heirs in rights heritable or moveable, nor can grant legacies, unleſs he had a gift of legittimation, or a power to teſt from the King: and, by parity of reaſon, the baſtard can do no effectual deed on deathbed, at leaſt, the King may reduce the ſame *ex capite lecti*.

IV. Albeit the King's donatar be liable to ſuffer the baſtard's eſtate to be affected with his debt, or diſpoſition in *liege pouſtie*, yet he is not perſonally liable; but muſt be called *cognitionis cauſa*, for declaring and eſtabliſhing the debt, whereupon adjudication may follow, either of the baſtard's moveables, or heritable rights, or the moveables may be arreſted and made forthcoming.

V. If the baſtard had infeftments of land or annualrent, the King uſes to diſpone the ſame to a donatar, and then the declarator is (*both*) a kind of declarator of property, and a ſpecial declarator of baſtardy. It were convenient that the diſpoſition ſhould bear a clauſe not to take infeftment, till the declarator were firſt paſt; otherwiſe any man's eſtate might have the burden and affront, by an infeftment of his eſtate, under pretence of baſtardy.

VI. Law doth not allow baſtardy to be declared after the death of the baſtard, and therefore the declarator muſt bear, that the baſtard was ſo holden and reputed, during his life. Yet, when the iſſue of the baſtard's body fails, the baſtardy may be declared after the baſtard's death: for, in that caſe, the purſuit may be, as upon the title of *ultimus hæres*; for, if the iſſue of the baſtard's body be extinct, all his means fall to the King as *ultimus hæres*, becauſe none of them could have an heir.

VII. The tenor of the declarator of baſtardy may be thus: "Our will is, and "We charge you, that ye paſs to the market-croſs of the head-burgh of ——— "where *B* baſtard did reſide at the time of his death, and to the head-burghs of "the ſhires where his lands and annualrents, or other rights by infeftment ly and "there, by open proclamation, lawfully ſummon all and ſundry having, or pre- "tending to have intereſt, in the eſtate of the ſaid *B*, to compear, *&c.* to anſwer "at the inſtance of *D* our donatar, as having right by diſpoſition from Us, to "the lands, annualrents, or other heritable rights by infeftment, *&c.* or by gift: "That is to ſay, to hear and ſee it found and declared, that the ſaid *B* was hol- "den and reputed baſtard, and that his mother was never lawfully married, or "at leaſt never lawfully married to *A*, who was commonly reported to be his "father; and that thereby the lands, annualrents, heritage, debts, ſums of "money, goods and gear, belonging to the ſaid baſtard the time he contracted "the ſickneſs whereof he died, did fall and belong to Us by his death, with- "out lawful iſſue of his own body, and now belongs to Our ſaid donatar, as "having a gift of baſtardy, or diſpoſition of the lands, or others wherein the "baſtard died laſt veſt and ſeiſed, as of fee, *viz.* ——— And that Our ſaid do- "natar

[i] See below, § 6. *h. t.*

" natar has good and undoubted right thereto, by virtue of the ſaid diſpoſition; " and that he may lawfully take infeftment thereupon, as his own proper heri- " tage, conform to the laws and daily practique of this Our realm, *&c.* Accord- " ing to juſtice, *&c.*"

VIII. If a baſtard die without iſſue, within a regality, having the benefit of baſtards goods, the declarator muſt proceed at the inſtance of the Lord or Bailie of regality, or their donatar, with concourſe of the King's Advocate, becauſe the right is only founded upon the royal intereſt; the Lord or Bailie of regality being only the King's donatar, and purſuing in his right.

IX. Albeit no perſon needs be ſpecially cited to this declarator, yet any concerned may appear and defend upon the general citation.

X. This declarator muſt have two diets; becauſe witneſſes are to prove that the baſtard was in his lifetime ſo reputed: and if there be any diſpoſition of his heritable rights, the property cannot be declared, without ſome evidence of the baſtard's title; for the quinquennial poſſeſſion is not in this caſe as in forfeiture.

XI. The proper exception againſt this declarator is, that the party pretended to be baſtard, was lawfully begotten, and that his father or mother were lawfully married: at leaſt lived and cohabited together as man and wife; at leaſt were ſo holden and reputed at the diſſolution of the marriage: or that the baſtard was legitimated by the King's gift, anterior to the donatar's gift or diſpoſition. How the being lawfully begotten may be inſtructed, and the other inſtances againſt baſtardy, may be ſeen upon that head, *lib.* 3. *tit.* confiſcation, § 42.—46.

TITLE XIII.

Declarator of the King's Right, as laſt Heir.

THE King's right, as laſt heir, befals when a defunct dies, to whom none can be entered heir of line or blood, or executor upon that title; and therefore ſuch a defunct's whole eſtate and means are *bona vacantia*, and belong to the King, or any other ſovereign authority, as a part of the publick revenue. But the King is not truly heir, but as heir; and therefore his donatar is not perſonally liable, as the defunct's heir would have been, but is only liable to ſuffer ſentences and execution againſt the defunct's eſtate. But in any mutual contract, if the donatar crave the benefit of it, he muſt perform the mutual obligements as the cauſe of it, not as a perſonal obligement, but as a quality of the right; otherwiſe it were *cauſa data cauſa non ſecuta.*

II. There is little difference in the declarator of *ultimus hæres*, from the declarator of baſtardy. The tenor thereof may be thus: " Our will is, and We " charge you, that ye paſs to the market-croſs of the head-burgh of the ſhire " of *E*, where *B* dwelt when he died, and alſo to the market-croſs of the head- " burgh of the ſhire of *F*, where the lands and others wherein he died laſt veſt " and ſeiſed, ly, *viz.* ———, and there lawfully ſummon, warn, and charge " all and ſundry having, or pretending intereſt, as heirs, ſucceſſors, or creditors of " the ſaid *B*, to compear, *&c.* to anſwer at the inſtance of Our Advocate, for " Our intereſt, and alſo at the inſtance of *D* our donatar, as having right to the " ſaids lands of ———, wherein the ſaid *B* died laſt veſt and ſeiſed, as of fee, " by virtue of Our gift or diſpoſition, dated, *&c.* That is to ſay, to hear and ſee " it found and declared, that all lands, heritages, debts, ſums of money, goods " and gear, which belonged to the ſaid *B* the time of his deceaſe, or the time " of contracting the diſeaſe whereof he died, do belong to Our ſaid donatar, " by virtue of the ſaid gift or diſpoſition granted by Us to him; and that Our " ſaid donatar, by virtue thereof, has good and undoubted right to the lands, " and others above-written; and that he may lawfully take infeftment thereon, " and diſpoſe of the ſame as his own proper heritage, in all time coming, con-

" form

" form to the laws and daily practique of this our realm, *&c.* According to ju-
" ſtice, *&c.*"

III. If any perſon appear, and condeſcend upon his propinquity of blood, it will found a dilator during the year of deliberation, that he may have competent time to deliberate, that he may enter himſelf heir; in which caſe the Lords will eaſily advocate the ſervice to the macers and aſſeſſors [k].

TITLE XIV.

Declarator of Recognition, Diſclamation and Purpreſture.

THESE declarators are competent to all ſuperiors, in the ſeveral caſes wherein they occur; and they are founded upon the nature of fees, which neceſſarily imply the fidelity of the vaſſals to their ſuperiors: and therefore it is as a clauſe irritant in the inveſtiture, if the vaſſal act any thing atrocious againſt that fidelity in any fee. But if, in a proper fee or wardholding, the vaſſal alienate the fee, or the major part thereof, or if he diſclaim his ſuperior wittingly, or if he invade his ſuperior's adjacent property, by adjecting it to his own, theſe deeds do reſolve his fee, and make it return into the hands of his ſuperior; whereby he recognoſceth it, or owneth it to become again his own property, albeit there be no mention of any of theſe in the vaſſal's infeftment. But the ſuperior cannot poſſeſs himſelf of the fee, or purſue any poſſeſſory judgment, until the recognition of the fee be firſt declared [l].

II. Albeit diſclamation and purpreſture have theſe proper names and titles, which uſe to be handled apart, yet they are but particular kinds of recognition; and therefore the tenor of the recognition is one in them all, tho' the particular acts inferring the recognition, whether one or more, muſt be ſpecially libelled: as if in blench or feu-holdings, the deed inferring recognition be the killing, wounding, or beating the ſuperior, or an atrocious deed importing infamy againſt him: or in ward-holdings, the diſclaiming him as ſuperior directly, or indirectly by owning another as ſuperior wittingly, or by alienating or burdening the fee above the half of the value, without the ſuperior's conſent, whether by infefting another to be holden *à ſe* of the ſuperior, or holden *de ſe*, or granting infeftments of annualrent exceeding the value of the half of the fee; in all which caſes the tenor is the ſame; but theſe ſpecialities are left blank.

III. The recognition may be either in the name of the ſuperior himſelf, or in the name of a donatar, who ordinarily gets a charter which he founds on, expreſſing the ſpecial cauſe of recognition: for in declarators of recognition there is no general clauſe, neither uſes there to be a gift, but only a diſpoſition and charter, whereby the obtainer thereof becomes vaſſal to the ſuperior, in place of the former vaſſal, according to the tenor of the charter.

It were regular and convenient, that ſuch charters contained a clauſe not to take infeftment before declarator, becauſe they may be given without juſt cauſe, and the donatar is in no hazard to be prevented by any other, if he timeouſly and diligently inſiſt in the declarator.

IV. This declarator is ordinarily at the inſtance of donatars, and may be more eaſily and ſimply at the inſtance of ſuperiors. The tenor may be thus: " Our
" will is, and We charge you, that ye lawfully ſummon *B*, as having been vaſ-
" ſal to *C* in the lands of ———, at leaſt apparent heir therein, who, or his
" predeceſſors or authors, have committed the deeds of recognition underwrit-
" ten, to compear, *&c.* to anſwer at the inſtance of *D*, as having right by char-
" ter from the ſaid *C*, ſuperior of the ſaids lands, and others foreſaids, as fallen in
" his hands by recognition, for the cauſes ſpecially contained in the foreſaid

 " charter,

[k] See above, III. 3. 47. [l] See above, II. 11. 10.—28.

" charter, *viz.* ——, which charter is dated, *&c.* That is to ſay, the ſaid defender to " hear and ſee it verified and proven, that he hath wittingly and wilfully committed " the ſaids deeds of recognition: and therefore to hear and ſee it found and de- " clared, that therethrough he has amitted and loſt the right of property of the " ſaids lands, and others foreſaids; and that the ſame did recognoſce to the ſaid " ſuperior of the ſame, and that from and after the committing of the ſaids deeds " of recognition: and that the ſaid purſuer, by virtue of the foreſaid charter, " hath good right to take infeftment thereof, and to bruik and joyſe the ſaids " lands, and others foreſaids, by virtue of the ſaid charter and infeftment to fol- " low thereupon, as his own proper heritage, in all time coming; and to intro- " mit with, claim and ſue for, the rents and profits of the ſamine, ſince the ſaids " deeds of recognition, againſt all poſſeſſors and intromitters therewith, con- " form to the laws and daily practique of this Our realm, *&c.* According to " juſtice, *&c.*"

V. This declarator muſt have double diets, unleſs the vaſſal's infeftment be produced. And albeit it bear not the deeds of recognition, to be wittingly and wilfully done, that will be preſumed upon the deeds, unleſs the vaſſal condeſcend and prove, that he did the ſame by ignorance or miſtake, without any wilfulneſs or contempt; as if the ſuperior or he were ſingular ſucceſſors, or that the fee was by the inveſtiture provided to other heirs, than he who now claims the ſame as ſuperior, or that the deeds againſt the ſuperior's perſon, were for neceſſary ſelf-defence, *ex inculpata tutela*, or in obedience to lawful authority, or in defence of a more ancient ſuperior; or that words importing his infamy were in obedience, upon judicial examination as a witneſs.

VI. But minority affords no exception in this matter, which of its nature is criminal. Neither will it be a relevant exception, that theſe deeds were done by him who had curators or interdictors, without their conſent: nor that the infeftment *a ſe* was null, not being confirmed, and ſo could import no alienation; if it did contain precept of ſeiſin, and that thereupon ſeiſin was taken, albeit the charter or precept of ſeiſin did bear a proviſion, that the infeftment ſhould not be effectual, unleſs the ſuperior conſented or confirmed: but if it did bear, that ſeiſin ſhould not be taken till the ſuperior confirmed, it would be relevant; for this clauſe were ſuſpenſive, whereas the former were only reſolutive. *

TITLE XV.

Declarators of Aſtriction.

MILLS at firſt were built only to procure hire for grinding of grain; but afterwards there were agreements between the proprietar of the mill and ſome of the neighbourhood, whereby ſuch a proportion of the grain grinded was agreed on to be given and taken, for the hire of that ſervice; without which agreement, or a particular agreement upon ſeveral occaſions, thoſe who came to the mill were underſtood to be obliged to pay the ordinary hire or multure. In either caſe, there was no more but a perſonal contract of location: but now of a long time, mills have become feudal fees, and ſeparate tenements, requiring ſpecial infeftments, except in the caſe of infeftments in barony, which is an univerſal title whereby mills are carried as part and pertinent without a ſpecial ſeiſin; yet ſtill ſome come to mills without aſtriction, and pay a leſs duty than thoſe who are aſtricted ordinarily; tho' there may be an aſtriction for ſo ſmall a duty, as is only equivalent to the ſervice, which all muſt pay that come, without ſpecial agreement. But agreement for a definite time doth infer aſtriction.

II. Aſtriction

* By act 20th *Geo.* II. *c.* 50. the caſuality of recognition is diſcharged for ever.

II. Aſtriction or thirlage is a perpetual burden upon the lands aſtricted, for paying a certain multure, and ſervices to the mill; and thereby it becomes a ſervitude, wherein the mill is the dominant tenement, and the lands thirled are the ſervient tenements; and it is a real burden affecting theſe lands, paſſing therewith to all ſingular ſucceſſors [m]. Yet there doth not thence follow a real action by poinding of the ground, but a perſonal action againſt the poſſeſſors, and is rather a burden upon the fruits than upon the ground. Nor doth it affect ſingular ſucceſſors buying the fruits, but only the poſſeſſors to whom the crop belongs, and not the maſter of the ground, if he be not poſſeſſor by labourage. It is alſo in the power of the poſſeſſors to labour more or leſs as they pleaſe, or nothing; if they labour none, even though they incloſe a part of theſe grounds, never to be laboured, there is no multure due, unleſs there be conſtitute a ſtocked multure, which is called a dry multure, which can only be ſo conſtituted by the heritor, and therefore is conſtantly due by him and by the poſſeſſors, though they labour none.

III. Heritors do aſtrict their own tenants, moſt ordinarily to their own mills; and then the multure and mill-ſervice becomes a part of the tenants rent, and there is no ground of complaint, how great ſoever the multure be, for the rent muſt be the leſs. Yea, the multure becomes a real burden upon the ſeveral rooms; and although *res ſua nemini ſervit*, yet there being a proper intereſt of the millers, and of the tenants; this thirlage is conſiſtent, notwithſtanding that rule.

IV. There needs no other probation of aſtriction of tenants, but their uſe of going to their maſter's mill. Yea, though ſome pay leſs multure and ſervices than others, yet all are aſtricted; and whoſoever acquires the mill by diſpoſition, appriſing, or adjudication, carries the multures of thoſe tenants that were accuſtomed to come to that mill, even though the lands aſtricted be not a barony; and that, though the diſpoſition of the mill do not bear expreſsly "with the thirle "multures of ſuch lands," or generally, "with thirle multures," but only "with "the multures uſed and wont." And albeit purchaſers ſhould be ſo uncautious as to buy the mill, without mention of multures, or that the mill be adjudged or appriſed without mention thereof; yet the aſtricted multures will follow the mill, unleſs it were otherwiſe expreſſed, or did appear by the nature of the ſale; as if an heritor ſhould ſell a mill and mill-lands, lying adjacent to the buyer's lands, without getting a price, ſuitable both to the mill and mill-lands, and to the multure, ſucken, and ſequels of the mill.

V. Thirlage of lands to mills of the King's property, is ſufficiently inſtructed, by uſe of coming to the mill, and paying the inſucken multures, though the thirlage be not founded upon, nor adminiculated by writ, which is a royal prerogative, neceſſary for the King, becauſe he is not prejudged by the neglect of his officers, in keeping any writs.

VI. Thirlage alſo of mills which did belong to kirk-men, as parts of their benefice, is more eaſily inſtructed than the thirlage of other ſubjects; becauſe, in the time of the Reformation, their evidents were deſtroyed and loſt. And that, albeit the queſtion be of thirlage of lands, which were not of their own property or ſuperiority; but much more, if the queſtion be of ſuch lands; for therein they are in the common caſe with other heritors, as to the multures of their own lands accuſtomed to be paid to their own mills.

VII. Thirlage, in other caſes, cannot be conſtitute or inſtructed by mere uſe of coming, and paying ſuch a multure, and ſuch ſervices and ſequels, unleſs there be other concurring evidences importing a thirlage, as if there were uſe of payment of a dry multure (unleſs it were proved to be by a temporary agreement) or if the multure-ſervice and ſequels were ſo great, that thoſe who were accuſtomed to come, might have them elſewhere much more eaſy and convenient; in that caſe immemorial, or forty years ordinary coming to the mill, and paying ſuch

[m] See above, II. 7. 15.—27.

ſuch duties, would inſtruct thirlage: for it is a ſtrong preſumption, that none would ſo long pay ſo heavy a duty unneceſſarily; yet it is but a preſumption, that may be elided by a contrary preſumption, as if the mill belonged to a near relation, which might give a probable ground, that the continuance at it, was by gratification.

VIII. The ordinary way of conſtituting thirlage of other men's lands, is, by bonds of thirlage, granted by the heritors of the aſtricted lands, to the heritors of the mill. Yet theſe bonds alone will not make it a real burden, affecting ſingular ſucceſſors, unleſs there were uſe of payment after ſuch bonds. 2. Alſo acts of court, whereby heritors enact their own tenants to come to another mill, and coming accordingly, makes the aſtriction real; but if it be only an act by a bailie, except his warrant be inſtructed, it will not make a conſtitution, but will be a title for preſcription. 3. Decreets for multures or mill-ſervice, though they be but by inrolments of baron-courts, without formal extracts, if they be on compearance, they are more effectual than the acts of bailies; for they are not only titles for preſcription, by ſubſequent poſſeſſion, but alſo they are evidences that the anterior poſſeſſion was not voluntary.

IX. Thirlage is ſometimes the ground of a poſſeſſory action, ſometimes of a petitory action, and ſometimes of a declaratory action. When the thirlage is ſpecial both as to the lands, and as to the liquid quantities of multure, which hath been ſo poſſeſt within ſeven years; then a poſſeſſory action is competent to continue the ſame. But if there hath not been ſo long continuance of poſſeſſion, albeit it was cled with ſome years poſſeſſion; yet, if the conſtitution hath not been ſeven years ſince, the multures may be acquired without a declarator, by a petitory action. But if there hath been no poſſeſſion within ſeven years, there muſt be a declaratory action, to declare the right of the thirlage, before there be a petitory or poſſeſſory judgment; in which the heritor of the aſtricted lands muſt be called, and likewiſe in the petitory judgment; but, in the poſſeſſory judgment, it is ſufficient to call the poſſeſſors.

X. The tenor of the declarator of thirlage may be thus: "Our will is, and "We charge you, that ye lawfully ſummon *B*, heritor of the lands of —— or "liferenter, or wadſetter of the ſamine, to compear, *&c.* To anſwer at the in"ſtance of *A*, heritor, liferenter, or wadſetter of the mill of——with the "multures, ſucken, ſequels and ſervices thereof, conform to their infeftments of "the ſamine, dated, *&c.* And als at the inſtance of *T*, tackſman, or tenant of "the ſaid mill, That is to ſay, The ſaids defenders to hear and ſee it found and "declared, That the ſaids lands of——were aſtricted and thirled to the ſaid "mill, in payment to the purſuers of the quantities of multure, ſucken, and ſe"quel after ſpecified, *viz.*——For the reaſons and cauſes following. (Here "muſt be inſert the particular ways of aſtriction and inſtruction thereof before "mentioned) And that the purſuers have good and undoubted right to the ſaids "multures, ſucken, ſequel and ſervices, ſince the ſaid aſtriction, and in all time "coming; and ought to be anſwered and obeyed therein by the defenders, their "tenants and poſſeſſors, and the ſaids aſtricted lands, conform to the quantities "of the grindable corns growing thereupon, grinded at any mill, or giſted or "ſold, and not grinded at the purſuer's mill, and alſo of all grains *invecta et* "*illata*, tholing fire and water within the ſaids lands thirled as aforeſaid, con"form to the laws and daily practick of this our realm, *&c.* According to ju"ſtice, *&c.*"

XI. *Invecta et illata* will be ſufficiently proved by cuſtom, though it be not expreſs in the conſtitution of the thirlage, unleſs the thirlage be ſpecial and particular in all things.

XII. It will be a relevant defence, that the bond or act of thirlage did not attain poſſeſſion before the defender's infeftment of the lands in queſtion, he being a ſingular ſucceſſor to him who granted the bond of thirlage, or made the acts of aſtriction, if theſe be the cauſes of aſtriction. But if poſſeſſion anterior, be

inſtructed

inſtructed or offered to be proved, it will be relevant. 2. It will be a relevant defence againſt aſtriction by preſcription, that there was interruption by proceſs for declarator of liberty from thirlage; or by interruptions *via facti*, by grinding of corns growing upon the lands pretended to be aſtricted, for ſeveral whole years; yet, if the purſuer libel and offer to prove ordinary coming to the mill, during the preſcription, and paying the duties acclaimed, though he prove not every year, the libel will be relevant, unleſs the defender poſitively offer to prove the interruption, as aforeſaid, wherein he will be preferred as more pregnant. 3. It is a relevant exception againſt this declarator, that the defender being ſingular ſucceſſor, did *bona fide* poſſeſs the lands in queſtion, and conſumed the fruits thereof, without the knowledge of any thirlage, but the reply of his being in *mala fide*, by inſtructing the thirlage by writ *ab initio*, or by a decreet of aſtriction, will elide that defence.

TITLE XVI.

Actions to inſiſt with Certification not to be heard thereafter, and Actions of double poinding.

LAW hath provided two remedies for freeing defenders from the hazard of purſuers, that do, or may inſiſt againſt them, that they may not at diſcretion be obliged to attend, for defence of their proceſſes. The one is, when they are cited to a certain day, and receive a copy of the ſummons; they appear the next Seſſion-day after the term to which they are cited, and produce the copy, and cauſe call the ſame, and crave proteſtation, that ſeeing the purſuer appeareth not to inſiſt, they may be declared free from that inſtance, and not to be called till they be cited of new. This is not competent at the firſt diet, becauſe they are to be cited to the ſecond diet, after the firſt is elapſed; ſo that the inſtance cannot fall by the firſt citation, ſeeing they are to be cited again by the ſecond citation.

II. This proteſtation being obtained and extracted, the defender lies ſtill under the hazard of the ſame cauſe in another inſtance; for remedy whereof, law allows him to raiſe a ſummons againſt the purſuer to inſiſt with certification, that if he inſiſt not, he ſhall never be heard thereafter, in that cauſe; whereby this certification is peremptory, not only excluding the ſummons till new citation, but excluding the cauſe, whereupon the ſummons was founded.

III. The other remedy is, when parties are, or may be purſued, by different purſuers, upon diſtinct rights; in which caſe, they cannot found upon a third party's right. And therefore the law allows that they may cite all parties, that do or may pretend right againſt them, for that which they do acknowledge they may be liable to, either by a perſonal or real action, to the effect that they may diſpute their rights and preferences, and that the purſuer in this action may be only liable in once and ſingle payment or performance; and that he, nor no right of his, may be liable to double diſtreſs, but that he may ſafely pay or perform to the party that ſhall be preferred, and found to have beſt right. Whereby a decreet of preference, and performance, ſecures the performer for ever; and that, albeit the decreet of preference were in abſence, or though thereafter it were reduced, whether it had been in abſence, or upon compearance; ſo that the party thereafter preferred, will (*only*) have acceſs againſt thoſe who were formerly preferred; for as payment made *bona fide*, ſecures the payer, when no other party is called, ſo much more are theſe ſecured, who pay or perform, *auctore prætore*.

IV. Both theſe actions are declaratory, and neither petitory nor poſſeſſory, albeit they have theſe ſpecial names, and are not under the general name of declarators.

V. The action for inſiſting, is not competent after litiſconteſtation; becauſe then, either party is maſter of the proceſs: for as the purſuer may inſiſt to prove, conform to the act; ſo the defender may call upon the ſame act, and circumduce the term, for the purſuer's not proving, and ſo may be aſſoilzied *ſimpliciter*, and not from the inſtance only; and therefore this action cannot proceed till the foremen-tioned proteſtation precede and be extracted; which may be obtained, although the purſuer appear and give out his proceſs to be ſeen; for if after it is returned, he do not inrol it, the defender may again call upon his copy, and will get proteſtation, ſimply, or conditionally to be extracted if the purſuer do not inrol the next inrolling day. And when the cauſe is called by the roll, if the purſuer inſiſt not, the defender will get proteſtation.

VI. If the defender in this action to inſiſt, do appear, if he have any probable ground for it, he will get a time to prepare himſelf to inſiſt.

VII. The tenor of the action of double poinding may be thus: "Foraſmuch "as it is humbly meant and ſhown to us by our lovit *A*, That whereas the "complainer, or his lands and goods, are diſtreſſed and troubled at the inſtance "of *B*, and *C*, as pretending right, by ſeveral arreſtments, and actions for ma-"king forthcoming, of certain ſums of money addebted by the complainer to "*D*, or wherewith his lands of———are affected and burdened, and may be "poinded by the ſaids parties pretending different rights and titles thereto: and "it being moſt juſt and reaſonable, that the complainer, or his lands and goods, "ſhould only be liable to once and ſingle payment and performance, to the party "who ſhall be found by decreet of the Lords of our Council and Seſſion, to "have beſt right thereto, and ſhould be freed of any trouble or diſtreſs, at the "inſtance of any of the other parties pretending right, as is alledged. Our will "is herefore, and We charge you, that ye lawfully ſummon the ſaid *B*, and *C*, "pretending right as aforeſaid, to compear, *&c.* To anſwer at the inſtance of "the purſuer, That is to ſay, The ſaids defenders to produce before the ſaids Lords "their ſeveral rights, titles and intereſts, whereby they pretend to be preferred "in the matter above written. And to hear and ſee it found and declared, by "decreet of our ſaids Lords, who hath the beſt and preferable right thereto; "and that the others may be decerned, to ceaſe and deſiſt from troubling or "moleſting the complainer thereanent; and that payment or performance to the "party found to have beſt right, ſhall liberate and free the purſuer at all hands; "with certification, that if they compear not, or produce not ſufficient titles and "rights to the ſubject in queſtion, or that compearing and producing, they ſhall "not be preferred; they ſhall never be heard thereafter, to purſue, moleſt, or "trouble the purſuer in any ſort; at the leaſt, that payment or performance to "the party who ſhall be preferred, ſhall abſolutely liberate and aſſoilzie the "purſuer from all inſtance, action and execution, for the matter in queſtion, "bygone, preſent, or in time coming, conform to the laws and daily practick of "this our realm, *&c.*" According to juſtice, *&c.*

VIII. The tenor of the action for inſiſting, may be thus: "Foraſmuch as, it "is humbly meant and ſhown to us by our lovit *A*, That whereas the com-"plainer was purſued at the inſtance of *B*, to appear before the Lords of our "Council and Seſſion, upon the———day, *&c.* In the hour of cauſe, with "continuation of days; alledging that, *&c.* According to which citation, the "complainer appeared and produced a copy of the ſummons; which copy being "oft-times called in preſence of the ſaids Lords, the ſaid *B* not compearing, the "ſaids Lords admitted proteſtation, declaring that the complainer ſhould not be "obliged to anſwer, nor the ſaid *B*, have any further proceſs in the ſaid cauſe, "till the complainer were of new ſummoned for that effect. And ſeeing the "ſaid *B* doth not yet inſiſt in the ſaid cauſe, having had ſufficient time to do the

"ſame,

" ſame, and that the complainer ought not to ly under the hazard of plea, in the " ſaid matter, at the option of the ſaid *B*, that he may take advantage of the " complainer, or of his ſucceſſors, in their minority, and ignorance of the affair, or " when the means of probation of the complainer's defences may be loſt: there- " fore, in all law and reaſon, he ought to be decerned to inſiſt in the ſaid cauſe, " with certification, that if he failzie, he ſhall never be heard therein thereaf- " ter, and that the complainer ſhall abſolutely be aſſoilzied therefrom for ever; " as is alledged. Our will is herefore, and We charge you, that ye lawfully " ſummon the ſaid *B*, to compear, *&c.* To anſwer at the inſtance of the ſaid " complainer; that is to ſay, The ſaid defender to hear and ſee the premiſes ve- " rified and proven; and being ſo verified and proven, to hear and ſee himſelf " decerned to inſiſt in the ſaid cauſe, with certification, that if he inſiſt not, he " ſhall never be heard therein thereafter; and that the complainer ſhall be *ſim-* " *pliciter* aſſoilzied therefrom, conform to the laws and daily practick of this our " realm, *&c.*" According to juſtice, *&c.*

TITLE XVII.

Declarators of Servitudes.

THE Roman law had two ſpecial actions in relation to ſervitudes; the one confeſſory, whereby parties did inſiſt to obtain a ſervitude to be decerned in their favour; the other negatory, for obtaining a decreet, declaring them free of ſuch particular ſervitudes.

II. The ſame actions are competent with us, but in different ways, and by diſtinct kinds of actions: for when parties inſiſt for ſervitudes, having been in recent uſe of enjoying the ſame, they may inſiſt in a poſſeſſory action for that effect; becauſe it is the continuation of their poſſeſſion, and they have no need to declare their right of the ſervitude. But if they, or their authors, have not been recently in uſe of enjoying that ſervitude, a poſſeſſory action is not competent to them, but they muſt firſt declare their right: the reaſon whereof, is the ſame which makes the difference betwixt poſſeſſory and petitory, or declaratory judgments; whereby thoſe who are out of poſſeſſion cannot purſue from the conſtitution of their right to their citation, for profits or damages, tho' they ſhould ſufficiently inſtruct their right to have been compleat from the beginning, but the defenders do enjoy their fees *bona fide*, without any ſuch burden, till they be conſtituted *in mala fide* by a proceſs, or that they have known the purſuer's right, and have hindered him to enjoy the ſame. The time of enjoying the privilege of a poſſeſſory judgment, in defence of actions of mails and duties, or removing, did vary for ſome time; but now hath been long fixed to ſeven years peaceable poſſeſſion, without interruption; ſo that, till reduction or declarator, they had a dilatory defence upon the privilege of a poſſeſſory judgment [n]. And tho' the ſame queſtion hath not frequently occurred in ſervitudes, yet no leſs time ſhould be required for that privilege in them.

III. The privilege of a poſſeſſory judgment is not competent againſt poinding of the ground upon annualrents, feu-duties, or other real burdens, which appear by infeftments, whereby they may be known, and which are ſeveral diſtinct fees, neither in actions for teinds, for the ſame reaſon; becauſe the rights thereof are notour. But this is not to be extended to ſervitudes, againſt which proprietors, wadſetters orliferenters, have the privilege of a poſſeſſory judgment, till the ſervitude be declared.

IV. The tenor of a confeſſory action, or declarator of ſervitude, may be thus: " Our will is, and We charge you, that ye lawfully ſummon *B*, heritor, wad- " ſetter,

[n] See above, II. 7. 22. Below, IV. 22. 5 & 8.

" ſetter, liferenter, or poſſeſſor of the lands of *S*, which lands are burdened with " the ſervitude under written, to compear, *&c.* to anſwer at the inſtance of *A*, " as having right to the ſervitude of ———, as part and pertinent of the lands " of *F*, belonging to the purſuer, his predeceſſors or authors, by continual poſſeſ- " ſion, and uſe of the ſaid ſervitude, as a pertinent of their ſaids lands, and to the " behoof thereof as the dominant tenement, by frequent and ordinary uſe and poſ- " ſeſſion, as they had occaſion, paſt memory, at leaſt during the ſpace of forty " years, at leaſt as having right to the ſaid ſervitude, by a bond of ſervitude, or diſ- " poſition thereof, from the heritor of the ſaid ſervient tenement, for the time; " which bond or diſpoſition is dated, *&c.* by virtue whereof the ſaid purſuer, his " predeceſſors or authors, have been in poſſeſſion, and uſe of the ſaid ſervitude: " That is to ſay, the ſaid defender to hear and ſee it found and declared, that the " ſaid purſuer hath good and undoubted right to the ſaid ſervitude, in manner a- " bove-written: and the ſaid defender to be decerned by decreet of the ſaids Lords " to deſiſt and ceaſe from troubling him in the peaceable enjoyment of the ſaid " ſervitude, and to pay and ſatisfy to him the damages ſuſtained through his " unjuſt hindering his enjoyment thereof, and through his detaining the pro- " fit of the ſaid ſervitude, as ſhall be modified by decreet of the ſaids Lords, con- " form to the laws and daily practique of this realm, *&c.* According to ju- " ſtice, *&c.*"

V. The negatory declarator of ſervitude is ſeldom uſed, becauſe ſervitudes have not proper poſſeſſion, but uſe in place thereof; and therefore parties concerned may ſtop that uſe, if they find any ground of doubt of the right thereof, without hazard of ejection or intruſion: for thereby the party having right to the ſervitude, may purſue a petitory or poſſeſſory action upon the ſervitude, if he be not long ſilent, as aforeſaid; yet the negatory declarator is requiſite, to liberate the purſuer's tenement of any pretence of right or poſſeſſion, whereby another may claim a ſervitude, as pertinent of the purſuer's tenement, by long poſſeſſion, or by an inſufficient title, accompliſhed by preſcription; eſpecially leaſt his probation of interruption may fail by the death of his witneſſes. This declarator requires no more but the denial of the ſervitude, which is negative and proves itſelf, unleſs the contrary be proved; and thereupon concludes declarator of liberation from ſuch ſervitude, decerning the defender to deſiſt and ceaſe from troubling the purſuer therewith.

VI. In the confeſſory declatators defences will be competent upon anteriority of the defender's infeftments, before the conſtitution of the ſervitude, or upon interruption thereafter; or that the ſervitude was conſtitute *a non habente poteſtatem*, he who conſtitute the ſame, either not being infeft in the tenement pretended to be ſervient, or being denuded in favour of the defender, his predeceſſors or authors, before the conſtitution attained poſſeſſion; whereby the purſuer will be obliged to reply and inſtruct, that the conſtituter of the ſervitude had right by infeftment, and that the ſervitude was cled with poſſeſſion before he was denuded, which he needs not libel and inſtruct *ab initio*; but he cannot exclude the defence, as not competent in this judgment, becauſe it is not poſſeſſory but declaratory.

VII. In the probation of the continuance of poſſeſſion, it will be ſufficient to prove, that frequently and ordinarily the ſervitude was made uſe of. An interruption will not be inferred by one year's forbearance to poſſeſs, unleſs there were actual debarring, or inſtruments taken upon interruption.

TITLE

TITLE XVIII.

Declarators of Clauſes irritant.

HItherto declaratory actions of the rights of purſuers have been handled. There remains yet reſciſſory actions, whereby the rights of defenders are reſcinded, and declared to be null or void, or to be reſolved, or falſe, or holden and reputed as falſe; whereby the rights of purſuers do by conſequence revive, and therewith alſo clauſes declaratory of the purſuer's own rights are joined; ſo that they are not only preferable to the rights reſcinded, but alſo declared to be abſolutely valid rights; in which caſe there muſt be citation at the market-croſs, againſt all and ſundry having, or pretending right to the right in queſtion.

II. Theſe reſciſſory actions are all declaratory, and neither petitory nor poſſeſſory, concluding nothing to be done by the defenders: for tho' they may conclude that they ſhould deſiſt and ceaſe, yet that is only negative, prohibiting to do.

III. Clauſes irritant are ſo called, becauſe they are deſigned to make void the rights in which they are contained, in the events therein expreſſed. They are alſo called reſolutive clauſes, becauſe in theſe events they do reſolve the rights wherein they are contained; and ſometimes they bear, that in the caſes therein mentioned, the rights ſhall thereby become null, *ipſo facto*, without declarator; but notwithſtanding of this, clauſes irritant are not effectual till they be declared, where they are exorbitantly penal: for the Lords *ex officio* have power to modify exorbitant penalties, albeit they bear to be liquidate of conſent of parties; and, for the ſame cauſe, they have power to qualify theſe clauſes irritant, and to allow time for purging the ſame [o]; yet only if they be truly exorbitantly penal: for ſuch clauſes contained in gratuitous rights take their full effect, becauſe then they are not penal, but are conditions and proviſions qualifying the right; and therefore they need no declarator: but if the right wherein they are, be founded upon by way of defence or reply, the alledgeance of the right's being gratuitous, will be relevant, *and the irritant clauſe effectual.*

IV. Theſe clauſes irritant may be contained in any right, but they uſe moſt ordinarily to be contained in wadſet-rights, bearing, that if redemption be not made conform to the reverſion, within ſuch a time, or in ſuch a way, then the reverſion ſhall become void: or in caſe the reverſion be only made temporary, the effect is the ſame, except it be in a true ſale for a competent price, wherein both clauſes irritant, and temporary reverſions are valid, becauſe there is nothing penal in theſe caſes.

V. The Roman Law doth abſolutely reject ſuch clauſes in impignorations, which they call *pacta legis commiſſoriæ in pignoribus.* Our cuſtoms did formerly ſuſtain ſuch clauſes, but modified the exorbitancy thereof, by giving competent time to redeem, albeit the time contained in the reverſion was elapſed; but did not ſuſtain the reverſion to be perpetual. But ſince, our cuſtom hath more cloſely followed the Roman Law in this point, if that which was done was truly an impignoration, and not a ſale for an equivalent price.

VI. The next caſe moſt ordinary for clauſes irritant, is in tailzies [p]; whereby the heirs of tailzie are burdened with certain proviſions and conditions, ſometimes by poteſtative conditions, in the power of the heir to perform; ſometimes accidental, not being in the heir's power. Theſe clauſes irritant in tailzies are not properly penal, becauſe it was in the power of the conſtituent to aſſume or not aſſume theſe heirs of tailzie to be his heirs; and therefore they are effectual, and eſta-

 bliſhed

[o] See above, I. 13. 14. II. 10. 6. IV. 5. 7.

[p] See above, II. 3. 58.

bliſhed by an act of Parliament 1685, *c.* 22. not only againſt the heirs of tailzie, and their ſucceſſors, but alſo againſt ſingular ſucceſſors, even tho' they be creditors appriſing or adjudging for the heir's proper debt; but they will not defend againſt the conſtituent's debt; in prejudice of which no poſterior tailzie could be made. Such clauſes irritant in tailzies do not well quadrate with the right of property: for thereby theſe heirs have not the power of diſpoſal of theſe tailzied rights, and therefore ſuch clauſes uſe not to be put upon heirs of line, nor heirs-male, nor heirs of proviſion by contracts of marriage; for all theſe are heirs of blood: and if, in ſuch caſes, heirs were ſo bound up, that they could neither ſell, nor effectually contract debts that might affect theſe eſtates, commerce of lands would thereby be taken away, and proprietars would frequently be rendered miſerable; becauſe, tho' the fee of their eſtates could not be affected for their debts, yet no tailzie could hinder their rents to be arreſted, and made forthcoming.

VII. Albeit clauſes irritant in tailzies be not penal, and upon that account require not declarators, yet there muſt be declarators before the tailzied infeſtment can be annulled or reſolved; becauſe ſuch clauſes are againſt the common courſe of law, and therefore are odious, and ſhould not take effect before they be declared; for if they were effectual by a petitory action, claiming the whole profits ſince the act contraveening the clauſe, the heirs of tailzie would be miſerable; and thoſe in whoſe favour the right were reducible, ſhould impute it to their own negligence, that they *did* not ſooner declare the clauſe.

VIII. Heirs of tailzie are ſometimes the neareſt male of blood, when fiars bring in their ſons, or other neareſt relations, *nominatim*, as branches of a tailzie, who otherwiſe would have been heirs-male; againſt ſuch theſe clauſes irritant ought not to be extended, nor againſt the heirs in the laſt termination of the tailzie: for if the eſtate come to the laſt branch of the tailzie, and his heirs whatſomever, it ceaſes to be a tailzied eſtate.

IX. Clauſes irritant are ſo many and various, that a common tenor cannot be framed for them; but as they may be purſued by declarator, ſo may they alſo by reduction, the ſtyle whereof is more fixed and uniform than of any other proceſs.

TITLE XIX.

Actions *cognitionis cauſa.*

ACTIONS *cognitionis cauſa* are declaratory, becauſe they do not conclude payment, or any thing to be done by the defender; and therefore are competent againſt apparent heirs without a charge.

II. The effect of the decreet is only to declare what debt was due by the defunct, that it may affect his heritage or moveables.

III. In this the apparent heir, or neareſt of kin, are called; becauſe, tho' they have not entered, nor owned their ſucceſſion, yet they may do it thereafter; and therefore they may object againſt the intereſt, order, relevancy, or inſtructions produced *ab initio*. But they can propone no exception, which if admitted would make them behave: nor can they propone it, becauſe they have no title in their perſon ſufficient to make litiſconteſtation.

IV. There is little need of theſe actions now, ſince adjudications are come in place of appriſings, except it be for deducing the firſt adjudication: for if one adjudication be paſt and extracted, all poſterior adjudications within the year will paſs as acts, and need no decreet *cognitionis cauſa*, unleſs the ground thereof be altogether illiquid, and then it may be an article in the proceſs of adjudication, and will obtain ſummarily an act for probation, to make it liquid, if it be neceſſary.

TITLE

TITLE XX.

Reductions and Improbations.

REductions of decreets are not here to be conſidered, for theſe come in, in the ſecond inſtance, and are to be ſpoken of after decreets, but reductions of other rights, which come in *in* the firſt inſtance, and improbation of writs neceſſary for theſe rights, (which being found or declared forged, do annul the right whereof theſe writs are evidents) are proper in this place, amongſt declaratory actions, which comprehend reſciſſory actions.

II. Rights are declared two ways; *affirmativè*, declaring the right itſelf to be good and valid, and ſufficient to exclude any other right; or *negativè*, by reducing and annulling any pretended right, whereupon action or exception might be founded, in prejudice of the purſuer's right. Both theſe ways may, and oftimes uſe to be joined in the ſame ſummons, reducing oppoſite rights, and declaring the purſuer's own right; which require divers grounds; for a purſuer on his right may remove a poſterior right, or a leſs formal, which will not infer that his own right is abſolutely valid and ſecure; and therefore, if a declarator of the purſuers be libelled, all having intereſt muſt be cited at the market-croſs; and no right of land can be declared abſolutely valid and ſecure, without inſtructing a clear progreſs from the King, who is ſupreme ſuperior, or by another progreſs ſecured by preſcription, and uninterrupted poſſeſſion, during the ſpace of forty years; for albeit reductions may contain a clauſe declaratory of the validity of the purſuer's right, upon leſs grounds, which will be ſufficient againſt the defenders, who have no better right; yet an abſolute right can no otherwiſe be declared, than by the two *media* now mentioned.

III. Summons of reduction may either be alone, or joined with an improbation in the ſame libel. A ſingle reduction proceedeth in the ſame form as a reduction and improbation: for in both, the writs craved to be reduced, are called for to be produced, with certification, that if they be not produced, they ſhall be holden to be null, and no ways to prejudge the purſuer's rights and titles, whereupon the reduction proceeds: and if they be not produced, certification is granted againſt them, or any of them. This certification is a decreet to be extracted by itſelf, but it bears only the writs called for and not produced, to be reduced, ay and while they be produced: the meaning whereof is, not that the production of them any way, will annul the decreet of certification; but they muſt be produced *legitimo modo*, *i. e.* in a proceſs of reduction of the decreet of certification. Yet the decreet of certification has this effect, that, whatever the reducer obtains poſſeſſion of, by virtue of the certification, or by any action following thereupon (whereby the reducer's own right takes effect, by removing the oppoſite right by the certification) he is not accountable therefore, whether it be the profit of lands, or of ſums, or of other rights, albeit the intromiſſion be after a ſummons of reduction of the certification, and ſtill until the reducer be put *in mala fide*, by producing writs ſufficient to reduce the certification.

IV. Single reductions have alſo this effect, that when writs are produced and reduced, by reaſons founded upon better rights; the decreet of reduction is a decreet *in foro contradictorio*, and hath all the privileges of decreets *in foro*. But becauſe ſingle reductions in matter of land-rights, are ſeldom uſed, without an improbation, the certification whereof for not production (albeit in abſence) is not reducible; there is no neceſſity to inſiſt further in a ſingle reduction. Only this muſt be obſerved, that no certification can be granted againſt any writs, but ſuch againſt which there is a relevant reaſon of reduction libelled. And therefore, general reaſons againſt all writs are at firſt libelled, as not being ſubſcribed before famous witneſſes, *&c.* And after production, the purſuers are allowed to add ſpecial reaſons againſt the writs produced.

V. Re-

V. Reduction and improbation needs no other general reaſon to be libelled before production, but that the writs called for are falſe and forged, and that the ſummons contain a certification that they ſhall not only be declared null, but alſo ſhall be holden and reputed falſe and forged, and to make no faith in judgment or outwith. And yet the certification hath only effect, as to the rights and titles, whereupon the proceſs proceeds: for the writs, though not produced, are valid as to all effects, either againſt any other party, or againſt the ſame party, as to other rights beſides theſe libelled.

VI. A decreet of certification upon this ſummons, is of all other decreets moſt difficile to be reduced, even though in abſence; yea, harder to be reduced than the decreet of reduction againſt the writs produced, though it be *in foro contradictorio*. The reaſon is, becauſe this certification is the moſt common and greateſt ſecurity of all rights by infeftment, and is much more effectual than a declarator of right; wherein, if the defenders be abſent, they will eaſily be heard in the ſecond inſtance, but will not ſo be heard againſt this certification, which I never obſerved to be recalled, except in the caſe of a certification, againſt a perſon, who, in the whole time of the proceſs, was out of the country, a ſoldier of the Scots forces then in Ireland, and in priſon; where there was a great number of privileges concurring.

VII. This proceſs hath alſo this advantage of a declarator, that a term will be granted to prove exceptions upon writs not produced, and if they be the writs of authors, there will be incident diligences ſuſtained; there may be alſo replies upon rights anterior to the rights in the defender's defences; and duplies upon rights anterior to theſe, or what further plies parties pleaſe to alledge. All of which, of old, was founded on a brieve of the chancery, called the brieve of right.

VIII. But ſince the erection of the College of Juſtice, this proceſs of reduction and improbation was invented and ſuſtained, which is peculiar to this nation, and is a more abſolute ſecurity of men's rights, than any form of proceſs in the Roman law, or in any neighbouring nation: for thereby all the rights that can be pretended to, muſt be produced before there can be any diſpute in the cauſe, except dilators againſt the intereſt of the purſuer, and order of the proceſs; and ſo there is rarely litiſconteſtation made in this proceſs, unleſs the purſuer libel upon poſſeſſion and preſcription; wherein preſent or recent poſſeſſion muſt be proved; but being proved as far as memory doth ordinarily reach, antient poſſeſſion will thence be preſumed, and the continuance thereof, unleſs interruption be alledged and inſtructed, or that the defender alledge he hath produced ſufficiently, to exclude the purſuer.

IX. This certification being of ſo great import, the Lords give large time for production. And before the act of regulation, *P.* 1672, *c.* 16. there were three terms for production aſſigned in this proceſs, and two in a ſingle reduction, wherein there is now but one term, and two in an improbation and reduction. And whereas formerly incident diligence by way of exhibition was allowed, during the progreſs of which the principal cauſe was ſuperſeded, until the incident ended; wherein, not only the oaths of parties havers of writs, but witneſſes were ſuſtained to prove the having, and thereupon a decreet of exhibition, and horning and caption, all which behoved to be ended before the principal cauſe were reſumed: yet now, by the act of regulation, horning is granted againſt all havers to produce at the firſt term, and caption for the ſecond term, in the ſame way as againſt witneſſes. For there is the ſame reaſon obliging parties to exhibit writs that may prove, and to give their oaths for that effect, as to give their oaths of verity in any other point as witneſſes.

X. There may be acts extracted for either of the ſaid terms: but theſe are not acts of litiſconteſtation, but acts of production, which are peculiar to reductions;

tions; ſo that it is ſo far from having two litiſconteſtations therein, that there is ſeldom one.

XI. This certification being ſo hardly reducible, the Lords are careful that the ſame be orderly extracted; yea, they will recal certifications, if further writs of importance be recently produced: and if any formality be omitted, or if there be improbation or reduction of the executions, whereupon the certification proceeded, the Lords will ſuſtain the ſame, even *pendente proceſſu*, to reduce the certification, or at any time thereafter, while parties are obliged to produce executions.

XII. If there be a declarator of right libelled in this reduction, when the reaſons come to be diſcuſſed, though the defender can have no term to prove; yet the purſuer may ſtill reply on other titles, till rights are produced prior or better than his titles, and will get terms to prove the ſame, which I have not ſeen ſuſtained in other reductions; but that, if the defender produced a better right, he was aſſoilzied from that libel; yet the purſuer might raiſe a new libel upon other better rights, or other more relevant reaſons; for in this caſe there is no ground for competent and omitted; and it were hard to bind up the defender from any further production, and yet to allow the purſuer to reply upon other rights than thoſe libelled; unleſs the defender may produce more writs, at the term aſſigned to the purſuer.

XIII. After ſo long dependence upon the acts for production, there is no incident ordinarily competent for recovering writs, becauſe horning is allowed againſt all havers: yet if the defender be poſitive, upon ſpecial witneſſes, to prove the having of the writs called for; he ought alſo to have horning againſt theſe witneſſes for proving the having, that he be not neceſſitate only to prove by the haver's oath or writ, which doth in all points ſupply the incident that was formerly allowed by way of action of exhibition.

XIV. In this ſummons there uſeth to be called for, not only particular writs but alſo there is a general clauſe, "calling for all other writs and evidents of the "lands, and others in queſtion, granted to the defenders, and their predeceſſors "to whom they may ſucceed *jure ſanguinis*; or which are granted to their au"thors called, or which were granted to their (*author's*) predeceſſors, to whom, "they may ſucceed *jure ſanguinis*:" for this proceſs being declaratory, it proceedeth againſt apparent heirs, without charges to enter heir; and therefore it proceedeth not only againſt thoſe who were actually heirs, but againſt thoſe who might have been actually heirs. But I find, that the general clauſe hath been ordinarily reſtricted to the writs only granted by the purſuer and his predeceſſors, to whom he is actually heir; or granted by his authors, whoſe rights he produceth, or by their heirs actually ſerved as heirs to them in the right in queſtion. This reſtriction is upon this account, that the purſuer hath no intereſt to reduce or improve any writs, but theſe granted by him, his predeceſſors and authors, which doth too much enervate this uſeful proceſs: for, ſeeing the purſuer's title gives him intereſt to call for removing of all writs, that may trouble him in the peaceable enjoyment of the lands and other rights, wherein he ſtands infeft, upon this ground that the rights called for are falſe; there is no reaſon to hinder him, to call for any right granted by whomſoever, whereunto the defenders have, or may have right by ſucceſſion, to the effect they may be improven, and thereby removed from troubling the purſuer in his right or poſſeſſion. Yet there is good reaſon, that the purſuer ſhould not inſiſt upon any title, to which he might have right by ſucceſſion, until he be actually infeft on that right: and for the ſame reaſon, he cannot inſiſt to reduce and improve, upon a diſpoſition, or any other right but an infeftment, if the reduction be for reducing infeftments.

XV. Any infeftment will be a title for founding a reduction, and improbation, even though it be baſe, and without poſſeſſion: but if the defender produce a public infeftment, or a baſe infeftment cled with poſſeſſion, although it were poſterior, it will ſtop certification; becauſe it is a better and preferable right.

XVI. It is a great prejudice to this uſeful proceſs, that purſuers are not maſters of their ſuperiors or their authors infeftments, and have no title to get exhibition of them, except in the way of incident, to inſtruct or aſtruct the purſuer's title. But ſince it is a neceſſary requiſite for infeftments, that the ſeiſins be regiſtrate, ſince the act of Parliament 1617, *c.* 16. it ought to be ſufficient to extract the ſeiſins of the purſuers authors, and libel thereupon: and the purſuit ſhould not be excluded for want of the principal ſeiſins, or warrants thereof, upon production of an infeftment of the defenders, prior to the infeftments produced by the purſuer; but the defenders ought to take terms to produce all rights they can pretend to the lands or other infeftments in queſtion; and the purſuer ought to have the ſame terms to produce his authors and predeceſſors infeftments, whoſe ſeiſins he produces, and to have diligence by horning and caption, againſt the havers thereof; that ſo all the rights that either party may pretend, may be *in campo*, before they come to diſpute the reaſons.

XVII. Not only the obtainers of infeftments called for to be reduced, muſt be cited; but alſo the author's granters of theſe infeftments, or their heirs, or apparent heirs, muſt be cited; becauſe there are ordinarily clauſes of warrandice in the infeftments, and therefore the authors have intereſt to defend the rights granted by them *.

XVIII. Theſe proceſſes are firſt called in the outer-houſe; and if there be no compearance, certification is granted. But if the purſuer himſelf can ſatisfy the production in a ſingle reduction, he will rather do it, than take certification, that he may get a decreet upon his reaſons repeated; which, though it be but a decreet in abſence, yet it is better than a certification in abſence. But if there be improbation with a reduction, he will readily reſt in that certification, which is ſo ſtrong.

XIX. If the defender appear, and produce the writs in queſtion, he muſt abide by the verity thereof, under his hand; with certification if he do not, the ſame will be holden as forged. This certification is on the ſame ground with the certification for not production, *viz.* That the defender dare not own the writ in queſtion as true. The Lords do ſometimes allow the abiding by *qualificatè*, that the uſer did not immediately receive the writs in queſtion, but had them by aſſignation, or by ſucceſſion; in which caſe he muſt abide by the verity of the aſſignation, and muſt give evidence that the writ was by the defunct the time of his death, in caſe the ſame be found falſe; ſo that his ſole aſſertion of uſing them *bona fide*, is not ſufficient.

XX. The defender may not only propone defences againſt the intereſt of the purſuer, and the order; but alſo, that all perſons having intereſt are not called, eſpecially the defender's authors: and likewiſe, if he produce rights relevant to elide the purſuer's titles, as being prior or preferable; the ordinary may hear him thereupon, which will ſtop certification, or taking of a term to produce: and if the defence be found relevant, the defender will be aſſoilzied. But if there be an interlocutor of the Lords repelling the defence, the defender may make a further production, and will be heard again upon the whole writs produced: but after that ſecond production, he will not be heard to diſpute upon any further production, till the full production be cloſed, or certification granted *contra non producta*. And ſo the proceſs goes on in the outer-houſe by calling the firſt and ſecond act for production, until the production be cloſed; which may either be by the purſuer's holding the production ſatisfied, or by a certification *contra non producta:* after which the ordinary can proceed no further, but makes a great aviſandum, for diſcuſſing of the reaſons of reduction *in præſentia*; unleſs the Lords have granted warrant to diſcuſs the reaſons *extra*, which they uſe not to refuſe in ſingle

* By act of Sederunt, 16th *Feb.* 1723, it is appointed, that purſuers of reductions, or of reductions and improbations, ſhall not be obliged to cite the authors of defenders, leaving it to the defenders to cite their authors, or intimate to them their diſtreſs.

ſingle reductions of ſmall moment. This is called a great *aviſandum*, in diſtinction from the ordinary *aviſandums*, to be reported to the Lords. According to the date of the great *aviſandum*, the cauſe is inrolled in the roll of the inner-houſe, and is ſet in order of the proceſſes produced that Saturday in which it is produced, according to their dates. The ordinary doth alſo allow the defender to ſee his own production in the clerk's hands, that accordingly he may be ready to diſpute when he is called *.

XXI. It is a relevant defence againſt certification, or taking a term to produce, that the writs called for are *in publicâ cuſtodiâ*, that is, in the regiſters of Seſſion, or in the chancellary: but extracts of ſeiſins, hornings, or inhibitions, will not ſtop certification, becauſe the principals are not left at the regiſter. Yet the defender muſt condeſcend upon the date of the regiſtration, and if the writs be not found accordingly, certification will be granted: and therefore the clerks of Seſſion, and the director of the chancellary uſe to be called; yet, though they be not, the Lords will appoint them to ſearch and produce, or certify that the writs are not found. 2. Certification will not be granted againſt executions, warnings, or minutes of proceſs, if the reduction be not very recent after pronouncing of theſe decreets; ſeeing ſuch minute ſmall papers, cannot be long preſerved. Yet if they be extant, they muſt be produced by the clerks, that it may appear whether the decreet was extracted according to the warrants. But if theſe be not extant, all is preſumed to be orderly done, eſpecially ſeeing defenders are allowed to ſee the ſcrolls of decreets, and to compare the ſame with the minutes, and to complain by bill, if the clerks do not frame the decreets accordingly. 3. In the reductions of appriſings deduced before the year 1624, certification will be refuſed; becauſe appriſings then were left as the warrant of the ſignatures for infeftment thereon, and ſo are *in publicâ cuſtodiâ*. But as to writs regiſtrate in other courts than the Seſſion, the clerks of theſe courts muſt be called, and the hazard of not production lies upon the defender, who, or his authors, chuſed that court to regiſtrate in.

XXII. Reductions with improbations muſt proceed at the King's Advocate's inſtance, for the King's intereſt; and therefore it muſt proceed upon a bill. The reaſon of the Advocate's concourſe is, becauſe the improbation is criminal, if the writ be produced; and the Lords decreet of improbation, is the chief ground of capital puniſhment for forgery.

XXIII. When the writs called for to be improven are produced, if the purſuer find ground to inſiſt to the improving of any of them, he has two ways to proceed: the one is by the witneſſes inſert, who when called, if ſeeing their ſubſcription, they do deny that to be their hand-writ, as they then were accuſtomed to write, and deny that they were witneſſes to the ſubſcription, or to the ſubſcriber's owning of his ſubſcription, the writ will be improven; and this is called the direct manner of improbation. But if the witneſſes be dead, or be not found, or do not remember of their having been witneſſes, or how they uſed to ſubſcribe at the date of ſuch writs, the writ will not thereby be improven. If there be but two witneſſes, if the one improve, tho' the other witneſs do affirm, the writ will be improved rather as null than forged. But if there be more than two witneſſes, of whom ſome are dead, theſe are preſumed to prove: ſo that if two dead witneſſes remain, the living witneſſes denying their ſubſcriptions will not improve, in the direct manner of improbation, tho' their teſtimonies may concur as adminicles in the indirect manner.

XXIV. The other called the indirect manner, is by compariſon of the hand-writ of the parties and witneſſes, with their other ſubſcriptions, or holograph writs, and by other evidences, as that the ſubſcriber or witneſſes were *alibi* at the date the writ bears, or that they could not ſubſcribe, *&c.*

XXV. If

* By act of Sederunt, 1ſt *Jan.* 1726, this practice of allowing the defender to ſee his own production, is diſcharged.

XXV. If the witneſſes be not ſufficiently deſigned, that they may be known how to be called, as if they be of a very common deſignation, whereof it is known there are many agreeing in the ſame, the defender muſt condeſcend upon a further deſignation, that they may be known; and if he do not, that witneſs will not be a proving witneſs.

XXVI. The indirect manner is not competent while the direct manner is competent. And the indirect manner muſt be by articles improbatory in writ, which muſt be ſeen by the defender, to whom there is allowed articles approbatory: and before the adviſing, witneſſes will be allowed to the purſuer to prove his articles of improbation, and to the defender to prove his articles of approbation: at the adviſing of which, the parties are to be heard as in a concluded cauſe; but there is no formal act of concluding the cauſe, as in other proceſſes, according to the common rule, *nunquam concluditur in falſo*, *i. e.* there is never a formal concluſion, but all evidences may be ſtill offered before ſentence be extracted.

XXVII. Reaſons of reduction may be as many as there can be defences, exceptions, replies, duplies, *&c.* For whatſoever is relevant for either party in the firſt inſtance in ordinary actions, is alſo relevant by way of reduction. But ſome points are only competent by reduction, and not by exception, and moſt of theſe reaſons of reduction are competent in competitions; of which hereafter.

XXVIII. The moſt frequent reaſon of reduction is *ex capite inhibitionis:* for inhibition is a legal remedy for ſecuring of rights, eſpecially of debts and obligations, and it paſſeth of courſe by a common bill, the deliverance whereof is ſigned by the ordinary on the bills, upon the truſt of the clerk of the bills, without ſpecial conſideration of the contents thereof: and the tenor of it is a repreſentation that the party craved to be inhibited, is like to diſappoint the complainer of the performance of his obligation, by dilapidation of his eſtate, directly by alienation, or indirectly by unneceſſary contracting of debt; and therefore craving that he may be prohibited to ſell, annailize, or contract debt till he ſatisfy the petitioner's debt contained in his bill; and that the lieges may be prohibited to accept alienations, or to contract with him till the foreſaid debt be paid. Inhibition being a legal execution, it will be explicated hereafter in its proper place. And there needs no more to be ſaid of it, but whatever is done contrary to it, is *ſpreta auctoritate*; and therefore gives a relevant reaſon of reduction.

XXIX. The proper exceptions againſt the reaſon of reduction *ex capite inhibitionis*, are, 1. That inhibition (altho' it paſs of courſe by inadvertency) cannot be extended to ſecure any obligement, but that *quæ habet paratam executionem*; and therefore it is no contempt to alienate or contract, where there is a term of long endurance, before the obligation to be ſecured can take effect, as if a debt be payable after the debtor's death, or after many years; much more if the obligement to be ſecured be only conditional: for when obligations are to a day, they are preſently obligatory; *nam dies ceſſit*, *licet non venit:* but conditional obligations are but obligations in hope, or rather the hope of an obligation, and ſo begin not to oblige till the condition exiſt [a]: and therefore inhibition upon them is not effectual, and if that objection were offered to the Lords, the inhibition would not be paſt. Amongſt conditional obligations are obligations for warrandice, the condition whereof is diſtreſs; and ſo, tho' inhibition paſs of courſe, upon clauſes of warrandice, yet, if the caſe were repreſented to the Lords, it would not paſs, except there were a diſtreſs, or an evident ground of diſtreſs inſtructed; and the clerk of the bills ought not to paſs ſuch inhibitions otherwiſe. 2. That inhibitions ought not be granted, nor ſuſtained, when paſt of courſe at the inſtance of wives upon their contracts of marriage againſt their huſbands, for performance of theſe obligements, which are againſt their common intereſt: as when

[a] See above, I. 3. 8.

when the husband is obliged to employ the tocher, and so much of his, upon land or annualrent. If the husband be a trading merchant, the employing of his stock so, doth ruin his trade; and therefore inhibitions should not pass thereon, except the husband be *vergens ad inopiam*, or do not providently follow trading. 3. That inhibition can reach no further than lands or annualrents, in the jurisdictions where it is published and registrate. 4. That the right craved to be reduced was not voluntarily granted, but that there was an anterior obligement, whereby the granter might have been compelled to grant the same, at least by a general obligation, as to grant an infeftment in wadset, annualrent, security or warrandice: and altho' particular lands be not expressed, yet the granting of any of these or the equivalent, out of any of the *granter's* lands, or other heritable rights, is secure. But if there be diverse obligements granted for the same cause, as principal bonds, and bonds of corroboration, the bond of corroboration is reducible upon inhibition prior to it, altho' posterior to the principal bond, unless the principal bond contain an obligement to grant such corroboration.

XXX. The second common reason of reduction is, *ex capite interdictionis*, which in effect is but a special kind of inhibition: for it is the prohibition that makes the interdiction effectual. And therefore all the exceptions that are competent against inhibitions, are competent against interdictions. The rise of interdictions is from positive law; for by pure equity every man is master of his own, and may gift or alienate as he pleaseth: but the positive law of most nations hath provided a remedy against levity and weakness of judgment; so minors, if they be enormly lesed, are restored; and if they have taken curators, their deeds without the curator's consent are null by exception: but their lesion is only annullable by reduction; for when they have curators not consenting, they need not alledge lesion. Positive law hath also restrained the liberty of lavish persons tho' majors; and the Roman law gave curators to prodigals, as well as to minors: and in both lesion behoved to be proved. But tho' deeds by minors having curators be null, yet deeds by lavish persons having interdictors are not null, but reducible upon lesion: for tho' the interdictors have a resemblance with curators, yet they are not obliged to manage the minor's affairs, by themselves or their factors, but only to consent with them, that their deeds be not reducible upon lesion.

XXXI. Interdictions are most secure which are made *causa cognita*, when lavish persons instruct their levity, and name provident persons to be interdictors. But frequently persons interdict themselves to such other persons, either simply, in which case the plurality is required, or by a *quorum*, or *sine quibus non*; in which case, tho' the *sine quibus non* accept not, die, or be excluded for malversation, or albeit a *quorum* remain not, the interdiction remains while any interdictor remains, because the levity, which is the cause of the interdiction, remains; but if the levity cease, the interdiction may be annulled *causa cognita*.

XXXII. Interdictions voluntary *sine causa cognita* are valid, altho' there be not a just cause, if there be any particular interest of parties for the interdiction; as if heirs be prohibited to act without the consent of such persons, this will not be effectual, unless a clause irritant be adjected, or that the provision be published as an interdiction; but if it be published, it will not be relevant to alledge, that the party was *rei suæ providus*, because there is a particular interest of a third party secured by the interdiction: otherwise it is a sufficient defence against voluntary interdiction, that the person interdicted was *rei suæ providus*, when the deed was done [b], or that he was not lesed thereby. But the renunciation of the interdiction with mutual consent is elided, if the party remained lavish; for as curators and their minors cannot by consent take away curatories, so neither can interdictors and lavish persons take away interdiction, *nisi causa cognita*; wherein the authority of the judge secures contracters, albeit the person remain

[b] See above, I. 6. 39.

laviſh: nor will the reduction of the decreet, upon probation of the levity, en danger the deeds after that decreet; becauſe as poſitive law gives authority to th interdiction, ſo poſitive law may take it off.

XXXIII. There is a common exception both againſt inhibition and interdicti on, that albeit the ſtyle thereof be expreſsly againſt the alienation of moveables as well as heritables, and albeit that ſtyle be ſo continued, yet they reach only he ritable rights, conſuetude having ſo reſtricted them, that there may be a fre courſe of commerce in moveables.

XXXIV. The third reaſon of reduction is, minority and enorm leſion; which being largely treated, *lib.* 1. *tit.* 6. § 44. it needs not here be repeated. But deed being done without conſent of curators, (where they are) is competent by exce ption, as a nullity; whereas minority and leſion without curators, is not compe tent by exception, but by reduction.

XXXV. The fourth reaſon of reduction, which is not competent by excepti on, is, when a right is craved to be reduced, as flowing *a non habente poteſtatem* which is, either when the granter of the right never had power to grant it, o had not that power when he granted it, as not being entered and eſtabliſhed i that power, or as having been in that power, but denuded of it. But this is on ly competent to the party that hath a better right, otherwiſe ſuch alledgeances ar *ſuper jure tertii*, and are only competent when the other parties pretending righ are called by double poinding or in competition.

XXXVI. The fifth reaſon of reduction is, upon nullities which are not in ſtantly verified, but following upon facts requiring declarator; as if the caſe b for annulling of rights upon clauſes irritant, if (*the deeds incurring*) theſe clauſe be not inſtantly verified, they cannot be proponed by exception, but will be re pelled, and reſerved till reduction. This caſe falls frequently, in clauſes irritan in tailzies, bearing, that in ſuch caſes the tailzie ſhall become void; and albeit i bear *ipſo facto*, or without declarator, yet cuſtom rejects theſe additions, as con trary to the current courſe of proceſs, and the neceſſary requiſites thereof; other wiſe all poſſeſſory judgments would be retarded by ſuch clauſes: as if an hei of tailzie were purſuing for mails and duties, and any defender having a titl ſhould propone that nullity of the tailzie, it would not be relevant, tho' the clauſe irritant did bear to be competent by exception, or without neceſſity of declarator. Yea, theſe clauſes irritant are ſo unfavourable, that tho' the condition be inſtant ly verified, ſometimes they will not be admitted by exception, but will be re ſerved to reduction and declarator, that during the dependence of theſe proceſſes the clauſe irritant may be purged.

XXXVII. The ſixth reaſon of reduction, which is not competent by excep tion, is, *ex capite lecti*, or upon deathbed. This is founded upon the proper law of this kingdom, whereby deeds done on deathbed, are not effectual againſt heirs, to affect their heritage, or againſt bairns to take away their legitime. This point being largely treated, *lib.* 3. title ſucceſſion, § 27. *et ſeq.* there needs the leſs to be added here.

XXXVIII. This law of deathbed is diametrically oppoſite to the Roman law, which did by all means ſecure the freedom of teſting, whereby all rights were tranſmiſſible by nomination of heirs, by legacies, and *fideicommiſſa*. But ſince the feudal law came in, whereby vaſſals cannot diſpoſe of their ward-fees without conſent of their ſuperiors; it was a fit and juſt conſequence, that they could not diſpoſe of ſuch fees by their teſtaments, or appoint other heirs than the heirs in the inveſtiture. And therefore they might not uſe indirect ways of alienation of theſe fees, by granting obligations, or doing deeds on deathbed, whereby the vaſ ſal might be changed. But the main reaſon of this law hath been, for the quiet and ſecurity of dying perſons, againſt the importunity of huſbands, wives, child ren, or other relations; and eſpecially againſt the importunity of the Romiſh prieſts, who pretended a far greater intereſt and duty of mortification to pious uſes, than of leaving to heirs, not only as meritorious to expiate the ſins of the donor's lives,

eſpecially

eſpecially of the more vicious perſons, but alſo for obtaining conſtant prayers and ſupplications for delivering their ſouls out of purgatory. And therefore this is a moſt convenient and juſt law, when men, through any indiſpoſition, continue in or about their houſes, and are not ſeen to indifferent and unſuſpect witneſſes; that thereby they may be free from all importunity, ſeeing they can do no more but diſpoſe of their ſhare of their moveables, which is rarely of conſiderable value, moveable debts being deduced.

XXXIX. Deathbed is not competent by way of exception; for if the alledgeance thereof were ſo competent, it would impede the courſe of moſt poſſeſſory judgments.

XL. There is alſo competent a declarator of *liege pouſtie*, Bearing, "that ſuch "deeds were done when the author thereof was in *liege pouſtie*," that is, in the poſture and condition of a liege able to ſerve his Lord in the war, not excuſable by indiſpoſition or ſickneſs; "and that therefore the right granted in that ſtate, "is to be declared valid."

XLI. There have been many debates upon this law: as particularly, when perſons were to be accounted in *liege pouſtie*, and when not, but that they had contracted diſeaſe, after which they did never convaleſce? And albeit at firſt it was much contended, that there behoved to be proved *morbus ſonticus*, a mortal ſickneſs, or a ſickneſs affecting the brain, inducing weakneſs and inſtability of judgment; yet theſe debates are now all laid aſide, and there being ſo many bad examples of diſpoſitions about the time of death, it hath been ſuſtained ſufficient, that before the ſigning and delivering of the writ conſtituting the right, the granter thereof became ſick, and never came abroad thereafter, to the publick view, where it might be evident, whether the party was without ſuſpicion of ſickneſs, or that he had ſo far convaleſced, as to be capable of unſuſpected witneſſes of his convaleſcence.

XLII. The common defence againſt this reaſon of reduction, is, That after the deed quarrelled, the defunct went to kirk and market, when there was confluence of people. And therefore to validate ſuch deeds, parties went ordinarily to the kirk in the time of publick prayer, when there was ſermon, or when there was reading, ſinging, and prayers, which was ordinary during the time of Popery, and a conſiderable time after the Reformation: for under Popery no prayers (but ſuch as were ſecret) were allowed, except in conſecrated churches and chapels, but none was allowed otherwiſe in families; yet, after the Reformation, devotion in families was generally urged, and therefore was more followed than the morning and evening prayers, which came to be diſhaunted, and fell into deſuetude: yet people to validate contraverted diſpoſitions, went to the kirk, though there was no publick meeting in it; and to the market, albeit not in time of market: and therefore convaleſcence or *liege pouſtie* by going to the kirk, albeit no publick exerciſe, or appearance thereat, or to the market, though not in market-time, were ſometimes ſuſtained. Which proceeding upon miſtakes, the Lords were unwilling to call in queſtion deeds ſo done before that miſtake was cleared; but they did clear the ſame for the future, by an act of Sederunt in *Feb.* 1692, declaring, "That they would not ſuſtain going to kirk and market, to "validate diſpoſitions to be made thereafter; unleſs it were proved, that the "granter went to the kirk when there was a publick meeting in it, or in the "kirk-yard for burying; or to the market, unleſs a confluence of people were "there in market-time [c].

XLIII. Declarator of *liege pouſtie*, is competent againſt the alledgeance of contracting of ſickneſs, as well as for proving convaleſcence from ſickneſs contracted.

XLIV. Small evidence ſufficeth to inſtruct the contracting of ſickneſs; yea, the preſumption of ſickneſs was ſuſtained, a party being ſequeſtrated upon ſuſpicion of the plague, and dying in that condition, though nothing could be proved that

[c] See above, III. 4. 28. 5.

that the party was actually infected before ſequeſtration. So that, if a party were detained by a ſore, which doth not commonly paſs under the name of ſickneſs, or a wound or bruiſe, if he kept in or about the houſe, and went not abroad; it is ſufficient, ſeeing it is difficile to know when fevers ariſe from ſuch cauſes.

XLV. The defence of kirk and market, is not excluſive of other evidences of *liege pouſtie*; as if a man ſhould go a voyage, though it cannot be proved he was at kirk and market.

XLVI. The defence of publick appearance preſumes convaleſcence, unleſs the contrary appear; as if there were evident tokens of the continuance of the ſickneſs, by the view of the party's countenance, or by fainting, or vomiting in going or returning; or not being able to go and return, without reſting or ſupport, for ſuch diſtance as men ordinarily walk a-foot to churches; or if a man ſhould be carried in a chair to the kirk-yard, going and coming free, that length would not prove *liege pouſtie*, if the deed were done of deſign to validate a controvertable right; but if a party came riding to the kirk-ſtile, or reſted in walking, or had ſome ſupport for conveniency or point of honour, *as* in other occaſions, it would do no prejudice; but when deſigned, it is a ſtrong preſumption of continuance of ſickneſs, when it cannot be done freely without help; and therefore in that caſe, Ladies behoved to forbear from being led for honour.

XLVII. Many domeſtick acts in and about the houſe, will not be ſuſtained as equivalent to kirk and market, to prove *liege pouſtie:* becauſe favourable witneſſes may be choſen of purpoſe; but, in publick view, there can be no ſuſpicion.

XLVIII. The defence of kirk and market, and the reply of the evidence of the continuance of ſickneſs, by fainting, vomiting, ſtopping, reſting in the way, or ſupport, uſed to be ſuſtained in the ordinary terms of litiſconteſtation ſuſtaining the reply, without acknowledging the defence, which therefore the defender behoved to prove; and if he proved it not, there was no neceſſity to prove a reply; neither did the defence acknowledge the libel, that ſickneſs was contracted, but that behoved to be proved, or otherwiſe the defender would be aſſoilzied: ſo that two witneſſes could prove any of theſe points, and carry the greateſt inheritance thereby. Upon occaſion of theſe contrary alledgeances, the one party offering to prove health, and the other ſickneſs; the one offering to prove ſupport in going to kirk and market, the other offering to prove, that the party walked free, there being none near him in all the way; the Lords reſolved to prefer neither party in probation, but before anſwer to the relevancy, allowed witneſſes to be adduced by either party, to be examined upon the condition of the defunct, when he delivered the diſpoſition in queſtion: for if he did retain it till he was ſick, it is alike as if he had then ſigned it; nor will the clauſe of diſpenſing with delivery ſuffice in that caſe, unleſs his liferent be reſerved, or that it be a tailzie competent to his heir, in which caſes he had intereſt to retain it. And next the witneſſes are to be examined, whether the defunct went to kirk and market or not? Or how he went, ſupported or free? And if there were evidences of ſickneſs, and what they were? Whereby witneſſes are deterred from falſe teſtimonies, and great intereſts are not carried by two witneſſes, which, in other eaſes, where writ uſes to be adhibited, could not prove above an hundred lib [d]. This form goes of courſe now of a long time; and the ordinary in the outer-houſe, when the reaſons of reduction are referred to him, may order it, though, in moſt caſes, he can do nothing which requires to be done *ex nobili officio* *.

XLIX. The ſeventh reaſon of reduction is, the incapacity of the granter of the right, by being inſenſible by drink, diſeaſe, or otherwiſe, when he granted the ſame; which is not to be ſuſtained by way of exception.

L. The

* By act 4. P. 1696, it is declared a ſufficient defence againſt the objection of deathbed, that the granter lived 60 days after executing the deed. See above, III. 4. 28. 8.

[d] See above, IV. 3. 2. 8. Below, IV. 39. 4. *et* 5.

L. The eighth reaſon of reduction is, the priority, which is largely explicated, *lib.* IV. title 35. *competition*, with all the exceptions thereof, which are many.

TITLE XXI.

Petitory Actions upon perſonal Rights.

ACTIONS before the Lords of Seſſion, were formerly divided into actions declaratory (comprehending reſciſſory actions) petitory, and poſſeſſory actions. We are now come to petitory actions, which are not ſo called, becauſe ſomething is ſought to be done by the judge; for ſo all actions are petitory, but they are called petitory, becauſe ſomething is demanded to be decerned by the judge, to be done by the defenders, which doth not ariſe from poſſeſſion. And ſo poſſeſſory actions are thoſe, whereby ſomething is to be done by the defender, not alone upon the point of right, but upon the point of right and poſſeſſion, or upon ſole poſſeſſion. And petitory actions are ſometimes taken more largely, as they comprehend all actions, but ſuch as are poſſeſſory; according to the ordinary diviſion of judgments, into petitory and poſſeſſory.

II. Petitory actions as here properly underſtood, are very many. But for order ſake, they may be diſtinguiſhed into thoſe actions that are founded upon perſonal obligations, and thoſe which are founded upon the right of moveable goods, and thoſe which are founded upon the rights of property of lands, and thoſe founded upon infeftments of annualrent, and thoſe founded upon the right of ſuperiority, and thoſe founded upon hypothecation. This order is according to the method of rights followed, *lib.* I. and II. of theſe Inſtitutions: there being no different action founded upon the third book, wherein is handled the conveyance of rights among the living by aſſignation, diſpoſition, or confiſcation; or from the dead, by active ſucceſſion; for paſſive ſucceſſion affords no action, but is only a paſſive title.

III. The firſt kind of petitory actions, according to this order, is upon perſonal rights. It would make the ſtile and tenor of ſummonſes much ſhorter and clearer, if difference were obſerved between ordinary petitory actions, which have a known ſpecial title in our law, and thoſe actions, which are involved in various circumſtances and matters of fact; which therefore, in the Roman law, are called *actiones præſcriptis verbis*; in which the matter of fact is to be firſt deduced, and the matter of right thence inferred, and then the will and conluſion ſubjoined. But in ordinary petitory actions, the will may be premitted, and the title of the purſuer libelled particularly, whereby the natural conſequences from ſuch titles are known, and determined in law; and are not at the conjecture of the framers of libels, as in the actions *præſcriptis verbis*.

IV. This will appear as we go through the ſeveral titles, in the order they are explained in the two firſt books of theſe Inſtitutions, from *lib.* I. *tit.* 2. of liberty. If any perſon be in reſtraint, the Lords, upon ſupplication, give charges to ſet at liberty, wherein there is not an ordinary action: but theſe charges come in with decreets, and executive actions. What elſe concerns liberty, is rather declaratory, than petitory, unleſs it be the damages by unwarrantable impriſonment, or reſtraint. The 3d title of obligations in general, contains only general conſiderations upon obligations, but no ſpecial obligation. The 4th title of conjugal obligations, foundeth actions at the inſtance both of huſbands and wives, ariſing from the nature of marriage, and the laws and cuſtoms relating thereto; but as to the actions upon the ſeveral tenors of contracts of marriage, they muſt be *præſcriptis verbis*, according to that tenor. From title 5th, of obligations between parents and children, there ariſe ordinary actions for all their mutual obligations, flowing from the law of nature, and the ſtatutes and cuſtoms clearing and eſta-

bliſhing the ſame. From title 6th, ariſe the ordinary actions between tutors and pupils, curators and minors, interdictors and perſons interdicted; and conſequently actions of compt and reckoning in all theſe caſes, which are competent to either party, or to both; but he is accounted to be purſuer that firſt provokes to judgment. All theſe compts are articulate libels, where every article is a ſeveral libel, but being ſo many, they cannot be diſcuſt at the bar, but by auditors. From title 7. of Reſtitution, there ariſe mainly actions for delivery of moveable goods, which will come in, *in* their own place; but here there comes in actions for reſtitutions of things *quæ cadunt in non cauſam*, or *ob turpem cauſam*, or of *indebite ſoluta*, or *cauſa datâ cauſa non ſecutâ*. From title 8. ariſe actions from the obligations *negotiorum geſtorum*, and the diligence required therein; the actions *de in rem verſo*, and *quantum locupletiores facti ſumus ex damno alterius*; and the actions of relief of thoſe who are jointly bound with, and do pay for others, as *correi debendi*, and conjunct cautioners. From title 9. Reparation, there ariſe petitory actions for damage by delinquence, by extortion, circumvention, ſimulation, colluſion. From title 10. there is no ſpecial action, it containing only general obſervations upon the nature of promiſes, pactions and contracts. From title 11. ariſe petitory actions upon loan, and upon bills of exchange. From title 12. ariſe actions on mandates or commiſſions, and the diligence of mandatars; and the contrary action for the mandatars expences. From title 13. there ariſe the actions for cuſtody or *depoſitum*, ſequeſtration, conſignation, depoſitation, and the actions on the edict *nautæ*, *caupones*, *ſtabularii*; the diligence of all theſe, and the contrary actions for the expences of depoſitars. From title 14. ariſe the actions upon permutation and ſale. From title 15. ariſe the actions from location and conduction. From title 16. ariſe the actions from ſociety and the duties of partners. From title 17. ariſe the actions againſt cautioners; actions upon tranſactions, and promiſſory oaths of parties. The 18th title affords no actions, but only exceptions, upon liberation from obligations.

V. The action for delivery of moveables, is alſo upon the perſonal obligation of the haver, which is diſtinct from the right of property, which is rather a declaratory action, as *rei vindicatio* in the Roman law did chiefly declare the purſuer's right of moveables; the action for delivery of moveables, may be from all title and intereſt in them; but the prime action is, from *lib.* I. *tit.* 1. *real rights*, where, beſides the general obſervations on real rights, the ſpecial ways of appropriation of moveables are handled, whether by occupation of that which belonged to none, acceſſion, alluvion, ſpecification, or conjunction: the remainder of that title, though it much conſiders poſſeſſion, yet theſe actions are not poſſeſſory actions; poſſeſſion being rather the probation of the right of moveables, than the cauſe of it; for thence it is preſumed, that the moveables poſſeſſed belong to the poſſeſſors: yet it admits contrary probation, if he that claims the ſame can prove that he once poſſeſſed theſe moveables, and that they did not paſs from him by any right of alienation, but by impignoration, cuſtody, loan, or by being ſtolen, or taken by violence, or having ſtrayed, or having been loſt, or that they were in poſſeſſion of a defunct the time of his death. And as theſe are competent exceptions, ſo they are ſufficient titles for petitory actions, for recovery of theſe moveables, as well as for detaining them.

VI. The property of prizes taken by letters of mart, from publick enemies, or by reprizal, afford adjudications of ſhips and loadings, which are more declaratory than petitory, and are properly *rei vindicationes*; but the recovery thereof by reducing theſe adjudications, are more petitory. Theſe adjudications cannot be begun before the Lords of Seſſion, but before the Admiral; and come only before the Lords in the ſecond inſtance; and ſo are not ordinary actions by the juriſdiction of the Lords.

TITLE

TITLE XXII.

Petitory Actions upon Infeftments and equivalent Rights.

FROM the third title, lib. II. treating of infeftment of property; there arise many actions both petitory and poſſeſſory. The petitory actions are competent to thoſe who have not been in recent poſſeſſion, but inſiſt upon the point of right by infeftment. Unto which, by act 62. *Parl.* 1661, are joined appriſings, whereupon there is a charge againſt the ſuperior to infeft the appriſer, which, in caſe of his diſobedience, is accounted equivalent, during the legal, as if he had given infeftment, ſeeing, during that time, there is no abſolute change of the vaſſal; but thereafter it becomes an irredeemable right, and then the ſuperior or others concerned may ſtop all action until the appriſer be infeft, and pay a year's rent. And adjudications being now come in place of appriſings, they have the ſame effect; as alſo adjudications upon renunciations of apparent heirs, or adjudications for implement of diſpoſitions of property or liferent. The heirs of vaſſals albeit not infeft, have a petitory action for a competent aliment according to their quality, to be paid by donatars of ward, and liferenters, which doth not extend to the reſerved liferents of parents, or others diſponing the property with reſervation of the diſponer's liferent.

II. The udal rights of Orkney, by the peculiar cuſtoms of the iſles of Orkney and Zetland, give the ſame right as infeftments, and thence ariſe the ſame petitory actions.

III. Manſes and gleibs being mortified to the kirk, have the ſame effect.

IV. Wadſets of property by diſpoſition and reverſion, and infeftments for ſatisfying of ſums, being redeemable rights of property, have the ſame effects againſt the poſſeſſors of the lands, as if they were irredeemable, until they be actually redeemed.

V. Theſe rights, as they are the ground of declaratory or reſciſſory actions, when they have not had poſſeſſion within ſeven years [e], and ſo cannot have action for mails and duties, or for removing, againſt the poſſeſſors, who poſſeſs by infeftment or equivalent right, if they or their authors have been ſeven years in peaceable poſſeſſion uninterrupted, *viz.* by interruption by way of action, or real intermiſſion of poſſeſſion, ſo they give petitory actions againſt others, for mails and duties or removing. But if the parties infeft, or their authors, or thoſe having equivalent rights, have poſſeſſed within ſeven years, then they have poſſeſſory actions for mails and duties, without neceſſity of an antecedent declarator. The title of theſe actions upon infeftments muſt be ſeiſins, with the warrants and adminicles thereof; ſuch as obligements to give infeftments, which ſuffice in old infeftments, or charters, precepts, or diſpoſitions in new infeftments.

VI. In theſe petitory actions, any party compearing for his intereſt, and producing an infeftment, or equivalent right, will be admitted; whence ariſes a competition wherein the ſame grounds of preference are competent, as in the caſe of reductions.

VII. Actions for mails and duties are not only competent to perſons infeft, or having rights equivalent, but likewiſe to others, who found upon theſe rights, as aſſignies to mails and duties; or to appriſers or adjudgers without infeftment or charge; or to thoſe having diſpoſitions without infeftment: for in all theſe caſes an aſſignation to the mails and duties is virtually comprehended, tho' not formally expreſſed. But theſe cannot inſiſt, except againſt tenants or poſſeſſors who pretend no right, unleſs they produce the infeftment of their authors, or that the rights

[e] See above, II. 7. 22. &c.

rights have been acknowledged by the poſſeſſors, as deriving poſſeſſion from the purſuers, or having paid mails and duties to them.

VIII. Infeftments in liferent or equivalent rights, do found the like actions for mails and duties, and removing, as are competent to the proprietars, in whoſe right they purſue: ſo that if the proprietar was in poſſeſſion, and the liferenters continued that poſſeſſion for ſeven years, the liferenters have the benefit of a poſſeſſory judgment; but if not, they have only the benefit of a petitory judgment, proceeding upon their author's right and their own; in which caſe it will not be effectual to call the tenants and poſſeſſors only, unleſs they have acknowledged the proprietar or liferenter.

IX. Liferenters by terce, or by the courteſy, have the ſame actions as liferenters by infeftment, either a-part or by reſervation in the infeftments of others.

X. The tenor of actions for a ſuitable aliment, at the inſtance of apparent heirs, againſt their ſuperiors, in ward-lands not being taxed, may be thus[f]: "Our will is, and We charge you, that ye lawfully ſummon *D*, ſuperior or "donatar of the lands of, *&c.* holden ward of him by *A*, who died laſt veſt and "ſeiſed as of fee in the ſaids lands, to compear, *&c.* to anſwer at the inſtance of "*B*, heir or apparent heir to the ſaid deceas'd vaſſal in the ſaids lands, as ha-"ving right to a competent aliment conform to his quality, out of the rents and "profits of the ſaids lands during the ward: That is to ſay, the ſaid defender "to hear and ſee a competent aliment modified by the ſaids Lords, and allocate "upon certain lands, being parts and pertinents of the ſaids ward-lands: and, "for that effect, to hear and ſee the rental of the ſaids lands verified and pro-"ven, conform to the laws and daily practique of this realm, *&c.* According to "juſtice, *&c.*"

XI. The proper exceptions againſt this action are, *firſt*, That the apparent heir has other lands or eſtate, ſufficient to aliment him according to his quality; at the leaſt, the ſaid other eſtate ought firſt to be allocated, and the remainder only to be taken out of the ward-lands. If it be replied, that the apparent heir's quality ought not to be the rule of the quantity of the aliment, but the quantity of the rent of the ward-lands, making a juſt proportion between the vaſſal and the ſuperior's intereſt in the ward-lands; this reply ought not to be ſuſtained, becauſe the aliment of heirs, and the value of the marriage of the heir, are mutual cauſes; and therefore, as the value of the marriage is due according to the whole eſtate of the vaſſal, and his quality, yet ſo as only to burden the ward-fee; ſo likewiſe the aliment of the heir muſt have reſpect to his quality.

The *ſecond* exception is, That the apparent heir hath right to an aliment from the liferenter of the ward-lands, or of other lands, who therefore muſt be called, either to bear the burden in the firſt place, or at leaſt a proportional burden. This exception is not clearly determined by law or cuſtom: for tho' it is certain that both ſuperiors, donatars and liferenters, are liable for an aliment to the heir: yet how the burden affects them is not determined. And it ſeems juſt, that the ſuperior, or donatar of ward-lands, ſhould alone be burdened, if the rent of the ward-lands be ſufficient for an aliment to the heir, conform to his quality; becauſe an aliment is in compenſation of the value of the heir's marriage. And as to liferenters, they are liable for an aliment to the heir, whatever the tenor of the fee be; and therefore they ought only to ſupply what is required above the rent of the ward-fee, proportionally to the rent of the liferent.

XII. The tenor of a ſummons of aliment, at the inſtance of the heir, or apparent heir, againſt the liferenters, may be thus: "Our will is, and We charge "you, that ye lawfully ſummon *L*, liferenter of the lands of, *&c.* wherein *A* "died laſt veſt as of fee, and who thereby is obliged to aliment the heir, or ap-"parent

[f] See above, II. 4. 36. 5. III. 5. 3.

" parent heir of the ſaid fee, to compear, *&c.* to anſwer at the inſtance of *B* heir, " or apparent heir of the ſaid fee: That is to ſay, The ſaid defender to hear and ſee " an aliment modified by decreet, *&c.* to the ſaid purſuer, out of the profit of the " liferent of the ſaid fee, to be allocated upon certain parts of the ſaids lands, " during the liferenter's life; and to hear and ſee the ſamen proportioned be- " tween the ſuperiors or donatars of the ward-lands, and the ſeveral liferenters of " the other lands: and, for that effect, to hear and ſee the rental of the ſaids " lands to be allocated, verified and proven, in preſence of the ſaid Lords, con- " form to the laws and daily practique of this Our realm, *&c.* According to ju- " ſtice, *&c.*"

XIII. It is a proper exception againſt this proceſs, that the apparent heir has a ſufficient eſtate of his own, or a calling ſufficient to aliment him.

XIV. The tenor of the petitory action for mails and duties, and the poſſeſſory action for the ſame, differ in this, that in the petitory action the purſuer ought to deduce his title upon the point of right, as high as he can; otherwiſe, if any having a prior right (tho' not in poſſeſſion) appear for his intereſt, he may exclude the purſuer; and he muſt alſo cite not only the tenants and poſſeſſors, but the heritors, tackſmen, or liferenters, who are in poſſeſſion by uplifting the mails and duties. But in the poſſeſſory action the purſuer ought expreſsly to libel, that he, his predeceſſors and authors, have been in uninterrupted poſſeſſion for the ſpace of ſeven years; and thereby have the benefit of a poſſeſſory judgment: and therefore he needs produce no more but a right warranting that poſſeſſion: for no other party that produces another right, will be ſuſtained to compete, unleſs he have the benefit of a poſſeſſory judgment, but his right will be reſerved to reduction. Nor needs the purſuer call any but the preſent tenants or poſſeſſors, becauſe he himſelf is in poſſeſſion by his tenants, from whom he uplifted the duties of the former years; and if the tenants pretend any other maſter, they ought to intimate the plea to him.

XV. The tenor of the petitory action for mails and duties may be thus: " Our " will is, and We charge you, that ye lawfully ſummon *B* and *C*, tenants and " poſſeſſors of the lands of ———, to compear, *&c.* to anſwer at the inſtance of " *A*, as having right to the mails and duties of the ſaids lands, by virtue of his title " herewith produced, *viz. &c.* That is to ſay, The ſaids defenders to hear and " ſee themſelves decerned to make payment to the purſuer, of the mails and du- " ties of the lands libelled for the years following, *viz. &c.* and in time coming, " during the purſuer's titles produced, and the defender's poſſeſſion, the terms of " payment of the ſame being always firſt come and bygone: and, for that effect, " to hear and ſee all lawful probation adduced for proving of the worth and va- " lue of the yearly rent of the ſaid lands, and others foreſaids, as the ſame may " pay for a conſtant rent in ſtock and teind, the defenders being always freed " and liberated of any teind-duties payable forth of the ſame, according to the " holding and ſowing of the ſaids lands, and the meadows, parks and incloſures " therein, conform to the rate and cuſtom of the country, where the ſaids lands " ly, and according to the rent of mills and fiſhings, as the ſaid mills are worth " conform to their thirle, and according as the ſaid fiſhings are worth conform to " the rates of the country: at the leaſt, to make payment of the bygone rents " conform to the laſt uſe of payment; and in time thereafter from the citation " hereon, to pay the full duties, which the ſaids lands and others foreſaids are " worth, conform to the laws and daily practique of this Our realm in all " points, *&c.* According to juſtice, *&c.*"

XVI. The proper defence in this proceſs is, That the defender hath a prior and better right to the ſaids lands and others, and duties thereof libelled; or that the defenders have the benefit of a poſſeſſory judgment, by ſeven years poſſeſſion, upon a valid title, which muſt be ſpecially condeſcended on, wherein not only infeftment, or other rights requiring no infeftment, with the foreſaid poſſeſſion, are relevant, but alſo tacks are relevant both for the time bygone, and payment made

conform thereto, and alſo for time coming, *viz.* in reſpect the ſame is granted by the ſetter having an anterior right, or the benefit of a poſſeſſory judgment. Yea, the defence upon a tack cled with ſeven years poſſeſſion is relevant *in poſſeſſorio*, to maintain the tack in time to come, until it be reduced, without inſtructing the right of the granter of the tack. A reply upon a prior poſſeſſion by the ſpace of ſeven years, by a ſufficient title, will not be relevant, if the purſuer have ceaſed to poſſeſs by a tack, which cannot recover poſſeſſion *activè* by a poſſeſſory judgment, as an infeftment may.

XVII. The petitory action of removing is ſeldom competent; becauſe, if the purſuer thereof, or his author, have not been in conſtant poſſeſſion for the ſpace of ſeven years, before intenting of the cauſe, he cannot purſue a removing until he declare his title, if the defender by a valid title be in poſſeſſion; and albeit he hath not attained the privilege of a poſſeſſory judgment, yet being in preſent poſſeſſion, tho' for a ſhorter time, he hath that competent defence againſt the purſuer, that he cannot inſiſt to remove, until he declare his right; which doth not ſo hold in actions of mails and duties, wherein the defenders may intimate the plea to their maſters, and if they be not defended, and pay *bona fide*, they are ſecure for theſe years: but when parties are removed, they can have no benefit either as to years paſt, or in time coming; yet all may be removed at the inſtance of thoſe from whom they had poſſeſſion, but it is not ſufficient that they have acknowledged the purſuer by payment of mails and duties, thereupon alone to be removed.

Seeing removing is ſo rarely competent by a petitory action, it is fitteſt to refer the tenor thereof and the exceptions againſt the ſame, to be handled amongſt poſſeſſory actions.

XVIII. All actions for mails and duties, and for removing, at the inſtance of ſuperiors, againſt the tenants and poſſeſſors of ward-lands, or againſt the tenants and poſſeſſors of other lands, after declarator of non-entry, or liferent-eſcheat, are petitory actions, proceeding upon the right of ſuperiority, without reſpect to poſſeſſion, and they do not require the libelling or proving of poſſeſſion in themſelves or their vaſſals: neither are defences upon poſſeſſory judgments relevant againſt ſuperiors, or their donatars, but only againſt the vaſſals who are proprietars, wadſetters, or liferenters.

XIX. The action for mails and duties, at the inſtance of the ſuperior or donatar, againſt the poſſeſſors of ward-lands, require no further title but the ſuperior's infeftment, which nothing can elide but the infeftment of the vaſſal; or thoſe rights that are introduced by law, ſuch as are liferent by terce, or by the courteſy; or otherwiſe rights granted by the vaſſal, with the ſuperior's conſent, to be holden of the ſuperior, which, tho' they have not attained infeftment, will exclude the ſuperior, upon the perſonal exception of his own conſent. But if his conſent be only to an infeftment, to be holden of his vaſſal, albeit infeftment follow, yet it will not exclude the actions of mails and duties, and removing, but will not exclude recognition.

XX. But when ſuperiors, or their donatars, purſue for mails and duties, upon non-entry, they muſt libel upon a decreet of general declarator: for till that be paſt, they cannot inſiſt even for mails and duties, and much leſs for removing. And the ſame holds in the like actions, upon liferent-eſcheats; wherein the general declarator muſt preceed the ſame: and in theſe actions not only the exceptions founded upon rights conſtitute by law, as liferents by terce or courteſy, or by conſent of the ſuperior; but all defences are competent againſt the ſuperior or his donatar, which would be competent againſt the vaſſal; becauſe liferent-eſcheat is not a caſuality of ſuperiority, by the nature of the feudal right, but by our particular cuſtoms, whereby vaſſals, being rebels civilly by denunciation for not obeying the charge, if they do not relax within the year, they are holden as *civiliter mortui*, and their fees are holden as void and open to their ſuperi-

ors;

ors; yet ſtill with the burden of all rights that did affect the ſame, when the vaſſal was denounced.

XXI. There is alſo a petitory action, at the inſtance of an heir, againſt a liferenter, for reparation of the liferent-lands and houſes, at any time of the liferenter's life, that they may be put in as good condition as they were at the liferenter's entry. And alſo it is competent againſt the heirs and executors of the liferenter, after the liferenter's death, wherein muſt be libelled the condition of the liferent-lands and houſes at the time of the entry, and how they are at the time that the liferenter is quarrelled; for which letters of horning are ſummarily granted to charge the liferenter to repair, and an action againſt the repreſentatives for the ſame effect.

XXII. There is likewiſe a petitory action, founded upon the mutual obligations of heirs and executors, for relief of the moveable debts whereby the heir is diſtreſſed, and of the heritable debts whereby the executor is diſtreſſed [a]: for creditors have action againſt either, or both of them, for any debt of the defunct. But creditors have not the ſame acceſs againſt heirs of line, male, tailzie and proviſion, there being an order of diſcuſſing amongſt them, that the poſterior heir cannot be diſtreſſed, till the heirs prior in order be diſcuſſed; unleſs the defunct have burdened one ſpecial heir only.

XXIII. There is alſo a petitory action, at the inſtance of fiars againſt cutters of wood growing upon their fee: this differs from ſpuilzie or wrongous intromiſſion; becauſe the growing wood was part of the fee, and therefore doth not belong to any other but the fiar; nor doth it fall under ejection, or intruſion, or wrongous intromiſſion, but it ought to be libelled upon the ſpecial title of the fiar.

TITLE XXIII.

Poinding of the Ground.

POINDING of the ground is a petitory action, founded upon many ſeveral titles and intereſts, and is of great importance; and deſerves to be handled by itſelf [b]. And by our antient cuſtom, after recovery of decreet againſt any landlord, there was a brieve of the chancellary paſſing of courſe, for poinding the readieſt goods upon that landlord's lands; which therefore was called the brieve of diſtreſs. But this was an irrational cuſtom, as if every landlord had taken a letter of mart againſt his neighbour, not only to ſeize upon his own goods, but upon his tenant's goods; and that not only for the landlord's real debts by infeftment, but for his perſonal debts. And therefore, by the 36th act, *Parl.* 1469, a very juſt alteration was made, whereby the brieve of diſtreſs became no more in uſe.

II. By this act; 1. The goods of the inhabitants of the ground were no more to be diſtreſſed, except for their term's mail; and even that is out of uſe, but the rents of tenants may be arreſted for their maſter's debt, and made forthcoming, not only for the bygone rents, but for a current term's duty, though the term be not come. 2. All execution became competent againſt the landlord's proper goods, which were to be poinded according to the avail of the debt; and failing of moveable goods within the ſhire where the landlord lived; or if theſe were not ſufficient, the King gave letters of poinding to other ſheriffs, wherever the debtor had moveable goods or rents. But, 3. There was no acceſs to the property of his lands, till his moveables were firſt diſcuſſed, and then letters were direct to the ſheriffs where the debtor had lands, or if the ſheriff gave the decreet himſelf, he was (without any other warrant, but his own executorials) authoriſed to ſell the debtor's land, to the avail of the debt, which neceſſarily required a publick

[a] See above III. 8. 65.

[b] See above, II. 5. 8.—10. III. 2. 13. 2. Below, IV. 47. 24.

a publick intimation at the head-burgh of the ſhire, upon a market-day, and in market-time, to all parties that pleaſed to buy; and it behoved to reſolve in a roup, that it might not be in the diſcretion of the ſheriff, to ſell at what rate he pleaſed, but at the beſt rate offered. Of the lands ſo ſold, there was no reverſion. But if there was no buyer found, the ſheriff, or other judge-ordinary was ordained to choice the beſt and worthieſt in the ſhire, and leaſt ſuſpect to any of the parties, to the number of thirteen perſons, to appriſe lands, and aſſign the ſame to the creditor to the avail of the debt, and that within ſix months after recovery of the decreet. And the ſuperior is thereby obliged to receive the creditor, or any other buyer, to be his vaſſal, he paying a year's mail, as the land was ſet for the time; unleſs he take the land to himſelf, and undergo the debt.

III. The alteration of the courſe eſtabliſhed by this excellent ſtatute, has brought much trouble and miſchief to the nation. For the Lords of Seſſion did grant letters of poinding and appriſing upon decreets for perſonal debts, directed to meſſengers, as ſheriffs ſubſtitute by the Lords, for that effect; and bearing diſpenſation with appriſing upon the ground of the land, within the ſhire, and by the worthieſt and leaſt ſuſpect of the ſhire; with power to appriſe at *Edinburgh*, by any inqueſt that the creditor pleaſed to call; whereby all that was claimed as the debtor's lands, without any evidence, that they were his lands, or that he was holden and reputed heritable poſſeſſor thereof, were appriſed at random, for the leaſt as well as the greateſt debt. And for a long time the appriſer enjoyed the whole rents, without imputing the ſame in his principal ſum, till that was in part amended, by act 6. *Parl.* 1621. And ſince divers alterations have been made. And by act 62. *Parl.* 1661, all appriſings were brought in, to have proportional ſhares according to their ſums, if they were deduced within a year, after the firſt appriſing, whereupon there was infeftment, or charge againſt the ſuperior to grant infeftment; and likewiſe all appriſings before the ſaid firſt effectual appriſing, and the ſame was ordained in all adjudications: this was not extended to real debts by infeftment. Alſo the legal reverſion was lengthened from ſeven to ten years. But this did not cure the inconvenience; and therefore, by act 19. *Parl.* 1672, adjudications before the Lords, were introduced in place of appriſings by meſſengers. And it was put in the option of the creditor to adjudge land, effeirand to his debt, and a fifth part more, in place of penalty, the lands being redeemable within five years; providing the debtor produced the evidents, and gave at leaſt tranſumpts of them, and conſented to the adjudger's poſſeſſion: or otherwiſe to adjudge all lands in general, redeemable in ten years, and coming *in pari paſſu* as before. But very few creditors made uſe of the ſpecial adjudication, and few debtors reſtricted them to it, to the great prejudice of both parties, whereby a great part of the nation has become bankrupt [c]; whereas the reviving of the old ſtatute would have cured all theſe inconveniencies.

IV. Albeit the foreſaid ſtatute 1469, allows the tenant's goods to be pointed for their maſter's debt, not exceeding a term's mail; yet the Lords have alwiſe interpreted it, to be for the maſter's debt due by infeftment (and not for his perſonal debt) and that by an action for poinding the ground. The effect of this action is only for granting letters of poinding and appriſing, that thereby the goods upon the ground may be pointed, not exceeding the term's mail, in the firſt place; and if theſe do not ſatisfy the terms annualrents inſiſted for, that then the ground-right and property of the lands may be appriſed, in ſatisfaction of the whole annualrents reſting, if there be no moveables pointed, and of the remainder if moveables be pointed. But creditors do frequently paſs by moveables, though they be upon the ground; and cuſtom hath ſuſtained appriſings, albeit they bear, that ſearch was made for moveables, and none found; when it was not ſo truly done; which is a bad cuſtom, and contrary to the foreſaid ſtatute, prohibiting lands to be appriſed, ſo far as the moveables on the ground can ſatisfy, which is not required in adjudications.

V. Poinding

[c] See below, IV. 51. 12. 2.

V. Poinding of the ground is competent; firſt, for the bygone annualrents of an inſeftment of annualrent, which is moſt ordinary: but there can be no poinding for the ſtock or the principal ſum, for which the annualrent is granted, yet the annualrents appriſed for, are not as mortified, that they could not be redeemed: for it is declared by act of Parliament, that where-ever an annualrent relates to a ſtock or principal ſum, it is redeemable upon payment of that principal ſum, without any conventional reverſion *. But frequently there is a perſonal obligement to pay the ſum: and ſometimes it bears, "That execution upon the "perſonal obligement ſhall be but prejudice of poinding the ground upon the "real right." In which caſe, the creditor may poind the ground for the bygone annualrents, and may appriſe the ſame for the ſtock; but this appriſing will not be effectual againſt ſingular ſucceſſors, as the appriſing on the annualrent will be, which is effectual as if it were of the date of the infeftment. The appriſings by the real right for the bygone annualrents, do not come in *pari paſſu*, with the appriſings or adjudications for perſonal debts; but have effect from the date of the infeftment of annualrent.

Secondly, Poinding of the ground is competent for all feu-duties, for which the ground of the lands, (where theſe feu-duties are in the *reddendo*) may be appriſed, for all the bygone feu-duties unpaid.

Thirdly, Ward-lands may be appriſed for the non-entry duties, due to the ſuperior after general declarator; which are preferable to all annualrents conſtitute by the vaſſal, albeit with the conſent of the ſuperior; that conſent only importing that recognition ſhall not follow upon ſuch annualrents; but it doth not import that theſe annualrents ſhall be preferable to feu-duties, or the non-entry duties, by decreets of general declarator.

Fourthly, The ground of lands may be appriſed for the avails of the marriages, after they are declared.

Fifthly, The ground of any lands may be appriſed by poinding of the ground, for any ſum wherewith the vaſſal's infeftment is burdened, or the land may be adjudged for the ſame ſum: and neither the appriſing nor adjudication will come in *pari paſſu*, with appriſings or adjudications for perſonal debts, but will be ranked according to the date of the infeftment, wherein the burden is expreſſed; eſpecially if it be not only expreſſed in the diſpoſition and charter, but in the ſeiſin; and the appriſing or adjudication will not only be effectual for the annualrents, but for both principal ſum and annualrents, wherewith the infeftment is burdened; yet ſtill the feu-duties and non-entry duties by general declarator are preferable thereto, as well as to the appriſings on annualrents; becauſe the real burden is not a burden upon the ſuperior's right, but upon the vaſſal's.

VI. Theſe appriſings and adjudications upon real rights, as they do not come in *pari paſſu* with theſe upon perſonal rights; ſo neither do they come in *pari paſſu* amongſt themſelves, though they be deduced within the year; but they are preferable in manner foreſaid; yet the poſterior appriſing imports a right to redeem the prior within ſeven years, all which is clear by the exception contained in the act 62. *Parl.* 1661, which beareth, "without prejudice alwiſe of ground-"annuals upon infeftment and other real debts, and *debita fundi*, and of com-"priſings therefore, of lands and others affected therewith, which ſhall be effe-"ctual and preferable according to the laws and practick of this kingdom now "ſtanding," *viz.* as the law was on the firſt of January 1661, which was the date of that Parliament.

VII. There is a very intricate queſtion, whether an appriſing deduced on the bygone annualrents, due by infeftment of annualrent, if the ſame ſhould expire unredeemed, would not only extinguiſh the right of the proprietor of the land, but alſo the right of the annualrent itſelf, ſo that there could be no poinding of the ground for any ſubſequent annualrents? This queſtion hath been reſolved *affirmativè*, *lib.* 2. title *annualrents*, § 11. But there remains yet this queſtion,

* The author ſeems here to refer to act 137. P. 1592, which however does not exactly apply.

whether an appriſer for the bygone annualrents due by an infeftment of annualrent, can appriſe the whole fee, or only ſo much thereof as is correſpondent to the value of the bygone annualrents appriſed for? The affirmative is much more juſt and conſonant to this right, that a branch ſhould not defeat the ſtock; and I have ſeen no deciſion to the contrary, but that the antient ſtatute ſtands unalterable as to this point; whereby there will never ariſe a queſtion betwixt the fiar of the annualrent, and thoſe that have only appriſed for ſome bygone years annualrents: for though the proprietor of the annualrent may redeem within the legal, yet he is not obliged to ſearch regiſters, that he may know what appriſings were upon bygone annualrents, and when expired; theſe being only deſigned to ſecure purchaſers, that they be not excluded by prior real rights.

VII. It is queſtionable whether poindings of the ground may now be by appriſing, ſince the 19th act, *Parl.* 1672, whereby adjudications are introduced in place of appriſings? or whether adjudication doth thereby only come in place of appriſings for perſonal debts? The reaſon of the doubt is, 1. Becauſe the narrative of that act bears, that meſſengers, or ignorant perſons of inqueſt, ſhould not be judges in matters of importance: and, 2. In the ſame ſtatute, it is ordained, "That upon proceſſes raiſed before the Lords, at the inſtance of any "creditor againſt his debtor, principal or cautioner; the Lords ſhall adjudge, "and decern to the creditor in ſatisfaction of the debt, ſuch a part of the debt-"or's eſtate, conſiſting in lands and other rights, which were in uſe to be appri-"ſed, as ſhall be worth the ſum principal and annualrent then reſting to the "creditor, and a fifth part more, in reſpect the creditor wants the uſe of his mo-"ney, and is neceſſitate to take land for the ſame; beſide the compoſition to the "ſuperior and expences of the infeftments;" which doth not well quadrate to annualrents or other real burdens which have no penalties, and ſhould not have a fifth part more upon that account. Both theſe objections are ſatisfied if poindings of the ground be by appriſing, according to the foreſaid antient ſtatute, by an inqueſt of the worthieſt and leaſt ſuſpected to any of the parties, in the ſhire where the lands lie; and not by meſſengers (as ſheriffs ſubſtitute) appriſing at Edinburgh, but upon the ground of the land, and upon particular inſpection of the worth thereof; whereby ſuch a part of the land may be appriſed, as may be equivalent to the bygone annualrents, or other real burden, for which the appriſing doth proceed; and that upon inſpection of the land, and chuſing ſuch a part thereof, as may be conveniently ſeparated from the reſt, having a reverſion for ſeven years after the appriſing, conform to that old ſtatute, which is much confirmed by the ſaid exception in act 62. *Parl.* 1661, providing, that appriſings for annualrents and *debita fundi* remain as before that act, and are not altered thereby. And therefore, though the legal reverſion of other appriſings for perſonal debts, be lengthened to ten years; yet theſe appriſings for real debts are only redeemable in ſeven years. And there ought to be no compoſition to the ſuperior for the entry of theſe appriſers, when the ſame proceed for his own feu-duty; or for the non-entry duties by the general declarator of non-entry; or for the avail of marriages, as being in favour of himſelf, or his donator; or even for annualrents holden immediately of himſelf; for thereby his vaſſal is not changed; and compoſition ought only to be for annualrents holden of the vaſſal, or for ſums wherewith the vaſſal's infeftments are burdened.

IX. In competitions with infeftments, the bygones of annualrents by infeftment, feu-duties, non-entry duties, or avails of marriages; are taken in and preferred in their due order as aforeſaid, albeit there be no appriſing thereupon deduced. And albeit theſe burdens that flow from the right of ſuperiority, be preferable, not only to appriſings on perſonal debts, but to appriſings on annualrents or other *debita fundi*, yet it doth not hinder appriſings to take effect for any of them, ſeeing the whole lands are not appriſed, but an equivalent portion thereof, effeiring to the ground of the appriſing.

X. The

X. The tenors of ſummonſes for poinding of the ground are different, according to the ſeveral rights, whereon they proceed. Summons for poinding of the ground for a feu-duty, may be thus: "Our will is, and We charge you, that "ye lawfully ſummon *B*, proprietor of the lands of —— (whoſe infeftments are "granted with a *reddendo* of an yearly feu-duty of——payable to *A*, his im- "mediate ſuperior) and alſo *C* and *D*, tenants and poſſeſſors thereof. And all "others having, or pretending to have intereſt, by open proclamation at the "market-croſs of ——— to compear, *&c.* to anſwer at the inſtance of the ſaid "*A*, ſuperior foreſaid, *&c.* That is to ſay, The ſaids defenders, to hear and ſee "letters of poinding and appriſing direct by decreet of the ſaids Lords, for "poinding the readieſt goods and gear upon the ground of the ſaids lands, in "payment and ſatisfaction of the bygone feu-duties reſting unpaid, extending to "the ſum of, *&c.* not exceeding a term's mail of the tenants and poſſeſſors of "the ſaids lands *reſpectivè*; and in ſo far as the ſaids feu-duties are not ſatisfied "thereby, and by the goods on the ground belonging to the ſaid *B* heritor there- "of; then, and in that caſe, for appriſing the ground-right and property of ſuch "part and portion of the ſaids lands, as is equivalent unto the ſaids reſting feu- "duties; whereby the right of the ſaid *B* vaſſal, in the ſaid portion of land, ſhall "be extinct, and the ſamen ſhall be conſolidated with the ſuperiority to the "purſuer, to be bruiked and joiſed by him as full proprietor thereof in all time "thereafter, redeemable alwiſe, as accords, *&c.* conform to the laws and daily "practick of this our realm, *&c.* According to juſtice, *&c.*"

XI. Summons of poinding the ground for non-entry duties differ from the former only in this, that non-entry duties are in place of the feu-duties, and that the decreet of declarator liquidating the ſame, muſt be ſpecially deduced: but if if it be at the inſtance of a donatar, there muſt be no mention of the conſolidation.

XII. If the ſummons of poinding the ground be for the avail of marriage, the title of the ſuperior, or his donatar, muſt be deduced, and the declarator of the avail of the marriage: and it muſt have the article of conſolidation, if it be at the ſuperior's inſtance; but is without it, if it be at the donatar's inſtance.

XIII. The ſummons of poinding the ground for the bygone annualrents, due by infeftment, may more conveniently be as a ſummons *præſcriptis verbis*, deducing the infeftment of the proprietar granter thereof, and the annualrenter's infeftment conſtituting the annualrent.

XIV. If the ſummons be upon a ſum burdening an infeftment, the ſame tenor muſt be followed, and the concluſion is the ſame, "being only to hear and "ſee letters of poinding and appriſing direct againſt the proprietars, Wadſetters, "liferenters, tenants, and poſſeſſors of the lands and others affected, for poinding "the moveables upon the ground thereof, not exceeding a term's mail of the "lands poſſeſſed by the ſeveral poſſeſſors, or the hail moveables ſo far as the "proprietar is in natural poſſeſſion, by labourage or paſturage;" becauſe the foreſaid old ſtatute, reſtricting the poinding of the moveables to the term's mail, is only in favour of tenants, againſt whom it is effectual, altho' the term be not come, the poinding being *currente termino*; for thereby the tenants are ſecure, that they may retain from their maſters the price at which their goods were appriſed.

XV. There are very few exceptions competent againſt actions for poinding the ground, unleſs it be by production of preferable rights, which turns into a competition; for thereby any preferable right is receivable, as if there were a reduction depending thereupon, becauſe annualrents and other *debita fundi*, are always ſuſtained without declarator or reduction, and without reſpect whether they have had recent poſſeſſion or not: and therefore, if an annualrent, or a real burden on an infeftment, were conſtitute *à non habente poteſtatem*, the ſame would be reducible upon that ground, and thoſe who had right would be preferable without reduction.

reduction. 2. Upon the ſame ground a defence upon an infeftment and ſeven years poſſeſſion, is not relevant againſt a poinding of the ground, which hath neither benefit nor detriment by poſſeſſion.

XVI. It will not be a ſuſtainable defence for tenants, that they are only liable for ſuch a duty by uſe of payment, or by tack, to reſtrict the poinding to that, if it be not a competent duty, but colluſive, if it be replied, that the juſt rent of the lands is more. But this will be a relevant duply that the tack was ſet, and cled with poſſeſſion before the conſtitution of the annualrent; which will not be relevant againſt poinding of the ground at the inſtance of the ſuperior, or his donatar, againſt whom no tack is effectual, albeit the ſuperior were a purchaſer of the ſuperiority after the conſtituting of the *tack* [e]; becauſe the act of Parliament ſecuring tenants againſt purchaſers, is only againſt the purchaſers of the property, wadſetters or liferenters. 2. It is not a relevant exception for tenants, that they can only be poinded for the half of their yearly rent, unleſs it be alledged that the ſame is payable termly, and not for the whole year together, (for in that caſe their goods may be poinded for a year's rent, ſeeing they may retain from their maſter, as well for a year's rent in that caſe, as for a term's rent in the other) becauſe it is preſumed that they have paid their maſters, when the term is paſt: yea, tho' they have not paid, the ſtatute ſecures them to be diſtreſſed for no more but their term's mail; but they are not ſecured if they pay before the hand. 3. It uſed to be alledged, and ſometimes ſuſtained for annualrenters, that the old ſtatute reſtricting brieves of diſtreſs to a term's mail, was only in relation to perſonal decreets for the landlord's rent: but now, of a long time, the landlord's debt is underſtood both of real and perſonal debt: and by the Lord, is not only to be underſtood the proprietar, who is the immediate Lord, but the ſuperior, who is the Over-lord; ſeeing the words of the ſtatute may bear that interpretation, and the reaſon expreſſed therein is alike for all: but there is no rent due to ſuperiors but in feus.

XVII. If the purſuer do not ſpecially libel the rent when he comes to poind, he cannot make the rent as he will then alledge; but the oath of the tenant muſt rule the ſame, tho' he ſhould depone upon a tack, and doth not produce it; becauſe poinding of the ground doth not require an antecedent charge, as poinding upon perſonal debts doth; ſo that the tenant cannot be preſumed to have always his tack about him: and therefore it is ſafeſt in poindings of the ground, to libel and prove the rent, if the purſuer intend to inſiſt againſt the moveables on the ground.

XVIII. If the tenant's rent be not in money, but in kind, the meſſenger (who is a kind of judge in the execution, as ſheriff conſtitute for that act) may determine the price by the oaths of the appriſers, as it is current the time of the appriſing, and ſo proceed to appriſe the tenant's moveables: and likewiſe he may take the oaths of other perſons, pretending the goods on the ground not to be the tenant's goods, but theirs, and may paſs by the ſame. And albeit it is not ſo cleared by cuſtom, whether the oath of any party will exclude the poinding in this real action, as it is clear in perſonal decreets, yet *in dubio ſequendum quod tutius eſt* *. The Engliſh indeed, upon theſe annualrents, which they call *rent-charge*, do indifferently poind the goods on the ground, to whomſoever they belong, if they find them but lying on the ground; and that by the tenor of their leaſes or tacks, which frequently bear that clauſe: and that in caſe no diſtreſs, or poinds, be found, the landlord may re-enter to the poſſeſſion, and expel the tenant without the authority of any judge. But then it is only competent upon the very term of payment, whereby all that have goods on the ground not belonging to the tenant, may drive them off. But we have no ſuch ſummary poinding of the ground, nor are our poindings reſtricted to any terminate time, but at any time when the annualrent is due, and the term of payment thereof come.

XIX. The

* The author gives his opinion below, IV. 30. 6. that a poinding of the ground will not be excluded by the oath of any claimant.

[e] F. annualrent.

XIX. The decreet obtained upon this proceſs, is effectual againſt all ſingular ſucceſſors, proprietors, wadſetters, liferenters, tenants, or poſſeſſors, without transference, or any other action againſt theſe ſucceeding; both as to the moveables on the ground, and as to the ground-right and property, or other heritable right; becauſe it is a real right whereupon the ſame is grounded, and needs but one ſentence; whereas decreets on perſonal rights muſt ſtill be transferred, becauſe the lands or goods are only poindable, as pertaining to ſuch perſons.

XX. In actions of poinding the ground, not only proprietors having prior rights may appear, and be preferred, whereby the action is totally excluded, and the ground is aſſoilzied; but likewiſe other annualrenters, or thoſe having right to *debita fundi*, may appear, and be preferred. As, 1. The ſuperior for his feuduties, non-entry duties, or avails of marriages, although they be due, after, not only the conſtitution, but the terms of the annualrent; becauſe theſe are due from the date of the infeftment of the firſt author of the annualrent. And, 2. Annualrenters, or thoſe who have right to real burdens, which are prior to the conſtitution of the annualrent inſtructing the ſame, will be preferred, and will have decreet for poinding of the ground; whereby it is poindable by all who inſtruct their rights, prior to the purſuer's right in their due order. (But poſterior annualrenters, or terms of annualrents poſterior to the date of the ſummons, will not be comprehended in the decreet, but will be repelled in that action, without prejudice to inſiſt in an other action. Yet prior annualrenters cannot ſtop the execution upon poſterior annualrents, by any pretence that can be moved to the meſſenger, who can be no judge in the competition, and can have little inconvenience, if only a parcel of the lands ſuitable to the annualrents reſting be appriſable. Only if the burden on the land be greater than the value, thoſe who are cut off by poinding of parcels, muſt impute it to their own negligence, that did not purſue when they might, *vigilantibus non dormientibus jure ſubveniunt*, not only in perſonal, but in real rights, which holdeth as to the bygone annualrents.) And if this did not hold, there could be no appriſing of a part but of the whole land, for which there was no warrant by the ancient ſtatute; and that cuſtom of appriſing came in upon perſonal decreets, in reſpect that the appriſers were not able to inſtruct the right of their debtor, and therefore were admitted to appriſe all they pretended to be the debtor's, *ſuo periculo*: which doth not hold in poindings of the ground, which extend only to the particular right expreſſed in the purſuer's own title, and can be extended to no other ground of the debtor: and therefore, in the remedy by the act 19. *Parl.* 1672, for poinding a part, the defender muſt produce his rights; or otherwiſe the whole muſt be yet appriſed or adjudged, as before; becauſe in theſe ſummary executions the purſuer cannot know who hath the laſt and beſt right.

TITLE XXIV.

Petitory Actions for Teinds or Teind-duties.

TEINDS are introduced by law and cuſtom, and do burden the fruits, not the fee of lands. Neither do they affect any but the intromitters with the fruits; nor all intromitters: for tenants paying a joint duty for ſtock and teind, are not liable for the teind (but their maſters are) in ſo far as they have paid *bona fide*. Neither doth a citation put them in *mala fide*, if it be not preſently inſiſted in, becauſe of their ruſticity, and ſubjection to their maſters, who will take decreets in their own courts and poind: much leſs will merchants buying for a

price be liable for the teind *. Nor is the heritor liable, but as he is intromitter with the whole rent for ſtock and teind, or with both the rent and teind when ſeparate. But becauſe heritors in the valuation of their teinds, do value whole baronies, or tenements together, that the fifth of the rent of the whole may be the teind of the whole, thereby they become liable for the teind, and not the tenants, becauſe it is not divided upon their rooms; yet if it be ſo divided, their maſters are not liable for the teind, unleſs they intromit with the whole crop, or receive payment of the teind apart, or a joint duty for ſtock and teind.

II. The right of teinds affords both a petitory and a poſſeſſory action in diverſe caſes. And in no caſe there is neceſſity of a declarator; but the petitory action is competent upon the right being inſtructed: and then there uſes no more to be inſiſted for, but uſe of payment or tack, or tacit relocation. But the poſſeſſory action is only competent for drawn teind, when the teind-maſter hath been in poſſeſſion to draw the ſame the year immediately preceeding: for then he has poſſeſſory action for ſpoliation of the teind. But if he was not in poſſeſſion the year immediately preceeding the year in queſtion, he will only get uſe of payment till he uſe inhibition, which is the legal way of interrupting tacit relocation of teinds, or uſe of payment: but the inhibition will reach no further than that year in which it was uſed.

III. There is an annuity due to the King out of teinds, the ſame being valued; which being a part of the revenue, letters of horning are granted for the ſame ſummarily againſt the teind-maſter, the heritor, or poſſeſſors, ſo far as the teinds are in their hands, unleſs the heritor have acquired right to the annuity, which not being annexed to the Crown, is at the King's diſpoſal. Theſe actions for teinds may be purſued againſt all intromitters with the whole crop, or againſt the heritors, where the teind is not divided upon the ſeveral rooms. But if the land come to be divided by diſtinct infeftments, or equivalent rights, either of property, wadſet, or liferent, they can only be purſued for their proportional parts of the total valuation; yet the favour of the ſtipendiary miniſters for their ſtipends, which are but alimentary, allows them to have action againſt any of the heritors, who come to have divided rights after the valuation for the whole, ſo far as the teind of their poſſeſſion can reach; and theſe have action of relief againſt the reſt. And if theſe ſtipendiaries have no locality, they have acceſs to the whole teinds of any part of the pariſh, ſo far as their ſtipend goes; and thoſe who are ſo made liable muſt ſeek their relief.

IV. Teind-maſters are thoſe who have right to teinds, wherein the common rule of the canon law is, that the parſonage teind is due to the parſon, and the vicarage to the vicar; and that without ſhowing any title but their incumbency, and their title to the benefice; (which is not needful to be ſhown by thoſe where there is *decennalis et triennalis poſſeſſor, qui non tenentur docere de titulo*, albeit it were in competition with other church-men, where the queſtion is only who hath right to the benefice, and not to particular teinds) and therefore, if miniſters be in poſſeſſion of the parſonage and vicarage, or of either of them, they may purſue upon their collation and inſtitution, or upon their act of admiſſion, without any other title.

V. But if the teinds have been otherwiſe applied or mortified, as to biſhops, abbots, priors, provoſts, chaplains, or to colleges or univerſities; the ſame muſt be purſued upon thoſe titles, at the inſtance of ſuch as derive right from theſe beneficed perſons, or from the King, or other patron, when the benefice is vacant, or when it is ſuppreſſed.

VI. The right of teinds which belonged to Popiſh prelates, did, after the Reformation from Popery, fall to the King, as *bona vacantia*, and were derived from the King by erections, and temporal lordſhips; but with the burden of miniſters ſtipends. And in like manner, the right of teinds was derived from kirk-

men

* Unleſs they buy the whole crop. See above, II. 8. 23. 2.

men by tacks; and when the tack-duty was not ſufficient to pay the miniſter's ſtipend, the commiſſion for plantation of kirks, had committed to them a parliamentary power, to burden theſe tacks with miniſters ſtipends, and in compenſation thereof, to prorogate the tacks for ſuch time as they ſaw convenient. By theſe erections and prorogations, moſt of all the teinds of Scotland are carried; and the ſame muſt be libelled and produced in the petitory actions, purſued at their inſtance, or at the inſtance of ſuch as derive right from them.

VII. In benefices patronate, the patron had right to the teinds *ſede vacante*. But ſeveral acts of Parliament have reſtricted the right of patronage; and now the patron has only the application of vacant ſtipends, to pious uſes within the paroch.

VIII. All thoſe who have right to teinds have one common name, by which they are called teind-maſters; and the purſuits at their inſtance proceed in the ſame way, as actions at the inſtance of heritors, wadſetters, or liferenters, againſt tenants, poſſeſſors, or other intromitters. And the petitory action runs in the ſame terms, except as to the variety of the active title, or of the paſſive title, by being poſſeſſors or intromitters. And becauſe now moſt teinds which belong not to miniſters, do belong to the Lords of erection, or to thoſe deriving right from them; therefore the tenor of one action at the inſtance of a Lord of erection, will ſuffice for all actions for teinds, altering only the active title, which action may be thus: "Our will is, and We charge you, that ye lawfully ſummon *B*, poſſeſſor or intromitter with the crop of the lands of —— to compear before the Lords of our Council and Seſſion, upon the———day, *&c.* to anſwer at the inſtance of *A*, who ſtands infeft in a barony erected by us, comprehending the teinds of the ſaids lands, conform to his infeftment, dated, *&c.* whereby the purſuer hath good and undoubted right to the teinds, parſonage and viccarage of the ſaids lands, and ought to be anſwered and obeyed of the ſamen. Which teinds of the ſaids lands, extend in value to the fifth part of the rent thereof: likeas, the ſaids lands pay, or are worth to pay, the ſum of——— reckoning the payments that are in kind to the ordinary rates of the country, where the land lies, extending in haill to the ſum of———yearly; and the ſaids lands are poſſeſſed, or the fruits and profits thereof are intromitted with by the ſaid *B*, the crops and years of God 1690, 1691, *&c.* That is to ſay, The ſaid defender, to hear and ſee the premiſſes ſufficiently verified and proven, and being ſo verified and proven, to hear and ſee himſelf decerned by decreet of our ſaid Lords, to make payment to the purſuer, of the teinds of the ſaids lands, extending to the fifth part of the fruits and profits thereof in manner above ſpecified, conform to the laws and daily practick of this our realm, *&c.*" According to juſtice, *&c.*

IX. The proper exceptions againſt this action, are, 1. That the defender or his maſter is infeft, or at leaſt is heir apparent to the perſon laſt infeft in the lands in queſtion, *cum decimis incluſis*. For inſtructing of this, it will not be ſufficient to produce a charter of the ſtock and teind of the lands jointly, even though it bear *cum decimis incluſis*; unleſs there be inſtructed a progreſs of ſuch rights bearing to be originally from kirk-men, and bearing *cum decimis incluſis*, which frequently is cleared by theſe words, *nunquam antea ſeparatis*; which charter with ſeven years poſſeſſion, gives to the heritors and poſſeſſors, a ſufficient defence *in judicio poſſeſſorio*; for the poſſeſſory judgment may be competent *paſſivè* to the defender, albeit the purſuer have no neceſſity of a declarator for his *active* title. 2. There is a proper defence upon the lands, which did belong to the Ciſtertian order, which were teind-free ſtill, by a privilege of that order, which is continued to their ſingular ſucceſſors, albeit they be not church-men. 3. There is alſo a proper exception of the teinds of temple-lands, (which were the gleibs of the templars) and of all gleibs of kirk-men, that were in time of Popery, or that have ſince been, or ſhall be deſigned for gleibs. There are many other competent exceptions and defences in this cauſe, which are common with other cauſes, for the defender,

defender, or for competitors producing and defending upon a better right, or by payment made *bona fide*, which are not to be mentioned at the ſeveral actions, but hereafter when litiſconteſtation is to be explained.

The poſſeſſory actions for teinds upon preſent poſſeſſion, or inhibition, are to be found amongſt poſſeſſory actions.

X. If teinds be purſued for *ſeparatim*, viz. the parſonage teinds, which are only due out of the crop; then there muſt be particular libelling of what was ſown, and what is the ordinary increaſe of the lands in queſtion, or what was the quantity of the crop, as it was proved and delivered by taſkers or ſervants; whereof the tenth part is only due.

XI. If the vicarage teind be ſeparate from the parſonage, and belong to another benefice; then the ſame muſt be particularly proved, by all the particulars carrying a vicarage teind, which is only according to the cuſtom of the place; for many more things are teindable in one place, than in another; wherein the tenth parth is due for the teind. But in vicarage, it is a ſufficient defence upon tack, or uſe of payment, or tacit relocation, until interruption, which does not require inhibition, as in parſonage teinds, but the citation makes interruption.

XII. There is alſo both a petitory and poſſeſſory action for vicarage. But the poſſeſſory action is, where the teind-maſter was immediately before, in poſſeſſion of drawing the teind, and was hindered by the poſſeſſor or other intromitter, to continue the drawing thereof: for thereby there is a ſpuilzie for vicarage teinds, as well as for parſonage; but with this difference, that it is a ſpuilzie in parſonage, if the teind-maſter was in immediate poſſeſſion, although he were not hindered to draw the teind; unleſs the poſſeſſor did himſelf ſeparate the teind from the ſtock, and preſerved it conform to act 9. Parl. 1617. anent the teinding of corns.

TITLE XXV.

Actions upon Hypothecation.

OUR law doth allow of no hypothecation of moveables by conſent of parties, without delivery, and real poſſeſſion; though it was competent by the Roman law: becauſe thereby the current commerce in moveables would be hindered. Neither doth it allow of many hypothecations competent by the Roman law, but only of the hypothecation of the fruits and goods on the ground, belonging to tenants or poſſeſſors, for the rent; and the *invecta et illata* in houſes, for the mails of the houſes. Which hypothecations extend only to one year, that commerce be not thereby hindered: for buyers or other acquirers, may and ſhould ſee that the preſent year's rent, when they buy, be ſatisfied, and then they are ſecure.

II. Theſe hypothecations have very different effects. The maſter of the ground hath no hypothecation upon *invecta et illata*, as is competent for houſe-mails: becauſe houſes have no fruits, and therefore the goods brought in are hypothecate in place of the fruits. But lands or other tenements which have fruits, may be ſecured by the fruits. By the fruits, are not only to be underſtood the grain growing on the ground, out of which the parſonage teind is taken; but likewiſe all things out of which vicarage teind can be taken in that place, as ſtirks, lambs, wool, and the product of milk, butter and cheeſe, ſtaigs, the birth of ſwine, herbs and roots; which may not only be detained upon the ground, at the term when the rent is to be paid, during that year, but may be recovered by action from all intromitters, albeit they were poinded upon perſonal decreets: or at the inſtance of donatars; unleſs there remained ſufficient fruits on the ground, at the terms of payment. And it is not enough that there were other goods upon the ground,

ground, ſufficient to pay the rent at the terms; becauſe the poinders might have pointed theſe other goods, and likewiſe the maſter of the ground might poind the ſame for prior rents: but ſtill the fruits of the ground ſhould remain, ſo as to be ſufficient for a year's rent when the terms come. This hath not been extended againſt buyers in publick market, which were too great a hinderance to commerce [d]: for in the market, none is obliged to inquire whether he that ſells the goods was tenant in the lands, whereon they grew; neither could his aſſertion of the contrary ſecure the buyer, if the fruits ſold in the market were hypothecated.

III. The hypothecation of *invecta et illata* for the rent of houſes, ought to be extended againſt all tenants, and poſſeſſors of tenements, which have no natural fruits, as againſt millers, colliers, ſalters and the like. Our cuſtom hath not made it ſo clear, what is meant by *invecta et illata*. There is no queſtion but it is extended to all the proper goods of the poſſeſſor, which are brought into the houſe, cloſs, or gardens, for the uſe thereof; as all houſhold-furniture, ornaments, and utenſils. But it is more queſtionable if other goods, which were brought in not to remain for any time, but to be removed, or ſold out, ſo ſoon as poſſible, can make the intromittors liable: for thereby, thoſe who buy from merchants, out of their ſhops, would be liable for the rent. There is no ground to make the goods of others, beſide the poſſeſſors, to be hypothecated, if they were carried out again before the term of payment: but if they be there when poinding is uſed for the rent, there ſeems reaſon enough, that they may be pointed, becauſe they might remove them in time, and not put the landlord to the neceſſity of their oaths; which I have not heard hath been made uſe of, to ſtop the poinding of goods in houſes for the rent thereof; but only for exeeming goods from poinding for the rents of lands.

IV. Theſe actions are petitory actions, becauſe maſters of the ground or landlords, require no poſſeſſion of the goods, recoverable by theſe actions.

V. The action againſt intromitters with the fruits of the ground, for the rent may be libelled thus: "Our will is, and We charge you, That ye lawfully "ſummon *B*, as he who intromitted with the fruits under-written, extending to "the prices after mentioned, which grew upon the purſuer's lands of———in "the year——and which by the law were hypothecated for the rents of the ſaid "year, in which the ſaids fruits grew, to compear, *&c.* to anſwer at the in"ſtance of *A*, maſter of the ground, to whom the rents of the ſaids lands were "due and payable; which fruits ſo intromitted with by the defender, extend "to the particular quantities and prices after following, viz. *&c.* That is to ſay, "The ſaid defender, to hear and ſee the premiſes verified and proved, and be"ing ſo verified and proved, to hear and ſee himſelf decerned, by decreet of "our ſaids Lords, to pay the price of the ſaids fruits, at the rates and quantities "libelled, conform to the laws and daily practick of this our realm, *&c.*" According to juſtice, *&c.*

VI. The proper exceptions againſt this action, are, 1. That the rent was paid. 2. That at the time of intenting the cauſe, there remained ſufficient fruits upon the ground, for payment of the rent, in whole or in part; but not that there were other goods upon the ground, ſufficient for payment of the rent; for to this it will be relevant to reply, that the other goods on the ground, were neceſſary for the ſtocking and labouring of the ground, and therefore the landlord was not obliged to waſte the ground, but might purſue the intromitters with the fruits. 3. Another exception is, that the defender intromitted by buying in publick market, at leaſt, acquired from thoſe who ſo bought. 4. The goods in queſtion, were poinded by letters for poinding the ground, which is a preferable right: for if ſuch poinders were not ſecure, they could not ſafely appriſe

[d] See above, I. 13. 15. and 29th March 1639, *Hay*.

ſo much of the land, as would be ſufficient for the remainder. 5. The goods in queſtion were reſtored to the poſſeſſors, before intenting of the cauſe.

VII. The action againſt intromitters with *invecta et illata*, for houſe-mails, differs little from the former; and the proper exceptions are much the ſame.

TITLE XXVI.

Actions poſſeſſory in general, and removing in ſpecial.

HAVING gone through actions petitory, there follows now (according to the method propoſed) actions *in judicio poſſeſſorio*; which differ from the former, mainly in this, that actions petitory proceed upon the point of right compleat in itſelf, at leaſt prior and preferable to any right of the defender: and albeit ſometimes poſſeſſion be requiſite to accompliſh the right (as in baſe infeftments the right is not compleat without poſſeſſion) yet the actions thereon are petitory. But the poſſeſſory actions are ſuch, as need not debate the point of right, but muſt continue poſſeſſion, as it was at the intenting of the action. Theſe actions are like the interdict in the Roman law, *uti poſſidetis*; whereby lawful poſſeſſion is continued, until the point of right be determined, and what is enjoyed *medio tempore*, is ſecure; until the obtainer thereof be put *in malâ fide*, by a better right, either by way of reduction, declarator, or in competitions of many rights, where there is a neceſſity to allow all parties, to adduce all their reaſons of preference, as in a reduction.

II. Theſe poſſeſſory actions are of two ſorts. Some require a ſpecial title in writ, not for probation of the right, but for conſtitution of it, which therefore muſt be libelled and inſtructed: others proceed upon ſole poſſeſſion, and require the production of no title in writ. Of the former ſort are actions for mails and duties, actions for removing, actions againſt moleſtation: of the other kind, ſome relate to moveables, to wit, ſpuilzie, and wrongous intromiſſion: others relate to lands, to wit, ejection, intruſion, and ſucceeding in the vice of removed tenants or poſſeſſors.

III. The diſtinction of the petitory and poſſeſſory judgments, as to lands and other heritage by infeftment, ariſeth from the feudal cuſtoms of this kingdom; where there are many ſubaltern infeftments of the ſame heritage, and every party keeps in their own hands their own right; ſo that, if the proprietor were (*obliged*) to inſtruct his progreſs, by inſiſting for mails and duties, or by recovering the natural poſſeſſion by removing of tenants and poſſeſſors, his right would be very lame and ineffectual, if any perſon ſhould produce a prior right, or the poſſeſſors ſhould ſay they poſſeſs in the right of another, who had a prior right; ſo that the proprietar behoved to found upon all his ſuperior's rights prior to that right, whereupon the defence were founded, which are not in his hand, and he had no title to get them into his hand, but by an incident diligence, if the proprietar poſſeſſing might be excluded by any right prior to his own infeftment. For remedy of which inconveniencies, our law hath wiſely introduced this remedy of a poſſeſſory judgment, whereby proprietars of lands and other heritages, purſuing for rents or removing, or defending their preſent poſſeſſion; need alledge and inſtruct no further, than ſeven years lawful and uninterrupted poſſeſſion, by virtue of an infeftment; whereby they do not only ſecure the profits they have made as *bona fide poſſeſſores*, but may continue to enjoy the future profits, till they be put *in malâ fide*, by judicial production of a better right, by way of reduction, declarator or competition.

IV. The moſt ordinary poſſeſſory action is, for mails and duties; whereby the rents and profits are claimed, as a yearly rent payable at one or more terms. The purſuer in this action doth ordinarily produce no more but his ſeiſin, againſt te-

nants

nants that have acknowledged him, and have no other right ſufficient to defend them: but if any other compear to defend them, and produce an infeftment, the ſeiſin will not be ſufficient; and therefore, when any ſuch title is ſuſpected, the purſuer ſhould more prudently libel upon infeftments of ſeven years ſtanding in himſelf, his predeceſſors or authors; for an apparent heir may continue his predeceſſor's poſſeſſion, upon production of his predeceſſor's infeftment.

This action for mails and duties, may either be petitory or poſſeſſory. It is petitory, when the purſuer founds not upon a courſe of poſſeſſion, but upon a title ſufficient to attain poſſeſſion, and in that way it hath been handled before, *lib.* 4. *tit.* 22. But if the proprietar, his predeceſſors or authors, have been ſeven years in poſſeſſion before the years purſued for immediately; at leaſt, there hath not ſeven years interveened, ſince he or they were in poſſeſſion ſeven years; then it is a poſſeſſory action, whereof the tenor needs not be expreſſed, becauſe it differs nothing from the petitory action, but that the title is libelled, and ſeven years continuance of poſſeſſion, by virtue of it; and it is often purſued ſimply by production of the purſuer's ſeiſin; and if a contradictor appear, the privilege of the poſſeſſory judgment is replied upon.

V. But removing is an action, by which not only the tenants and poſſeſſors muſt be called; but if they be tenants and poſſeſſors who have paid mail and duty to another as their maſter, the action will not be effectual until that maſter be called, if he have had a lawful poſſeſſion, by uplifting of mails and duties by infeftment, or by a tack, whereof there were terms to run. Therefore, removing being more frequently purſued, as a poſſeſſory action; it was not treated of amongſt petitory actions, but was reſerved to this place. And albeit it may be alſo purſued as a petitory action, againſt any who hath not been in poſſeſſion ſeven years, by virtue of any infeftment or tack unexpired; yet the tenor in both is much the ſame.

VI. Removing in Scotland, antiently was thus. The maſter of the ground did verbally intimate to the tenant, to remove at the next Whitſunday, after expiry of his tack; and at the ſecond lawful day after Whitſunday, he expelled the tenant *brevi manu*, without ſentence [e]; and thus it was till the 39th act Parl. 1555. preſcribed the order of removing thus: "Lawful warning being made "forty days before Whitſunday, to the tenant; and on the ground of the lands, "leaving a copy of the precept of warning and executions thereupon; and the "precept of warning being read at the pariſh kirk where the lands lay, upon "a Sabbath day in the forenoon, the time of preaching or prayers," which cuſtom hath interpreted to be at the diſſolution of the firſt preaching, or at the time when it uſes to be diſſolved, if there be no preaching, "and a copy left "affixt upon the moſt patent door of the kirk; upon this, action for removing "is competent, on ſix days. But if the party warned compear, and ſhows no-"thing, but offers to improve the indorſation; in that caſe, he ſhall not be heard "in judgment, but if he find ſufficient caution to the warner inſtantly, that if he "prove not his alledgeance being found relevant, the profits, damage and intereſt, "that the warners or others having intereſt, have ſuſtained, or ſhall ſuſtain, be "the delay of the foreſaid alledgeance, ſhall be refounded."

VII. This ſtatute is ſtill in vigour, but becauſe Whitſunday was a mutable term, running oft times far in ſummer, whereby the removing tenants did eat meadows, and haining; therefore the fifteenth day of May, is now the term of removing, by act 39. *Parl.* 1690 *. Whatever the term of removing be, the warning muſt be forty days before the ſame term, *viz.* Whitſunday, (and albeit tenants or their maſters being out of the country, muſt be ſummoned on threeſcore days, yet the warning needs only be upon forty days) becauſe the ſame term is the competent term

* See a method of removing without warning introduced by act of Sederunt 4th December 1756.

[e] See above, II. 9. 39.

term for taking lands, and providing feuel, which is ordinarily peats, to be caſte and win about that time. This ground doth not extend to tacks of houſes i burghs-royal, or other burghs, nor to any other tack, which hath not that ſpeci conſideration.

VIII. Removing may proceed on a great variety of titles. 1. If the poſſeſſo have been introduced by the purſuer, he cannot require any title for the removing at the purſuer's inſtance; unleſs he hath been forced by proceſs to acknowledg another maſter. But receiving of mails and duties will not be a ſufficient title where the defender received not the poſſeſſion from the purſuer; becauſe if h deſert the poſſeſſion unwarrantably, he will be liable for the rent, as poſſeſſor, *nam pro poſſeſſore habetur qui dolo deſiit poſſidere.* 2. A diſpoſition, though without in feſtment, is a ſufficient title to remove the granter of it. 3. An appriſing o adjudication with a charge, being ſince the act 62. *Parl.* 1661. is a good title fo removing; becauſe it is holden equivalent to an infeftment during the legal. 4. The terce of a relict being kenned, is a ſufficient title for removing the tenants of her ſhare. 5. The courteſy of Scotland is likewiſe ſufficient. 6. A tack containing a power to remove tenants, expreſsly, or by the nature of the tack, being a liferent-tack, or a rental, if it hath attained poſſeſſion, or that the ſetter thereof was in poſſeſſion when he ſet it. But an apparent heir hath no title to remove, till he be infeft, though he may purſue for mails and duties; becauſe he may renounce to be heir, and ſo the tenant will be liable as if he had continued to poſſeſs: yet if he warn, when he is apparent heir, and be infeft before the time of *removing* [f], his title will be ſufficient; becauſe the former reaſon holds not in that caſe, if his predeceſſor died in poſſeſſion. 7. Any infeftment of property or liferent, or the ſuperior's infeftment during the ward, or after declarator of non-entry, or liferent-eſcheat, are valid titles of removing: but infeftments upon the purſuer's own reſignation, are not ſufficient titles for removing; unleſs the purſuer have been in poſſeſſion by mails and duties; becauſe infeftments paſs of courſe in Exchequer, upon any perſons own reſignation (except it be of the King's property) ſeeing the King receives all his ſubjects in any other rights of property, whereof the caſualities only belong to the King; though for knowing the progreſs of rights by infeftment, the King be the ſupreme ſuperior.

IX. The tenor of a ſummons of removing may be thus: "Our will is, and "we charge you, that ye lawfully ſummon *B*, tenant or poſſeſſor of ——To com- "pear, *&c.* To anſwer at the inſtance of *A*, as having right to in-put and out-put "tenants, in the ſaids lands, by virtue of, *&c.* (here is to be mentioned the par- "ticular title) That is to ſay, the ſaid defender, To hear and ſee himſelf decern- "ed by decreet of our ſaid Lords, to flit and remove himſelf, his family, ſubte- "nants and cottars, forth and from the ſaids lands, *&c.* and to offer the void poſ- "ſeſſion thereof, that the purſuer may enter thereunto, brook and enjoy the ſame, "conform to his right, and that at the term of, *&c.* conform to a warning made "to the ſaid *B*, forty days before the ſaid term for that effect. Conform to the "act of Parliament made anent warning and removing of tenants, laws and "daily practique of this our realm, *&c.* According to juſtice, *&c.*"

X. There are many proper defences againſt this ſummons, and not as objections only upon the inſufficiency of the title, and intereſt of the purſuer, or againſt the legality and order of the warning: as, 1. This dilator defence is relevant, that all parties having intereſt are not called, eſpecially the defender's maſter, to whom he is tenant, by payment of mails and duties preceeding the warning, and who ſtands infeft, or hath tack for terms to run. This defence not being peremptory of the cauſe, muſt be inſtantly verified, unleſs other diſtinct defences be ſuſtained to be proved; for then this alſo will be admitted to probation: but otherwiſe there muſt be at leaſt produced diſcharges of the rent, bearing the maſter's title, which the tenant is not obliged to diſpute, nor could he be maſter of his landlord's title, who hath been in poſſeſſion by lifting of mails and duties; which being ſo evident a poſſeſſion, he ought to have been cited.

Secondly,

[f] F. Warning.

Secondly, That the defender is tenant to another, who is his maſter by a ſufficient title to defend the poſſeſſion, by payment of mails and duties to the ſaid maſter, who was not warned. This exception is not merely dilatory, as only excluſive of the inſtance by this ſummons, but is excluſive of any ſummons for removing at this term; and therefore it ought to have a term for proving, altho' there were no other defence, in which it differs from the former exception: for tho' the tenant's maſter were not called, yet if he were warned, a new ſummons would remove the tenant at the ſame term. And tho' this reply hath been ſuſtained againſt this defence, that the purſuer has reduced the right of the perſon whom the tenant pretends to be his maſter, yet the tenant is not obliged to diſpute his maſter's right, when he is not called: but it would be relevant againſt the exception of not warning that perſon, that warrant be granted to cite him, for proving of the reply. But the production of *the decreet* [h] *inſtanter*, without calling the maſter, ought not to remove the tenant.

Thirdly, Another exception againſt removing, is upon preſcription by act 82. *Parl.* 1579, bearing, "that all actions of removing be purſued within three "years after the warning, with certification, that the warner ſhall never be heard "thereafter, to purſue the ſame upon that warning." Or, tho' the action begin within the three years, yet it muſt be renewed, according to *Parl.* 1669, *cap.* 9. whereby it preſcribes in ten years, if it be not wakened every five years *.

Fourthly, Another defence is, the purſuer's paſſing from the warning expreſsly or directly, or by deeds importing the ſame; as by taking of rent before the hand, or for terms after the warning; or by requiring or accepting ſervices or preſents expreſsly due by the tack, or by taking the herizeld of a defunct tenant, whereby his wife and bairns cannot be removed for the year thereafter.

Fifthly, Another defence is, upon any perſonal obligement, or incompleat right, importing a right to the tenant or his maſter, to retain or attain the poſſeſſion; which is not relevant againſt ſingular ſucceſſors.

Sixthly, Another exception is, that the defender poſſeſſeth the lands in queſtion *pro indiviſo* with other lands. But this is not relevant *againſt* [i] removing from any ſubject, whereof there are daily profits diviſible, as a coal-heugh, or fiſhing. Neither is it relevant for a liferenter on her terce, againſt the fiar of an indiviſible tenement: for there the greateſt intereſt muſt carry the natural poſſeſſion, and be liable to the leſſer for its ſhare. So likewiſe, if a poſſeſſor by virtue of a right coming in *pari paſſu* with another greater right, (as is now frequent by concurring adjudications) or if a tenement have ſeveral tenants poſſeſſed *pro indiviſo*, and having different houſes, any of theſe tenants may be removed, and another put in his place, or the maſter of the ground may poſſeſs the ſame.

Seventhly, This is alſo an exception, that the defender or his maſter hath the privilege of a poſſeſſory judgment, by virtue of a valid right, capable thereof, condeſcended on, and ſeven years poſſeſſion by virtue thereof, in the perſon of the defender, his predeceſſors or authors. This will not be elided by an alledgeance of its being clandeſtine, or having a vicious entry. But it will be elided by the reply of interruption, either by intermiſſion of poſſeſſion, or by proceſs of removing, or of mails and duties. But if the action be not poſſeſſory, that the purſuer, his predeceſſors or authors, have been ſeven years in poſſeſſion, by virtue of a competent title; the defender's poſſeſſion, tho' it be not for ſeven years, will yet defend him till the purſuer's right be declared, or the defender's reduced: yet if the purſuer had been in poſſeſſion by a competent title, for ſeven years, albeit not immediately before the warning, it will be ſufficient for removing the defender, unleſs, after the purſuer's ſeven years, he hath poſſeſſed peaceably for ſeven years,

* This act 9. P. 1669, is thus explained by c. 14. P. 1685, that ſuch actions ſhall preſcribe in five years, if not wakened within that time.

[h] F. it. [i] F. for.

otherwiſe his ſhorter poſſeſſion will not defend him againſt the prior ſeven years poſſeſſion, being *in poſſeſſorio*.

Eightly, The laſt defence againſt removing, is obedience, that the defender hath removed at the term, conform to the warning, and left the tenement void, and delivered the void poſſeſſion to the purſuer, or at leaſt offered the ſame. But it is not relevant that the tenant left the poſſeſſion void and red, if before he offered the ſame, any other entered in his vice, or if any that was in his family continued to poſſeſs, or if he did not remove his cottars who require no particular warning.

XI. None of all theſe defences, not being inſtantly verified, are competent, until caution be found for the profits, and the warner's damage and intereſt, in caſe the defender ſuccumb; as is provided in the foreſaid ſtatute.

XII. It is not a relevant defence againſt the removing, that it is purſued before the term, if it be after the warning: for tho' in perſonal obligements, actions be not competent before the term, yet removings have been ſo ſuſtained, and juſtly; becauſe, if the ground be not red at the term, the intrant tenant can have no acceſs, and ſo may proteſt to be free, and the land will be left waſte.

XIII. Albeit removings be in the roll of cauſes that are ſummarily diſcuſſed; yet the term falling in the vacance, this great inconveniency follows, that the warning cannot be made effectual at the term: and therefore warning may be made in the beginning of January, that the removing may be diſcuſſed before the end of February.

XIV. There is another kind of removing, which is called ſummary, in diſtinction from the former ſolemn removing by warning. Summary removing without neceſſity of warning, is competent in ſeveral caſes: 1. By the nature of the poſſeſſion, which if it be vicious, violent or clandeſtine, removing is competent at any time without warning, as againſt thoſe who ſucceed in the vice of perſons removed, whether they remove by conſent or by proceſs; for their entry is by intruſion; and all others that ſo enter may be ſummarily removed; much more thoſe who enter by ejection of the natural poſſeſſor; and all who poſſeſs precariouſly, may be ſo removed. Yea, if any have entered in poſſeſſion and have never paid mail and duty to any, albeit the poſſeſſion was altogether void and deſerted, ſo that the poſſeſſor will not be liable as an intruder, yet he may be ſummarily removed: thus the bairns, ſervants, or others that were in family with removed tenants and others; or thoſe who were in family, or ſervants, or cottars to liferenters, in what was in the liferenter's natural poſſeſſion, may be ſummarily removed.

Secondly, Summary removing is competent *ex pacto*, even againſt tenants, if by their tack they be obliged to remove at the iſh thereof, without warning. But if they be not removed preciſely at that time, by an antecedent charge of horning, they are underſtood to be continued by tacit relocation; and therefore muſt be warned ere they can be removed *.

Thirdly, Thoſe who diſpone lands or other hereditaments, with an obligement to enter the acquirer in poſſeſſion, may at that time be ſummarily removed. But if there be only a diſpoſition, with an obligement to infeft, although there be expreſſed a term of entry, which gives acceſs for mails and duties, and implies a tacit obligation to remove; yet the diſponers not removing, will not infer violent profits; nor is there reaſon to remove him from his natural poſſeſſion, without warning; at leaſt, he will only be decerned to remove at the next Whitſunday, without violent profits; and much more, if the purſuer's title be but appriſing or adjudication, whether with charge, or with infeſtment; for theſe are but legal diſpoſitions, and ought not to remove the debtor ſummarily; yea,

* This is altered by act of Sederunt, *Dec.* 4. 1756, whereby it is declared lawful to charge the tenant with horning on ſuch a tack, forty days before any Whitſunday after the tack is expired, and the ſheriff may thereupon eject him ſix days after the term.

yea, though he be warned, the Lords may reſtrict the appriſer or adjudger's poſſeſſion to his annualrent, being within the legal, *Parl.* 1661, *cap.* 62.

XV. There may be an objection made againſt what hath been ſaid of removing, by the privilege of a poſſeſſory judgment; that a poſſeſſory judgment hath been accuſtomed only to be made uſe of, in way of defence, ſo that any having a prior right, may remove a poſſeſſor having but a poſterior right, without neceſſity for the purſuer to alledge any poſſeſſion. It is true, that any infeftment may remove a naked poſſeſſor, but cannot remove a poſſeſſor by infeftment, though poſterior, unleſs the purſuer inſtruct his right immediately, or by progreſs from the King; or at leaſt, that it is perfected by preſcription, or that it hath continued in poſſeſſion for ſeven years, and ſo hath the privilege of a poſſeſſory judgment, whereby the poſſeſſion muſt be continued; unleſs the defender, who is actually in poſſeſſion, have acquired a poſſeſſory judgment; which will defend, though the poſſeſſion be poſterior to the other, if it hath had ſeven years peaceable poſſeſſion without interruption: for any man may infeft another, which will not give action againſt a poſſeſſor infeft, unleſs a progreſs be ſhown from the King, or from a common author to the purſuer and defender, whoſe right neither party can quarrel: and even, in that caſe, the purſuer muſt inſtruct, that his, or his author's right was once cled with poſſeſſion, otherwiſe it is underſtood as a continued baſe infeftment, holden of the common author, which cannot exclude him that is in actual poſſeſſion, though his infeftment be of the ſame kind; becauſe it has the advantage of poſſeſſion *. But this will be further cleared in the title Competition.

XVII. If, in removings, there be any defect in the order, or any probable defence, whereby the defender appears not to be *in malâ fide*, or litigious; the Lords are accuſtomed to decern in the removing, only to have effect at the next removing term after the ſentence.

It were proper here to treat of violent profits. But it is more proper to be treated in an action by itſelf, after ejection and intruſion, whence violent profits are conſequent, as well as from removing, unleſs the purſuer have ſet the land.

TITLE XXVII.

Moleſtation.

MOleſtation [k] is a poſſeſſory action, having the like requiſites as removing. And though the name in the vulgar acceptation, might comprehend moleſtation in moveable goods, as well as in heritage; yet as a law-term, it relates only to conterminous tenements, where ſome part or pertinent is controverted, to which of the two it pertains, or if it be common to both. And ſo it is competent, chiefly in rural tenements; though it may alſo, and doth ſometimes occur in tenements in towns, where there are gardens, or cloſſes, or waſte ground, wherein either party may claim right, and attempt to labour or ſow, or to throw dung thereon. In this action, as well as in removing, there muſt both be poſſeſſion, and a ſufficient title of that poſſeſſion; whereas ejection and intruſion, which are alſo poſſeſſory actions, require the production of no title, but are founded upon mere poſſeſſion.

II. Moleſtation is almoſt the ſame with that action in the Roman law, *finium regundorum*. And by this the marches of adjacent tenements were determined and regulated; yea, and not only were the parts and marches of either tenement declared;

* The diſtinction of baſe and publick infeſtments, is now taken away by act 13. *P.* 1693. See below, appendix, No. 2.

[k] See above, I. 9. 28.

declared; but they were ſo regulated, that if they might be better ordered by exchange of parts, which reached into either tenement, or whereby there might be a more defencible march, it was accordingly ordered: and it were a very juſt concluſion in our moleſtations, which is already ordered by the act 39. of *Parl.* 1586, for incloſing upon marches.

III. Regulating of marches may be by perambulation, for preventing of moleſtation; which is by a Brieve of the chancery yet in vigour, which paſſeth of courſe, and is the moſt proper remedy, whether there be moleſtation and contention, or not; yet the Lords of Seſſion are authorized by 42. *Parl.* 1587, to order moleſtations upon complaint made to them, conform to an act of Sederunt of their own, then ratified in Parliament, bearing, "That they were much hindered in expedition of other weighty cauſes, by complaints of moleſtation, "which cannot be ſo conveniently determined as upon the ground. And therefore it is ſtatute, That whenſoever any party ſhall mean themſelves to the Lords, "upon troublance or moleſtation, committed upon properties or commonties; the "Lords, by their deliverance, ſhall direct letters, ordaining the inferior judges-ordinary, to take cognition therein, upon ſummons or precepts to be directed "upon fifteen days warning. Whereupon the defences of parties ſhall be firſt "diſcuſſed, where the judges uſes to ſit, or where the Lords appoint: and after "the production of the parties rights, conſiſting in writ; the judges ſhall put "the points probable by witneſſes, to the knowledge of an inqueſt, the moſt part "being landed men, having four ploughs of land, or three hundred merks of "yearly rent unredeemable, and all the inqueſt ſhall be of the pariſh where the "lands lie, or the next adjacent pariſhes. And if there be mutual moleſtations; "then before litiſconteſtation, the witneſſes on both ſhall be remitted to the in-"queſt, who ſhall viſit the ground, and examine the witneſſes, and return their "report. And the judge-ordinary, or other judge delegate upon ſuſpicion of "him, ſhall, at acceptation of their commiſſion, make faith to miniſter juſtice "duly, and that they have not taken, nor ſhall take reward, profit or good deed "from any of the parties, nor have made, nor ſhall make any paction or con-"tract with any of them, for any certain ſum before the plea be intented, or "during the dependence thereof. And in caſe of mutual moleſtations, the e-"qual half of the aſſize ſhall be taken of the perſons ſummoned for either of "the parties. And if there be any wanting, the judge ſhall ſupply them, of "landed men, or famous and honeſt yeomen, and the odd man ſhall be choſen "by cavel or lot. And if the judge-ordinary be ſuſpect, or if the lands be in "divers juriſdictions; the Lords ſhall name judges by commiſſion. And in caſe "of error by the inqueſt, they are puniſhable *pœna temere jurantium ſuper aſſi-*"*ſam.* After the verdict of the inqueſt, the judge-ordinary or delegate is to give "his decreet. There is only exception of moleſtations for, or againſt the mem-"bers of the College of Juſtice, who ſhall uſe their privilege to purſue before "the Lords, or other judges-ordinary as was formerly accuſtomed."

IV. This act determines nothing of the election of the inqueſt, except in mutual moleſtations. So that, in other caſes, the purſuer hath too great advantage, having the power or influence of citing all the perſons for the inqueſt, out of which the judge muſt name the whole inqueſt, being qualified as aforeſaid: and therefore the Lords ought to give ſo long a term, and ſo many days for citation, that both parties may have mutual actions of moleſtation; and they ought to give injunctions to the director of the chancery to give the like time.

V. Albeit there be an exception of the actions of moleſtation of the members of the College of Juſtice, that the ſame may be before the Lords; yet that ought to be extended no further, than to the making litiſconteſtation, and decreet; but the probation ſhould be by an inqueſt and commiſſion direct for that effect, which may be in the vacance; ſeeing their privilege is founded on their attendance on the Seſſion.

VI. In

VI. In this action, whoſoever firſt provokes to judgment, is purſuer, and the other is defender But where there are mutual actions, either party may inſiſt.

VII. It hath been variouſly decided, whether the ſuperior of either, or both parties ought to be called in moleſtations. But the caſe is not alike in all infeftments: for in ward-holdings, the intereſt of the ſuperior is far greater than in other holdings, not only for his caſualties, but for the ordinary cauſe of returning of the property by recognition, upon alienation of the major part; and ſeeing parts of either tenement may be adjudged to the other, it is juſt in ward-holdings, that the ſuperior ſhould concur or be called, but not other ſuperiors.

VIII. The tenor and nature of brieves of perambulation are explained before, *lib.* 4. *tit.* 2. ordinary actions, *&c.* The ſummons of moleſtation may be thus: "Our will is, and We charge you, That ye lawfully ſummon *B*, heritor, wad-"ſetter, or liferenter of the lands of———and——tenants and poſſeſſors there-"of, to compear before the Lords of our Council and Seſſion, *&c.* To anſwer "at the inſtance of *A* heritor, liferenter, or wadſetter of the lands of ——— as "being moleſted and troubled in the poſſeſſion of the ſaids lands by the ſaid *B*, "or by the tenants and poſſeſſors of the ſaid *B*, his ſaids lands of ——— at the "leaſt, who may be troubled or moleſted therein, by reaſon of the unclearneſs "of the marches and poſſeſſion thereof; That is to ſay, The ſaid defender, to "hear and ſee letters direct to the judge-ordinary, where the lands lie, or other "judges delegate, to take cognition, and to determine the marches and poſſeſſi-"on of the ſaids lands, conform to the act of Parliament made anent the order "of cognition in caſes of moleſtation, laws and daily practick of this our realm, "*&c.*" According to juſtice, *&c.*

IX. The only proper defence, is upon a prior cognition, or bounding charter; and yet immemorial poſſeſſion altering the ſame, will be a relevant reply.

TITLE XXVIII.

Ejection and Intruſion.

THESE two actions are here joined, becauſe they differ in very little, ſave in this, That ejection is by ſome kind of violence, when the poſſeſſor of lands or other tenements, or his family, ſervants, or goods on the ground are diſpoſſeſt, and turned away, or not ſuffered to enjoy the benefit of the ground, ſo that the ground is not void. But intruſion is, when, though there be neither family, ſervant, nor ſtock of goods upon the ground, yet the poſſeſſion is detained *animo*, the natural poſſeſſion having been lately before, by dwelling, labouring, or paſturing, and is not preſumed to be relinquiſhed [1].

II. Theſe actions require no active title to be produced or proved, but only poſſeſſion. For one of the firſt principles of government, is, the preſervation of each perſon in their poſſeſſions, not to be put therefrom, but by their own conſent, or order of law, yea, though the poſſeſſion itſelf had been violent, or clandeſtine, it will not warrant a diſpoſſeſſion any other way: for though, in ſome caſes, there be compenſation in crimes, yet not in this, becauſe it is the chief baſis of the publick peace. But there muſt be libelled and proved natural poſſeſſion, by dwelling, labouring or paſturing, to have been recently before intruſion, or to have been at the time of the ejection. Interverting of the landlord's poſſeſſion, by payment of mails and duties, will not be a title for theſe actions, but both the tenant paying will remain liable, though it inſer double payment, and the intromitter will likewiſe be liable for payment.

III. It hath been commonly held, that ejection is not competent to the maſter of the ground, when his tenant is ejected. But in this, the caſe muſt be diſtinguiſhed,

[1] See above, I. 9. 25.—27.

guiſhed, that the tenant will have the benefit of the violent profits; but there is no reaſon to exclude the maſter of the ground to purſue the ejection, as to repoſſeſſion, and the ordinary profits; and albeit his tenant would not inſiſt, yet the maſter may uſe his name for theſe effects.

IV. Ejection is not only competent to the party ejected, but if he die, it is competent to his wife and bairns, without repreſenting him by entering heirs or executors; ſeeing poſſeſſion is only in the queſtion, which is continued with thoſe to whom the right would befal [m].

V. The tenor of a ſummons of ejection may be thus; "Our will is, and we "charge you, that ye lawfully ſummon *B*, to compear, *&c.* To anſwer at the "inſtance of *A*, for the defender his wrongous, violent and maſterful coming by "himſelf, his ſervants, complices and others in his name, of his cauſing, ſend-"ing, hounding out, command, reſet, aſſiſtance, or ratihabition, upon the—— "day of, *&c.* to the lands of —— pertaining to the purſuer, at leaſt, in his poſ-"ſeſſion, by labouring of the ſame, and paſturing of his goods thereupon, and "by other deeds of poſſeſſion: and then and there wrongouſly, violently and "maſterfully ejecting the purſuer, his family, tenants, cottars, goods and gear, and "intruding himſelf in the poſſeſſion of the ſame, by himſelf and others as afore-"ſaid; and alſo violently and maſterfully continuing and maintaining the ſaid "violent and maſterful poſſeſſion, by the ſpace of——That is to ſay, the ſaid de-"fender to hear and ſee the premiſſes verified and proved; and being ſo verified "and proved, To hear and ſee himſelf decerned by decreet of our ſaids Lords, to "repone and reſtore the complainer, his tenants, cottars, and ſervants, to the "poſſeſſion of the ſaids lands, in the ſame ſtate and condition they were in, the "time of the foreſaid ejection: and to make payment of the violent profits ſince "the ejection, till the purſuer be re-poſſeſſed; with the other damages ariſing "from the ejection. And alſo to hear and ſee himſelf decerned to deſiſt and "ceaſe from troubling the purſuer therein, in any time thereafter, otherwiſe "than by due order of law. Conform to the laws and daily practique of this "our realms, *&c.* According to juſtice, *&c.*"

VI. The ſummons of intruſion differs only from that of ejection, in this, That the intruder did wrongouſly enter in the poſſeſſion of the lands, and violently and maſterfully detains the ſame, by himſelf, his complices, and others, *&c.* as in the former ſummons.

VII. The proper defences againſt theſe actions, are, 1. That the defender reſtored the ground, and relinquiſhed the poſſeſſion, within twenty four hours after the intruſion or ejection; which will aſſoilzie from the ſame, but not from the expences and damages ſuſtained thereby, wherein the purſuer will have his oath *in litem*. 2. That the defender entered the poſſeſſion, by authority of a competent judge. 3. That the defender entered in poſſeſſion by conſent of the purſuer or others, who were in lawful poſſeſſion of the lands; which will not be ſuſtained, unleſs a more pregnant evidence of that conſent be condeſcended on, than the acts of violence which ſhall be condeſcended on by the purſuer; ſuch as delivering of keys, removing of goods, renunciation of poſſeſſion ſubſcribed by the renouncer. But if the condeſcendences be not evidently more pregnant, and witneſſes offered of greater fame and faith, the Lords will *ex officio* admit witneſſes of equal number, to be adduced by either party, to be examined, on theſe points, *viz.* who were preſent at the entry of the poſſeſſion? And what way it was entered? To the effect that if other perſons were preſent, which neither party adduce, the Lords may ordain them to be cited, as witneſſes moſt unſuſpect, if they be not in degrees defendent to one or other of the parties; that upon the whole teſtimonies the Lords may determine. 4. Another defence is the particular preſcription by act 81. *Parl.* 1579, bearing, "That all actions of "ſpuilzies, ejection and others of that nature (which comprehends intruſion) "be purſued before the ordinary judge, within three years after committing "thereof; otherways, the purſuer's alledged hurt never to be heard thereafter. "Providing

[m] See above, III. 5. 2.

« Providing this act extend not to minors, but to be purſued within three years « after their perfect age." Yet cuſtom hath allowed to inſiſt in the action, even after theſe years, for reſtoring the poſſeſſion, and the ordinary rents; but not for violent profits.

VIII. No defence will be admitted againſt theſe actions, without it be inſtantly verified; unleſs caution be found the firſt diet of litiſconteſtation, as in removing, *Parl.* 1594. *cap.* 221. But cuſtom hath required caution to be found, before acts of litiſconteſtation be extracted.

IX. No diſpoſition or obligment to poſſeſs, expreſs or implied in diſpoſitions conventional or legal, will be relevant againſt ejection; unleſs it bear a warrant to enter in poſſeſſion ſummarily: and even then, it will not be ſufficient, if reſiſtance be made: for it will not import to alledge, *fruſtra petis quod mox es reſtituturus*, which hath many exceptions, and will be elided, becauſe *ſpoliatus ante omnia reſtituendus*, which hath no exception; ſave ratification of the poſſeſſion. Yet theſe will be ſufficient defences againſt intruſion, where the poſſeſſion, though not deſerted ſimply, was yet deſerted as to corporal poſſeſſion; ſo that here the defender may defend upon obligements to poſſeſs; or upon voluntary diſpoſitions, having preſent entry, expreſſed or implied. But a defence will not be ſuſtained, upon appriſing or adjudication, there being a power reſerved to the Lords to reſtrict theſe; neither do they contain any warrant for ſummary poſſeſſion.

TITLE XXIX.

Actions for Violent Profits.

WITH theſe actions of ejection, *&c.* there are ſometimes added clauſes for violent profits, which is not ſo regular: for the decreet of repoſſeſſion is the title for the violent profits, which therefore ſhould be expede before the other can be inſiſted in: yet a diſtinct proceſs may be carried on therewith for the violent profits, to be inſiſted on immediately, and not to begin thereafter and go to the roll. And there is the more reaſon to admit the conjunction, ſince the courſe of the roll, than before. And where theſe are not diſtinct proceſſes, there muſt be a new diſpute, and new terms taken to prove the violent profits. But becauſe violent profits ariſe not only from intruſion and ejection, but from removing and ſucceeding in the vice, which is a kind of intruſion; therefore they ſhall be here conſidered as they are inſiſted for in a ſeveral action.

II. Violent profits are ſo called, becauſe they ariſe from violent attaining or retaining of poſſeſſion, and are partly perſecutory, partly penal, comprehending not only the ordinary profits of a tenement, which it would be worth, as a conſtant rent, but ſuch profits as the greateſt induſtry could procure, allowing nothing for the expence of the labour: for he that ſets theſe violent poſſeſſors at work muſt pay their charges [n].

III. The extent of violent profits hath not been fully determined. It is true, in houſe-mails, the double mail is ordinarily ſuſtained for the violent profits. Neither is it oft controverted, whether the tack-duty, or uſe of payment accuſtomed, be the full rent that the tenements might yield as a conſtant duty: but certainly, if the eaſe were conſiderable, the double of the full rent would make the violent profits, otherwiſe the penalty would be very unequal: for ſometimes houſes are ſet too high, upon ſpecial conſiderations of the fancy and pleaſure of the taker, and ſometimes too low. But the violent profits of other tenements are much more unclear, eſpecially of lands, where there is reaſon that he, who is injured by violence, ſhould have his oath *in litem* as much, if not more, in violence in lands than in moveables, if he depone what he eſteems the true rent of the

[n] See above, II. 9. 44.

the land, as it might pay as a conſtant rent, and that he ſhould have the doubl thereof, as well for theſe, as for tenements in burgh; which were far mor ſummary, than that which is frequently uſed, by libelling and proving wha the lands could ſow, and what the increaſe might be by the beſt induſtry what cattle it might feed, and what profit might thence ariſe by buying in land beaſts to be fatted, or by ſtocking only with milk-cows, and the profit o the ſtirk and milk, and the profit of the wood, lambs and milk-ews °, which i more conjectural and expenſive.

IV. Violent profits ariſe not only from ejection and intruſion, and ſucceeding i the vice of perſons removed, but from continuing of poſſeſſion after decreet o removing, which is ſtill a violent poſſeſſion againſt the will of the obtainer of th decreet.

V. The tenor of this action may be thus: "Our will is, and We charge you "that ye lawfully ſummon *B*, againſt whom the decreet for poſſeſſion after men- "tioned was obtained, to compear, *&c.* to anſwer at the inſtance of *A*, who ob- "tained a decreet againſt the ſaid *B* before, *&c.* upon the ——— day of, *&c.* "for quitting and renouncing the poſſeſſion of, *&c.* to the effect the purſuer "might enter in and to the natural poſſeſſion thereof, where nevertheleſs th "ſaid *B* continued in the violent and wilful poſſeſſion, after as before the ſaid de- "creet: That is to ſay, the ſaid defender to hear and ſee the premiſes verified "and proven by production of the ſaid decreet, and by probation of the ſaid "violent poſſeſſion: and being ſo verified and proven, the ſaid defender to hear "and ſee himſelf decerned by decreet of the ſaid Lords, to make payment to the "purſuer of the violent profit of the ſaids, *&c.* not exceeding the double of the "ordinary conſtant rate the ſame were worth, according to the eſtimation of the "ſaid complainer upon oath; and that for all years and terms ſince the term of — "which was the ſaid term of the violent profits. And ſiklike yearly and termly "in time coming, until the complainer be put in the peaceable poſſeſſion of the "ſame, conform to the laws and daily practique of this Our realm, *&c.* Ac- "cording to juſtice, *&c.*"

TITLE XXX.

Action of Spuilzie and wrongous Intromiſſion.

THE action for ſpuilzie of moveable goods [p] differs verv little from the ſum- mons of ejection, ſave in this, that ejection is diſpoſſeſſion of the poſſeſſor for in heritable rights by infeftment, and ſpuilzie is the diſpoſſeſſion of the poſſeſſor for in moveables; ſo that the tenor of the ſummons is much the ſame, except as to the ſubject.

II. The oath *in litem* in ſpuilzies hath this effect, that if a part of the move- ables be proved to be ſpuilzied, the purſuer hath not only *juramentum in litem pr* *prætio affectionis*, but for the whole particulars libelled, unleſs the defender prove by the purſuer's oath or writ, that theſe particulars which were proved, were no ſpuilzied.

III. Spuilzie is not only extended againſt the principal partv, but againſt all ac- ceſſories, who are all liable *in ſolidum*, and have no relief againſt their complices, un- leſs the purſuer aſſign the decreet of ſpuilzie to them; and even in that caſe, they will only have effect againſt their complices *pro rata*, except againſt the principal actor. But in ejection none can be decerned to reſtore the poſſeſſion, but the par- ty that took it.

IV. The exception of preſcription in not purſuing within three years, is rele- vant againſt ſpuilzie, as well againſt ejection, by act 81. *Parl.* 1579. But that ex- ception

° See above, I. 9. 27. 2.

[p] See above, I. 9. 16.—24.

ception doth not exclude wrongous intromiſſion: ſo that albeit the act of Parliament bear, that the purſuer ſhall inſiſt within three years after the ſpuilzie, otherwiſe the purſuer's alledged hurt never to be heard thereafter; yet cuſtom hath interpreted it only in relation to ſpuilzie as ſuch, that is, for the violent profits, and the oath *in litem*; but in that proceſs the purſuer may inſiſt for reſtitution of the goods, or the ordinary values, which hath not been ſo interpreted in ejections, wherein none can inſiſt on the preſcribed ſummons of ejection, for reſtoring the poſſeſſion ſummarily: yet he may warn the ejector, and inſiſt in a removing or repoſſeſſion.

V. This is alſo peculiar in ſpuilzie, that the exception of lawful poinding hath this reply, That the goods poinded were plough-goods, which are not poindable the time of plowing the ground, where any other goods are that may be appriſed or poinded, according to the common law, beſides the horſes, oxen or other goods pertaining to the plough, that labours the ground the time of the plowing, if the other goods were in view, or offered to be brought in view of the meſſenger.

VI. There is alſo a peculiar exception againſt ſpuilzie, that the time of the poinding a party compeared and offered to depone, that the goods were his own, and not the party's againſt whom the letters of poinding were direct; which oath the meſſenger, as judge in the execution, is allowed by cuſtom to receive: but he ought to examine the party upon any pertinent interrogatory proponed by the creditor poinding, or that occurs to himſelf; as, how the goods alledged became his who claims them? Whether by a natural poſſeſſion, or only by a ſimulate poſſeſſion from the debtor, *retenta poſſeſſione?* Or whether they were delivered in truſt, or for the behove of the debtor? And whether the mutual cauſe of diſponing and delivering them by the debtor, was performed? And accordingly he may proceed or ſtop. But if all points of doubt be clear by the oath, the poinder muſt paſs by theſe goods. Or if the wife, bairns, or domeſtick ſervants, of him that claims the goods, offer their oath, it will ſtop the poinding; becauſe the owner himſelf could not know the time of the poinding, that he might attend; and becauſe he might by way of action recover theſe goods, tho' poinded for another man's debt; whereby the creditor would be at more inconvenience. And albeit theſe perſons ſhould ſo depone, the creditor would not be excluded from proving the goods to be his debtor's; becauſe ſuch oaths not being oaths of verity, could not abſolutely eſtabliſh the right, being againſt the preſumption of property by poſſeſſion; and therefore the deponent muſt clear by his oath, when and how he poſſeſſed the goods he claims, and how he ceaſed to poſſeſs the ſame, that it may appear if by any alienation from or to the debtor, or if he put them a-graſing to the debtor, or that they ſtrayed upon his ground. But this will not be relevant againſt any execution upon a decreet of poinding of the ground, which can go no further than the peſſeſſor's term's mail, againſt whom, any other whoſe goods was in his poſſeſſion, may recover the price from him: for poinding of the ground has much more privilege than poinding on perſonal debts. See *lib.* 4. *tit.* 47. *executorials on decrees*, § 26.

VII. Wrongous intromiſſion is here joined with ſpuilzie, becauſe it differs not from a ſpuilzie, ſave that in a ſpuilzie, reſtitution is craved by the oath *in litem*, and the violent profits of the ſpuilzied goods, which uſe not to be extended further than to the profits of cattle, and thoſe things which, by their proper uſe, render a profit; and ſo corns, or other ſuch goods, have not violent profits; but oxen or horſe, though they have not a natural profit by themſelves alone, yet they have by their maſters uſing them, in riding or plowing, *&c.* But the profits which are merely natural, as of mares, ſheep, goats, *&c.* are competent, even where there is no ſpuilzie, *in quantum* thereby the poſſeſſor was *lucratus:* but if he had a colourable title, he is ſecure, as to the fruits *bonâ fide* conſumed.

VIII. Wrongous intromiſſion by the meaning of the term, would ſeem only to be extended, where the entry of the poſſeſſion was by wrong: but though there

were no injury in the entry, yet ſo ſoon as the owner claims his goods, and they are refuſed, the poſſeſſor becomes a wrongous intromitter; and therefore, by this action, all parties may recover their goods, where there is not another ſpecial title; as if the goods were delivered by location, cuſtody, ſociety, truſt, &c. which accordingly ought to be libelled as the title of repetition. And though there were no wrong in attaining or retaining poſſeſſion; yet, by a natural obligation, all men are obliged to reſtore to the owner, that which is his, by that general precept of the law *ſuum cuique*, as well as to permit the owner to intromit therewith by vindication; this action is competent for recovery of all goods to the true owner, when there is no ſpecial title competent for recovery thereof.

IX. But becauſe moveables paſs from hand to hand, by all titles of alienation without writ, and frequently without witneſſes; therefore there is neceſſarily introduced a *præſumptio juris*, that he who is poſſeſſor is proprietor [z]; ſo that he who would purſue for recovery of the ſame, muſt exclude the preſumption, by a ſtronger probation that the goods do not belong to the poſſeſſor, but to the purſuer; and therefore he muſt condeſcend and prove, that theſe goods could not paſs from him by alienation, as by donation, ſale, exchange, ſolution, &c. As, 1. He may prove by the defender's oath, that he knows the goods are the purſuers, and did not paſs from him by any alienative title. 2. He may inſtruct that the goods were ſpuilzied from him, or poinded for another man's debt, or that they were ſtolen, robbed, ſtrayed, hired, or that they were the goods of a defunct in his poſſeſſion the time of his death, or the like: and ſo theſe grounds muſt be ſpecially libelled, that the purſuer was in poſſeſſion of the goods in queſtion, and that they paſt from him, not by any alienative title, but by the ways aforeſaid, and therefore ought to be reſtored with the natural fruits thereof, at the leaſt, in ſo far as the poſſeſſor, or he who, by fraud, ceaſed to poſſeſs, was profited thereby.

X. Againſt this, it will be a competent exception, that albeit at firſt the goods did ſo paſs from the purſuer, as is libelled, yet he did thereafter recover the poſſeſſion, and that the defender offer to prove from whom he acquired the ſame, and is not obliged to prove any other intermediate author, without prejudice to the purſuer to purſue that author, who muſt inſtruct his author, whereby at laſt though with many proceſſes, and much expence, the purſuer may find out the wrongous intromitter, and have damages againſt him for all, if he was *in mala fide*.

TITLE XXXI.

Actions acceſſory, and ſpecially Tranſumpts.

IN the third title of this book [a], treating of actions generally, according to our cuſtoms, there were propoſed ſeveral diſtinctions of actions; and firſt, that of actions declaratory, petitory and poſſeſſory, which now have been expended; and we are next to come to the diviſion of actions in principal and acceſſory. Theſe actions are called acceſſory, which can have no effect alone, but as they are acceſſory to other actions, which therefore are called principal actions, ſuch as are all the actions preceeding.

II. The firſt of theſe acceſſory actions, is the action for granting tranſumpts of writs, which is alwiſe a *medium* for other actions, by the writs tranſumed, which are to be uſed, either by way of action or defence.

III. The riſe of this action is, becauſe oft-times writs are common evidents to ſeveral parties, and have not clauſes of regiſtration, or parties are not willing to publiſh them by regiſtration; and therefore any concerned muſt purſue the havers of them to exhibit them, and to hear and ſee tranſumpts thereof granted and delivered

[z] See above, II. 1. 42. III. 2. 7.

[a] See above, IV. 3. 47.

elivered, to be made uſe of as authentick writs, having the ſame effect as if they ere regiſtrate.

IV. This action doth moſt ordinarily ariſe upon obligements to grant tranmpts, as when a part of any barony or tenement is diſponed in property, wadet or liferent; the diſponer retains the evidents, or a part thereof in his own and, and obliges himſelf to give tranſumpts to the purchaſer. By this he is bliged to exhibit the writs, to be tranſumed before the Lords, and ſo muſt ſufer them to remain in the clerk's hands, till doubles thereof be formed, which oubles the Lords ordain to be collated and ſigned by the clerk of regiſter, or the rincipal clerks of Seſſion, as his deputes. But although there be no expreſs obigement to grant tranſumpts, yet the intereſt in common evidents, is a ſufficient itle to cauſe them be produced, to be tranſumed; but a collateral intereſt will ot be a ſufficient title, but only when the writs are a part of the purſuer's proreſs of any right, perſonal or real. Leſſer intereſt gives only title for exhibting writs *ad deliberandum*, or *ad probandum*; but will not give ground for a decreet of tranſumpt. Yet parties concerned may take inſtruments on the production, and may crave that the tenor of the writs may be contained in the inſtrument; which hath not the full effect of a decreet of tranſumpt, for that inſtrument will only prove againſt the parties who were in the proceſs, and did produce theſe writs, and againſt thoſe repreſenting them, but will not prove againſt their ſingular ſucceſſors; but a decreet of tranſumpt proves as fully as a decreet of regiſtration, againſt all parties having intereſt; with this difference, hat, in caſe of improbation, the extract of a regiſtrate writ will ſtop certificaon, but not unleſs the writ be regiſtrate in the publick and common regiſters of eſſion, or chancery, if the date of the regiſtration be condeſcended upon, and e found by the regiſter-books to have been ſo regiſtrate, which being found, the xtract is ſufficient to all effects, becauſe the principal is left with the regiſter, as n publick cuſtody, for which thoſe who give them to be regiſtrate, are not anwerable, but the keepers of theſe regiſters; but when decreets of tranſumpt are uarrelled, as to the verity of the principal writ, the uſer of the tranſumpt muſt roduce the principal, becauſe there is nothing left in the record to inſtruct; nd therefore he will obtain incident diligence againſt the havers, to produce the ame.

V. In the action for tranſumpts, the granter of the writ, or thoſe who do or may repreſent him, or their aſſignies, muſt be called, as well as the havers, and ll others having or pretending intereſt, at the head burghs of the ſhires where he granters of the writs, or thoſe repreſenting them, or their aſſignies do reſide; o hear and ſee the writs inſpected, as unvitiated and unſpect, and to be tranſumed. And therefore, though there be an expreſs obligement to give tranſumpts, a tranſumpt upon that obligement will operate no further, than againſt he perſon obliged, and thoſe repreſenting him; unleſs the granters of the writ, nd thoſe to whom it was granted, and the repreſentatives of both were alſo called.

VI. The tenor of this action may be thus: "Our will is, and We charge "you, that ye lawfully ſummon *B*, granter of the writ underwritten, or heir, "or apparent heir to him, or aſſigny to the ſaid writ, and all others having, or "pretending to have intereſt, at the market-croſs of the head-burgh of ——— "where the granter thereof doth reſide, to compear, *&c.* To anſwer at the in"ſtance of *A*, as now having right to the ſaid writ, in manner after ſpecified, "viz. *&c.* And thereby having good and undoubted right and intereſt, to call "and purſue for an authentick tranſumpt of the ſame, of which writ the tenor "follows (here the full tenor is inſert) That is to ſay, The ſaid defenders, to hear "and ſee themſelves decerned to produce the ſaid writ; and being ſo produced, "to hear and ſee the ſaid tenor above inſert, ordained by decreet, *&c.* to be ex"actly collated with the principal, and to hear and ſee it found and declared, "by decreet aforeſaid, that the principal is unvitiated and unſuſpect of forgery,

" and

" and that the tranſumpt thereof foreſaid ſhall be as effectual to all intents and " purpoſes, as if the ſame were regiſtrate in the books of Council and Seſſion; " except in the caſe of certification, for not production of the ſame in an im- " probation. Conform to the laws and daily practique of this our realm, *&c.*" According to juſtice, *&c.*

VII. There is no exception againſt this action, except improbation upon the forgery of the ſubſcription, or vitiation *in ſubſtantialibus*. Yet there may be objections againſt the intereſt of the purſuer, or that all parties having intereſt are not called.

TITLE XXXII.

Actions for Probations of the Tenors of Writs.

THIS action is not a principal action, but acceſſory, for thereby a writ loſt or deſtroyed is only made up by witneſſes, and no right is claimed thereby, either declaratory, petitory or poſſeſſory, but only the making up of the tenor of the writ; upon which writ, actions may be intented, or defences proponed.

II. The riſe of this action is from two grounds. 1. Some writs are eſſential ſolemnities, and not evidences of probation only. And therefore, though the deeds in ſuch writs were truly done, yet if they be not done in ſuch a form, they are null. 2. By our law, witneſſes are not admitted to prove, in caſes where writ may, and uſes to be interpoſed. For albeit probation by witneſſes be ſufficient in all caſes by the moral law; yet the memory of witneſſes being lubrick, and their apprehenſion of what is ſaid or done being uncertain, whether they adverted or not, or whether they rightly conceived what was done or ſaid; therefore poſitive law hath juſtly and fitly rejected witneſſes in ſome caſes, unleſs they had been particularly required to have been witneſſes, and the ſpecial points repeated to them: and, in other caſes, though they had been required, they will not be admitted, becauſe the law hath required parties to take writ in caſes of importance, and as the penalty of their neglect rejects witneſſes. Yet when writ hath been adhibited, and without the parties fault hath been loſt or deſtroyed; in ſuch caſes, witneſſes cannot be rejected, either to prove the fact, where the writ is only for probation, or to prove the tenor of the writ, that it may remain for probation; or to prove the tenor, where the proving of the fact will not ſuffice, in reſpect the writ is a neceſſary ſolemnity.

III. This action in divers caſes, requires divers points to make it relevant. For, 1. There is a great difference in probation of the tenor of writs; for ſome writs are deſigned to remain conſtantly, as diſpoſitions of lands and heritable rights, which though they may be retired before infeftment or poſſeſſion; yet that was not the deſign of granting them: but other writs are not deſigned to remain conſtantly, as bonds of borrowed money, which are not deſigned ſo to remain, but to be payed; and therefore the debtor making payment, uſes to retire his bond, and needs not require a diſcharge. Hence it is that the law doth preſume, that *chirographum apud debitorem repertum præſumitur ſolutum*. Yet this is not *præſumptio juris et de jure*: for it admits a contrary probation, that the writ came to the debtor's hand in another way, than can infer payment, or quitting the right; as if it were given to the debtor to ſee, and he refuſed to return it; or if he found it, or intromitted with it any unwarrantable way: therefore the tenor of bonds for borrowed money, is relevant to be proved by the oath of the debtor, or by ſuch a ſpecial *caſus amiſſionis*, as neceſſarily proves the writ was in the creditor's poſſeſſion; as if it be proved that the writ was in the creditors poſſeſſion when he died, found among his writs, or in the hands of his advocates, or in the clerk's hands,

hands, produced by him; or if the witneſſes prove that his houſe was burnt, and that they knew the bond was there, and that no writs were gotten out ſafe; or that they knew the writ was ſtolen, or taken away by violence from the creditor, or any intruſted by him; in theſe or the like caſes, the tenor even of bonds may be proved, albeit there be not adminicles in writ, relating to them: becauſe the witneſſes do only take away the preſumptive probation, that the ſum was ſatisfied, and the writ retired, by the debtor. And therefore it will be a relevant exception, for the debtor to offer to prove by witneſſes, that after the time at which it is libelled to be proved by witneſſes that the writ was burnt, ſtolen or taken by violence; the ſame was in the creditor's hand, or that it was in the debtor's own poſſeſſion: yea it will be ſufficient to prove by witneſſes, that the ſum was paid or ſatisfied; for here the debtor cannot be excluded from uſing witneſſes, becauſe this is a caſe in which writ uſes not to be adhibited, neither do witneſſes take away a writ which requires no witneſſes: but as witneſſes are competent in an extraordinary caſe, for the creditor; ſo they cannot be refuſed in the like caſe, for the debtor.

IV. This doth not ſo hold as to the probation of aſſignations, tranſlations, retroceſſions or repoſitions, and the writs conveyed thereby; becauſe no prudent man will reſt ſatisfied with the retiring of ſuch writs, that neither being ordinary nor ſafe: for in all aſſignations, *&c.* Inſtruments of intimation are requiſite to make them effectual, and a prior intimation with a later aſſignation is preferable; and therefore a more general *caſus amiſſionis* is relevant in the probation of the tenor of theſe; unleſs the contrary be offered to be proved by the creditor's oath, either of calumny, knowledge, or verity.

V. The *caſus amiſſionis* muſt alwiſe be libelled; becauſe the purſuer's deſign may be to prove the tenor of the writ to be other and better than the writ truly was; and alſo becauſe of the frailty of the memory of the witneſſes, who if they privately ſaid they did remember the writ to be of ſuch a tenor, (*might continue to affirm it*;) though that being ſaid to the purſuer, will not exclude them from being witneſſes, except he had prompted them ſo to ſay. It unſecures men's rights when they are put upon the memory of witneſſes, and not *de recenti*, and in plain caſes: and therefore if the *caſus amiſſionis* be not ſpecial, adminicles in writ muſt be produced, relative to that tenor; or otherways, no article extraordinary ſhould be ſuſtained to be ſo proved by witneſſes: for the tenor of a writ may be proved as to ſome articles, and not as to others pretended to have been in it, even though there be adminicles of the writ; unleſs they mention theſe articles: as if in bonds of borrowed money, there be alledged tailzies or extraordinary ſubſtitutions or irritancies, or caſes in which the ſums ſhall not be due or payable, or the like in contracts of marriage or other writs.

VI. But where there are adminicles relating to the tenor produced, the *caſus amiſſionis* will be ſufficiently libelled, that the writ was loſt. But without theſe, ſome proof ſhould be of the *caſus amiſſionis*; as if the Lords require the purſuer to depone that the writ was loſt. But if the defender require his oath of verity or calumny, his oath may utterly exclude any further proceſs.

VII. So then in probation of tenors, there muſt ſtill be libelled a *caſus amiſſionis*. But if that be ſpecially proved, there needs no adminicles. And if there be adminicles as to the ordinary articles, there needs no further probation, than what has been ſaid of the *caſus amiſſionis*. But the oath of party is ſufficient without both.

VIII. If the witneſſes depone that they were witneſſes inſert, or that they remember who were the witneſſes inſert; the names of the witneſſes and their deſignations, which are a part of the tenor, and even their ſubſcriptions, ſhould be contained in the decreet. And if they depone that they were witneſſes inſert and ſubſcribing, they ſhould ſubſcribe a duplicate of the tenor. And in both theſe caſes, the witneſſes are not only witneſſes of the exiſtence of the writ, but

de rei geſtæ veritate, or if they ſaw the writ ſubſcribed and delivered, or ſaw the deed performed mentioned therein; all which make the ſtrongeſt evidence againſt improbation.

IX. The witneſſes in probations of tenors, do prove, if they depone that they ſaw the writ, and that they took notice of the ſubſcription thereof, and that they did not ſee any vitiation or appearance of forgery therein; and that they remember the tenor of the principal articles therein, and that they were to the ſame effect as now they are drawn in form; which is ſufficient, although they do not depone that they were in the ſame words.

X. Tenors of writs may be proved, without the oath of party or witneſſes, by writs relating the ſame, ſubſcribed by the ſame party, his heirs or aſſignies, in ſo far as they are related; yea though they be not related, it is a ſufficient preſumptive probation, if there be authentick writs preſuppoſing the writs, whereof the tenor is to be proved: for inſtance, if a charter be granted originally to a vaſſal, bearing for implement of a diſpoſition or contract; though it bear not the tenor thereof, yet the tenor may be made up according to the tenor of the charter: or if a precept of *clare conſtat* be granted, it is a preſumptive probation to make up the tenor of the defunct's charter: or if in a charter upon reſignation, a procuratory of reſignation be mentioned a-part, or in a diſpoſition, thence the tenor of the diſpoſition or procuratory may be proved, in ſo far as may ariſe upon the clauſes in the charter.

XI. But improbation will always be competent againſt tenors, by the indirect manner of improbation; unleſs two witneſſes inſert prove the tenor, and ſubſcribe the duplicate: in which caſe the defender muſt inſiſt in the direct articles by way of defence, againſt the proving of the tenor; becauſe the probation of the tenor will be equivalent to a declarator of the verity of the writ, wherein if the defender compear, he will be excluded from inſiſting in an improbation. But in all other caſes, the indirect manner of improbation is ſtill competent, yet without hope in many of the caſes before propoſed.

XII. By what hath been ſaid, it is evident, that this action is ſo various, that it muſt be purſued as an action *præſcriptis verbis*, and hath not one common definite form.

TITLE XXXIII.

Exhibition *ad deliberandum aut ad probandum.*

EXhibition and delivery is an ordinary principal action, whereby the owner of a writ craves the ſame to be exhibited and delivered to him; ſo that it is a petitory action, when he claims it as his own by right, and a poſſeſſory action, when he claims it as having been unwarrantably taken from him, being in his poſſeſſion, or that it was in his cuſtody, *&c.*

II. But there are other two kinds of exhibition, which are only acceſſory actions; as when an apparent heir purſues the havers of his predeceſſor's writs, to exhibit them, that he may have inſpection, to the effect he may deliberate whether he will enter heir to that predeceſſor or not [c].

II. The other exhibition is *ad probandum*. For when any party hath a point to be inſtructed, or proved by a writ, which is not his own writ, but belongs to another, the law, from the common duties of ſociety in the ſame common-wealth, obliges the haver to produce, altho' it be his own writ, and tho' the claimer hath no other intereſt, but to inſtruct or prove ſome point competent to him to inſtruct or prove. And this is only in the dependence of a proceſs, whence this exhibition is ſuſtained *incidenter*: and therefore it is called an incident diligence which

[c] See above, III. 5. 1.

which was only competent by way of action, till the act of regulation of judicatures [d], whereby warrant is granted for letters of horning, to charge thoſe who are alledged to have ſuch writs, to compear and depone anent the having, and to exhibit what they acknowledge, in the ſame way, and upon the ſame ground, as they might be ſummarliy charged to compear and depone as witneſſes: yet the action will not be excluded, if no more time be protracted but what would be neceſſary by horning and caption; becauſe the having of writs is probable by witneſſes. But it is not proper here to ſay more of this action, till its proper place in proceſſes.

IV. The riſe of exhibition *ad deliberandum* is, becauſe, by our law, an heir entering is liable to all his predeceſſor's debts, tho' they do far exceed his heritage, and that in favour of creditors, that they be not put to compt and reckoning upon the value of the eſtate and debt of their debtors, as in other nations: and therefore we allow the heir a year to deliberate, during which time he has the benefit of this action, that he may call for all writs which might infer debt on him if he were entered, or might exclude him from the benefit of any right, wherein he finds his predeceſſor infeft. And tho' ſometimes this action hath been reſtricted, as to diſpoſitions granted to ſtrangers *extra familiam*, yet that is only to be underſtood where theſe ſtrangers produce the evidents, denuding that predeceſſor, or at leaſt condeſcend on the dates where they are *in publica cuſtodia*, if they be ſo found there (which is competent to all parties called to produce writs *ad deliberandum*, if they be in the Seſſion-records at Edinburgh, for thereby the apparent heir may have inſpection, but he is not obliged to go to all other regiſters, not being able to know the clauſes of regiſtration, or in what courts the writs are to be regiſtrate.) But if the defender inſtruct, that the purſuer's predeceſſor was denuded, he needs not produce any anterior writs of that right [e].

V. This action is competent not only within the year of deliberation, but thereafter, till the heir be entered: yet ſo, that creditors may charge him to enter heir, and obtain decreets thereupon. But it will not be a relevant defence, that he hath behaved as heir, or is lucrative ſucceſſor; for theſe are paſſive titles, only competent to creditors. Neither needs the apparent heir prove his propinquity of blood, but that is preſumed as notour in the vicinity, againſt which no man would come, being under the hazard of great expences, if he come in the contrary, to the trouble of any other.

VI. The tenor of this action may be thus: "Our will is, and We charge you, "that ye lawfully ſummon *C* and *D*, as thoſe who have in their hands the writs "underwritten, neceſſary to be ſeen by *B*, that he may deliberate whether he "will enter heir or not to *A* his predeceſſor, to compear, *&c.* to anſwer at the "inſtance of the ſaid *B*, neareſt lawful heir apparent, of line, male, tailzie or proviſion to the ſaid *A*, and thereby having good intereſt to call for inſpection of all "writs, by which it may appear, whether the heritage will be profitable or hurtful: That is to ſay, the ſaids defenders to hear and ſee themſelves decerned, "by decreet of Our ſaids Lords, each of them for their own parts, to exhibit "and produce before the ſaids Lords, all bonds importing debt, granted by the "ſaid umquhile *A*, or any of his predeceſſors whom he did repreſent, and whereby the purſuer might be liable: and likewiſe to produce all writs and evidents "of lands, wherein the ſaid *A*, or his predeceſſors, died laſt veſt and ſeiſed as of "fee; and alſo all diſpoſitions of lands, heritage, or ſervitude, granted to, and in "favour of the ſaid *A*, by any perſon or perſons whatſomever, whereunto the purſuer would have right as heir foreſaid; as alſo all writs and evidents, whereby "the lands and others foreſaids, were provided to other heirs; and ſiklike all "writs and evidents granted by the defunct and his predeceſſors, to whom he "was or might have been heir, whereby they were not totally denuded: and "all heritable obligements, in favour of the defunct, and his predeceſſors or au-

"thors,

[d] See below, IV. 41. 4. [e] See above, III. 5. 1.

" thors, or whereto they had rights by progreſs: To the effect the complaine
" may deliberate, whether he will enter heir to his ſaid predeceſſor or not; the ha
" ving of ſuch writs the purſuer refers to the oath of verity of the ſaid defende
" *reſpectivè*, in ſo far as they ſhall not be proved by writ, conform to the law
" and daily practick of this Our realm, *&c.* According to juſtice, *&c.*"

VII. The proper defences againſt this action are, 1. That the purſuer is alread actually entered heir, and ſo has no place for deliberation. 2. That the purſuer predeceſſors were totally denuded; which will not be competent by way of qua lity, (*in the defender's oath*) but muſt be inſtructed by writ. 3. That the writ are *in publica cuſtodia* at Edinburgh, and the dates being condeſcended on, and ſ found.

TITLE XXXIV.

Action of Transferrence and Wakening.

THE action of transferrence is neceſſary, when either the purſuer or defende dieth *pendente proceſſu*: for then the proceſs muſt be transferred in the perſon repreſenting that defunct *activè*, if the purſuer die; or againſt the perſon that doth or may repreſent the defender *paſſivè*; or both *activè* and *paſſivè*, if both purſuer and defender die. But if the libel bear ſeveral purſuers, and alſo ſeveral de fenders, and if there be ſeparate intereſts, wherein the others needs not to be called or concur, in ſo far the proceſs may proceed without transferrence. By this it is evident, that this is not a principal, but an acceſſory action; whereby the proceſs in the principal cauſe is put in the condition that it may proceed in the ſame ſtate and place in the roll as before.

II. The active title will not be relevant, that the purſuer of the transferrence i apparent heir, but he muſt be actually heir. But it is ſufficient for the paſſive title that the defender is apparent heir: and therefore there can be no proceſs, unleſs the purſuer's active title be actually inſtructed.

III. Transferrences were required formerly, not only when the perſons were changed as predeceſſor and ſucceſſor, but alſo when they were changed as author and purchaſer; and ſo aſſignies, or ſingular ſucceſſors, could not proceed in their author's proceſs, till they transferred the ſame in themſelves *activè*, or in the de fenders *paſſivè*, if they became denuded in favour of ſingular ſucceſſors. And in the libel and decreet of transferrence, all the proceſs was *verbatim* inſert. The former was chiefly in favour of the biſhops, for the quots; whereby moveable rights remained *in bonis defuncti*, unleſs aſſignations were intimated in the defunct's life; and therefore there behoved to be a confirmation. The poſterior ground was *propter commodum curiæ*, that there might be many ſheets in the libel and decreet of transferrence: but both are now well altered; for the proceſs is only expreſſed by a breviate, and confirmation is but ſeldom required; and there is no neceſſity of transferring, except in the caſe of the death of the purſuer or defender *: ſo that there is no neceſſity of mentioning a tenor of this action which is obvious.

IV. Summonſes of wakening are neceſſary, when a proceſs hath once been called, and is ſuperannuated, not being called in a whole year, through the purſuer's negligence. For tho' all actions before the Lords are with continuation of days, whereby the parties muſt attend till their tours of calling come; yet it were unreaſonable that they ſhould be obliged conſtantly to attend, without being called: and therefore, if the purſuer at any time neglect to call them for a whole year,

* By act 15. P. 1693, transferrings active are taken away, and it is declared ſufficient that the heir, executor, or aſſigny, produce their title. Special aſſignations, tho' not intimated in the defunct's life, are alſo declared valid without confirmation.

year, he can have no proceſs till the defender be cited again, which is called a wakening; becauſe the principal proceſs became to be (as it were) aſleep, after that year. But frequently the clerks call the proceſs in the outer-houſe, at leaſt put upon it a *partibus*, expreſſing a day when the proceſs was of new called *. But if a cauſe be inrolled, altho', with the multiplicity of buſineſs, the Lords fall ſo ſhort of the roll, that a year interveen, there is no need of a wakening, becauſe the parties are not obliged to attend at uncertainty as before, but they may be advertiſed by their advocates, when their cauſes come near in the roll.

V. Concluded cauſes are not excluded for want of a wakening, becauſe then regularly there is no need of the client's informing upon new matter of fact; for nothing is to be adviſed but the probation. The tenor of this proceſs is alſo ſo very obvious, that we ſhall not mention it.

VI. Both theſe actions are ſo far acceſſory, that whenever the day of compearance paſſes, the principal cauſe is called, as it ſtood in the roll, and the transferrence or wakening, is only to take off the objection of the death of the parties, or ſleeping of the proceſs.

TITLE XXXV.

Competition.

ALL ordinary actions with their acceſſories, which are competent by our cuſtoms, before execution on decreets or ſummary execution, have been hitherto explained. There are other actions executive, which come to be conſidered after decreets; ſuch as actions for making arreſted ſums forthcoming, actions for breach of arreſtment, and for deforcement, actions for adjudication of real rights, and actions for contravention of lawborrows, which are to be handled in their proper place. It remains now before litiſconteſtation, to conſider the competition of rights, which implies as many different actions, as there are competing rights. In which alſo both declaratory, petitory and poſſeſſory actions are comprehended: for whatever parties may alledge in declarators, reductions, or improbations; they may alledge the ſame in competitions, when many ſeveral rights contend for one common ſubject, and do inſiſt for preference; which ordinarily are referred to an auditor, if the competition be about real rights by infeftment or equivalent titles, who conſiders all the titles and evidents produced, and reports any difficulty in the preference of them; whereupon a decreet of preference or ranking followeth.

II. Our cuſtom regards not the priority or poſteriority of perſonal rights, but only the priority or poſteriority of diligences, except what concerns the royal prerogative, eſpecially that the King is not prejudged by the neglect of his officers.

III. There is alſo preference amongſt the creditors of defuncts, for thoſe debts which are expended for medicaments for the ſick and funeral charges, wherein humanity hath given them the privilege to be preferred to other debts, though having prior diligences [f].

IV. Special legacies are alſo preferable to general legacies, that if the defunct's part be not ſufficient to ſatisfy all the legacies, ſpecial legacies ſuffer no abatement with the general legacies. But there is no privilege for legacies to pious uſes, but they ſuffer abatement with other legacies, unleſs they be ſpecial, or that they be preferred expreſsly by the defunct.

* By act of Sederunt, *Feb.* 26. 1718, the clerks are diſcharged to mark *partibus* on proceſſes after the firſt calling.

[f] See above, III. 8. 64. *fin. et* 72.

V. The Roman law gives privilege and preference to the tochers of women, in competition with the creditors of their huſbands: for by that law, their tochers return to themſelves, at the diſſolution of the marriage. In place of which, our cuſtom gives them infeftments in liferent or proviſions in money for their liferent-uſe; which uſed to have preference to the huſband's other creditors, in caſe the money had not been employed, nor infeftment taken for the liferent of lands: but the Lords of late have rejected this preference, in reſpect that theſe proviſions to wives became exorbitant; whereby it was preſumed, that they were deſigned for the children, to exclude the creditors.

VI. There hath been a frequent competition, amongſt arreſters and aſſignies; wherein arreſtments come in according to their dates, if the arreſters have not been negligent, in procuring decreets for making arreſted ſums forthcoming: and therefore arreſtments, whereupon actions were purſued before the Lords, are not poſtponed to poſterior arreſtments purſued before inferior judges, though obtaining the firſt decreet; if the purſuer before the Lords was only kept off by the courſe of the roll, and not by his negligence. But if both purſuits were in the ſame court, the prior decreet is preferable, albeit upon the poſterior arreſtment; becauſe the arreſtment doth not give the arreſter right, but proceſs thereupon excludes poſterior voluntary rights by diſpoſitions or aſſignations, as being *in curſu diligentiæ* of the arreſter: yet if he be ſupinely negligent, the voluntary right will be preferable, if perfected, by intimation of the aſſignation, and by poſſeſſion on the diſpoſition.

VII. In competition of aſſignations amongſt themſelves, they are preferable, not according to the dates of the aſſignations, but of the intimations. In competitions between arreſtments and aſſignations, if the intimation be prior to the arreſtment, the aſſignation is preferable: if both be of one day, and expreſs different hours, the preference is according to the hours, if ſo many hours interveen, as the meſſenger or notary may not be miſtaken in the latitude thereof; ſo that three hours will be ſufficient, otherwiſe they come *in pari paſſu*.

VIII. The great grounds of competition are upon infeftments, upon which many competitions have, and will always ariſe, and much more now than before, ſince the act 62. *Parl.* 1661, bringing in appriſings *pari paſſu*, &c. which doth likewiſe extend to adjudications, which are come now in place of appriſings. And the general rule of preference of rights by infeftment, is, *prior tempore, potior jure*. The rule doth not only extend to rights of property, but alſo to rights of wadſet, and to infeftments granted for ſatisfaction of ſums, whereby the parties inſeſt have right to the haill duties, to be imputed firſt in the annualrent, and then in the principal ſum till it be paid, which have the ſame extentions and limitations as general appriſings or adjudications. This rule is alſo extended to appriſings or adjudications general or ſpecial, and likewiſe to rights equivalent to infeftments (as the right of courteſy of huſbands, and terces of wives) and to infeftments granted for ſecurity of ſums, whereby theſe ſums become *debita fundi*, or to other *debita fundi*, and alſo to infeftments for relief, or for warrandice of principal lands. In this, theſe real rights differ from perſonal rights, wherein reſpect is not had to the priority or poſteriority of their dates, nor to any diligence for obtaining decreets thereupon; but are preferable according to the priority of real diligence by arreſtment, and decreets for making forthcoming, or by appriſings or adjudications of heritable ſums, while they were not arreſtable *, or of incompleat voluntary rights without infeftment. The rule is alſo extended to infeftments for annualrents.

IX. The priority and poſteriority of infeftments, is not only when they are upon different days, but when they are upon different hours of the ſame day, the diſtance being at leaſt three hours, that thereby it may be evident that the notary could not ſo far miſtake the true hour; and this is the reaſon why in ſeiſins the notary mentions the hour of taking the ſeiſin, which, if he omit, though it will not

* Heritable ſums are arreſtable before infeftment, *P.* 1661, *c.* 51.

not annul the ſeiſin, yet any other ſeiſin on the ſame day, expreſſing the hour, will be accounted prior; and no probation by the oath of party, by the notary and witneſſes, or even by writ, will determine the hour; becauſe it is a ſolemnity no other way probable, but by the tenor of the ſeiſin, and not otherwiſe probable, than the other contents of the ſeiſin itſelf.

X. The priority and poſteriority of infeftments, is to be reckoned according to the laſt act neceſſary for accompliſhing the right, which is the date of the ſeiſin *, except in charters for confirmation: for diſpoſitions or charters granted by vaſſals *a ſe*, i. e. to be holden of their ſuperiors by confirmation, are accounted null, as incompleat, until the charter or confirmation be granted; and though the vaſſal's charter contain a precept of ſeiſin, whereon ſeiſin is ordinarily taken before the confirmation; yet it is the charter of confirmation, that makes the infeftment valid from the date of the ſeiſin confirmed; unleſs there were a *medium impedimentum*, by the ſuperior's granting a prior confirmation, albeit of a poſterior ſeiſin, or by his granting a charter upon reſignation, whereof the ſeiſin is taken before confirmation, or by receiving an appriſer or adjudger before the charter of confirmation. In this a charter for confirmation, is better than a charter upon reſignation, that if the ſuperior, or the vaſſal-reſigner die before ſeiſin be taken, ſeiſin cannot be taken on that charter upon reſignation **.

XI. Charters of confirmation granted by the King, as to priority, are reckoned by appending the Great Seal. And therefore the ſervant intruſted to append the Seal, writs upon the charter, the day of ſealing, and ought to expreſs the hour of that day, and ought not to prefer or poſtpone any party who offers a charter to be ſealed, and the parties who ſo offer, may take inſtruments thereupon; or if the matter be recently queſtioned, the Lords will examine the appender or witneſſes on the true time of the offer, and will declare the charter to be of that date. But if ſeiſin have not been taken, till after the confirmation, the date of the ſeiſin is the rule.

XII. The main reaſon why there is no preference of perſonal obligements by their dates, but only of diligences and infeftments, is, becauſe it is a great intereſt of a nation, to know with whom they may contract, which were utterly impoſſible, if the dates of obligations, or yet the dates of diſpoſitions incompleat, ſhould give preference. But infeftments muſt neceſſarily be taken upon the ground, which therefore the tenants or neighbours may eaſily give account of to parties concerned: and the knowledge of the priority or poſteriority of them is now much better attained by the act 16. *Parl.* 1617, ordaining ſeiſins to be regiſtrate; "Whereby it is declared, that ſeiſins not being regiſtrate within three-"ſcore days, ſhall be null in prejudice of third parties, acquiring perfect and "lawful rights to the lands and heritage contained in the unregiſtrate ſeiſin." Another reaſon of the preference of infeftments, by the dates of the laſt ſolemnity accompliſhing the ſame, is, becauſe thereby the granter was, or was preſumed to be, ſo far diveſted of the right conveyed; and therefore any poſterior infeftment was *à non habente poteſtatem*, the granter being before denuded. And albeit the ſame deed may be due by ſeveral obligations; yet the right of property can only be conveyed by one conveyance: for he who had the property before, can have it no further, and he cannot be diveſted until another be inveſted: yet he who hath the real right of ſuperiority or property, may defend himſelf by many conveyances againſt ſeveral parties; becauſe all the conveyances may be excluſive of their ſeveral rights, and ſo he avoids his trouble or peril from them, and no other can pretend, that his right is not founded upon that conveyance.

XIII. This general rule of preference of infeftments by priority, hath very many exceptions. And, 1. If there be any nullity by reaſon of the want of any neceſſary

* Now the regiſtration of the ſeiſin, *P.* 1693, *c.* 13.

** Procuratories of reſignation, and precepts of ſeiſin are now effectual after the death of the granters or receivers. *P.* 1693, *c.* 35. See below, appendix, No. 1.

neceſſary ſolemnity, required in the conſtitution of the right; it is thereby ſimply null, and can have no effect, even againſt the granter, further than an incompleat diſpoſition would have; which is, that it would be a ground to compel the granter to give a valid infeftment, and might defend the poſſeſſion againſt him, as implying an aſſignation to the fruits or rents. And albeit in controverſies between a poſſeſſor by infeftment and a petitor, *in poſſeſſorio*, even nullities would not be receivable without reduction; yet when there comes many competitors to inſiſt together, whatſoever might afford a relevant reaſon of reduction, is receivable as in a reduction: for inſtance, a perſonal obligation with an inhibition, being prior to all the competing infeftments, not only prior to the ſeiſins, but to the diſpoſitions or obligements to diſpone; will ſo far prefer the ground of the inhibition, as if an appriſing or adjudication were actually deduced thereupon, with an infeftment or charge; though theſe muſt be uſed thereafter for other effects. What ſolemnities are requiſite in infeftments of property or of annualrent, without which they will be ſimply null, will appear in theſe titles above, *lib.* 2. *tit.* 3, 4, 5. But the priority of infeftments doth always prefer *in petitorio*, when the queſtion is alone as to the titles, abſtract from poſſeſſion: as when none of the parties competing are in preſent poſſeſſion, and cannot inſtruct that they or their predeceſſors or authors were ever in poſſeſſion. And yet in that caſe, neither party inſtructs a perfect and full title, unleſs they inſtruct the progreſs of their right, from a common author to the parties; in which caſe neither of them may quarrel their common author's right, on which their own is founded: and conſequently the common author being diveſted by the firſt infeftment, the poſterior infeftments are *à non habente poteſtatem.* And if a common author do appear under the King, who is the ſupreme ſuperior and firſt author of all infeftments, albeit the progreſs upward to the King be not inſtructed, it is ſtill preſumed *præſumptione juris et de jure:* for the King claims not the property of any land, but of the annexed property, and of the property of lands falling to him by forfeiture, recognition, or as laſt heir (whereof baſtardy is a ſpecies) or by acquiſition, wherein the King *utitur jure communi*; hence it is that the King gives charters of confirmation, or upon reſignation without exact inſtruction of a full progreſs from the King, the ſame being always given *periculo petentium*, even though the fulleſt warrandice were expreſſed in the King's charter, which imports no more but protection by law. If therefore the progreſs of the competitors come up to one common author, if none appear to own that common author's right; the firſt infeſtment may without hazard of diſclamation take infeftments of the King as ſuperior. And if by the competitor's progreſs a common author appear, albeit all the progreſs be not compleat by the infeftments of every heir; yet the firſt original right will be preferred in competition: for therein apparent heirs are as well preferred as heirs entering: and it is *jus tertii* to the other competitors having poſterior rights from the ſame author, whether the heirs *ſucceſſivè* were entered and infeft or not; becauſe the preſent vaſſal, if any part of that progreſs were wanting, could yet ſerve to the laſt that he ſhows to have been infeft, and thereupon may be infeft. But if in the progreſs from the neareſt common author, there be ſingular titles, if the one competitor ſhow a progreſs all along from the common author by predeceſſors; and not by ſingular ſucceſſors, and the other ſhow a progreſs by ſingular ſucceſſors; the tranſmiſſion from the heirs to theſe ſingular ſucceſſors, if recent, muſt be inſtructed, and if antient, muſt be adminiculate, wherein antient poſſeſſion, or common fame in the vicinity of the ſingular ſucceſſors their being holden and reputed heritable poſſeſſors, will be ſufficient.

XIV. Secondly, If a poſterior right from the common author inſtruct long poſſeſſion, and the prior infeftment cannot be inſtructed to have attained poſſeſſion before the poſterior; then ariſes the *præſumptio juris* acknowledged by *cap.* 105. *Parl.* 1540, whereby a poſterior infeftment, where warrandice may fall, cled with peaceable poſſeſſion, at leaſt for year and day, by labouring, manuring and uptaking

uptaking of the profits, and ſo kenned heritable poſſeſſor thereof, year and day; is preferred to a prior baſe infeftment not cled with poſſeſſion: for in that caſe, the firſt infeftment is preſumed to be fraudulent *retentâ poſſeſſione*. All original infeftments granted by, and holden of the firſt common author as ſuperior, were baſe infeftments; and the firſt cled with real poſſeſſion, was preferable: and albeit ſingular ſucceſſors obtained right to that original infeftment, by reſignation or confirmation, appriſing or adjudication; yet the original right being baſe, if it attained not poſſeſſion before the other competing original right, the rights by progreſs (however acquired) fall with the original right in conſequence. And in the competition of poſterior rights by ſingular titles, that which is upon reſignation or confirmation, will be preferred to a prior right from the ſame ſuperior, being baſe *.

XV. Thirdly, Theſe were the grounds of preference of infeftments, before that excellent ſtatute of preſcription, *Parl.* 1617. *cap.* 12. and continues ſo as to infeftments whereupon there were interruptions: for purſuing of which there were thirteen years allowed next after the date of that act; in which time actions or competitions were to be regulated as before the act: "otherways thoſe who "have infeftments with forty years continual poſſeſſion following and enſuing the "date thereof, and that peaceably, without any lawful interruption made to them "therein during the ſaid ſpace; ſuch perſons, their heirs and ſucceſſors, ſhall "never be troubled, purſued nor unquieted in the heritable right and property "of their ſaids lands and heritages foreſaid, by his Majeſty or others their ſup-"periors and authors, their heirs and ſucceſſors, nor by any other perſon pretend-"ing right to the ſame, by virtue of prior infeftments publick or private, nor "upon no other ground, reaſon, or argument competent of law, except for "falſhood. Providing they be able to ſhew a charter and ſeiſin to them or their "predeceſſors, by their ſuperiors and authors preceeding the entry of the ſaid "forty years poſſeſſion; or that they produce inſtruments of ſeiſin, one or more, "continued and ſtanding together for the ſaid ſpace of forty years, either proceed-"ing upon retours or upon precepts of *clare conſtat*, which are declared to be "valid and ſufficient rights (being cled with the ſaid peaceable and continual "poſſeſſion of forty years, without any lawful interruption) for bruiking of the "heritable right of the ſame lands and others foreſaids: but the years of mi-"nority is not to be accounted in the courſe of the ſaid forty years." And becauſe infeftments might ſtill be uncertain by interruptions within the ſaid thirteen years, as to infeftments prior to the act of preſcription; or within the forty years poſſeſſion as to rights poſterior, which might not eaſily come to the knowledge of the proprietars, or falſe executions might be made up; therefore by the *cap* 10. *Parl.* 1669. it is ſtatute, that all executions of ſummons for interruption, be only by meſſengers. And if the execution be not perſonally, it muſt be at the pariſh kirk of the defender in time of divine ſervice, or immediately thereafter. And that all citations for interruption, whether in real or perſonal rights, be renewed within ſeven years, otherways to preſcribe. In which ſeven years, minority is not to be counted. And likewiſe all executions of ſummons muſt bear expreſsly the names and deſignations of the parties, purſuers and defenders, and ſhall not only relate generally to the parties in the ſummons, without naming and deſigning them, unleſs the execution be indorſed on the back of the ſummons; *cap.* 6. *Parl.* 1672, and muſt be ſubſcribed by the witneſſes, *cap.* 5. *Parl.* 1681 **. Albeit theſe ſtatutes have done much to ſecure purchaſers, and to order the preference of infeftments; yet there are many caſes, in which the competition muſt be upon the former grounds, which were before the act of pre-

 ſcription;

* The diſtinction between baſe and publick infeſtments, is now taken away, *P.* 1693, *c.* 13. See below appendix No 2.

** By act 19. *P.* 1696, it is further provided, that all ſummonſes for interrupting the preſcription of real rights, ſhall paſs upon bill and ſhall be regiſtrate with the executions thereof within 60 days, and that an inſtrument ſhall be taken upon all interruptions *via facti*, and regiſtrate in the ſame manner.

ſcription; as not only interruption by citation, but alſo interruption by intermiſſion of poſſeſſion, or of the continuity of ſeiſins; which cannot be underſtood by every diſcontinuity, for no ſeiſin can follow another, till the party to be infeft, gets his infeftments renewed by charges upon his retour, or by precepts of *clare conſtat*, which muſt take a time; and if the ſuperior be unwilling, they may take a long time, and yet the ſeiſins muſt be reckoned as continued,

By the act of preſcription, no other ſeiſins are ſufficient without their warrants, but thoſe which proceed on retours or precepts of *clare conſtat*; in all which caſes the competition muſt be upon the former grounds.

In theſe competitions, no ſpecial privilege is reſpected by ſeven years poſſeſſion, which takes only place *in judicio poſſeſſorio*: but in theſe competitions, all parties are as *in judicio petitorio*.

In competitions, all parties will be admitted for their intereſt, who produce an infeftment to themſelves or to their predeceſſors, to whom they are, or may be heirs in that right, or to their authors; if therewith they ſhow a title voluntary or legal, from theſe authors, to them or to their predeceſſors, to whom they are, or may be heirs.

In competitions, all perſons who produce the foreſaids infeftments, will upon ſupplication obtain ordinary and incident diligence by horning and caption, againſt all the havers of writs, that may inſtruct their progreſs, as high as they can: and albeit ordinarly incident diligences are not granted till after litiſconteſtation; yet ſeeing they are granted in reductions, ſo ſoon as terms are taken to produce, that they may be able to ſatisfie the production, they ought alſo ſo to be granted in competitions.

Preſcription was only an exception to defend poſſeſſors; but this ſtatute 1617. makes it an active title, to attain or recover poſſeſſion, and to exclude all other rights.

XVI. Fourthly, The priority of infeftments, is not the rule of preference, where the competition is upon infeftments by or from the heirs of defuncts; for in that caſe the 24th act, *Parl.* 1661, "doth annul any right or diſpoſition made "by apparent heirs, within a year after the defunct's death, in ſo far as may "prejudge their predeceſſor's creditors. And declares, that the creditors of the "defunct ſhall be preferred to the creditors of the apparent heir, after that act, "as to the defunct's eſtate: providing the defunct's creditors do diligence againſt "the apparent heir, and the real eſtate belonging to the defunct, within the "ſpace of three years after the defunct's death." By this ſtatute, poſterior infeftments for the defunct's debt, are preferable as to the defunct's eſtate, to prior infeftments for the heir's debt, as aforeſaid. By the creditors doing diligence within three years, muſt be meant compleat diligence by appriſing or adjudication, whereupon infeftment or charge hath followed to the party himſelf, or to any other appriſer or adjudger, with whom he comes in *pari paſſu*: for if incompleat diligence within theſe years were ſufficient, it might keep the preference uncertain for forty years.

XVII. Fifthly, Any voluntary infeftment being granted *in curſu diligentiæ* of a creditor, that creditor's right is preferable, and in competition will be preferred, though it be not compleated [k]; but *curſus diligentiæ* is taken away, if negligence interveen; which muſt not be reckoned by what diligence poſſibly might be done, but by ſuch diligence as prudent men would have done in ſuch circumſtances. By diligence in this caſe, is not underſtood a perſonal action, which could not be known, but a real diligence for affecting the ſubject in queſtion, and not the perſon of the debtor only; whereof the law hath determined ſeveral caſes; as, diligence by appriſing runs from the denunciation of the lands to be appriſed; and diligence by adjudication now come in place of appriſing, runs from the citation upon the ſummons of adjudication, which muſt ſo hold in adjudications upon the renunciation of heirs, or for compleating of diſpoſitions. But ſo ſoon

[k] See above, I. 9. 15. 11.

ſoon as decreets of appriſing or adjudication are obtained, and ſuch time as a charge may be given to the ſuperior, that diligence is then compleat, and the infeftments are preferable according to theſe ſeiſins or charges. In like manner, an inchoate diligence of inhibition, is preferable to a voluntary infeftment, albeit granted before the inhibition was compleat: for inhibitions require executions againſt the parties inhibited, and alſo againſt the lieges at the market croſſes of the head-burghs of the juriſdiction where the perſon inhibited dwells; and therefore, during the courſe of this diligence, the debtor may not give a voluntary right, which may fruſtrate that inhibition; ſo that the voluntary right is not only reducible upon the inhibition, when compleat, but when inchoate, if diligently inſiſted in.

XVIII. Sixthly, When any debtor becomes bankrupt or inſolvent, no voluntary right after he is charged with horning, will be preferred to the debt, whereupon the horning was raiſed, and that, by the act of Parliament 1621, againſt fraudulent diſpoſitions of bankrupts; bearing that clauſe expreſsly, in theſe terms: "That in time thereafter, if any divor, or interpoſed perſon partaker of the fraud, "ſhall make any voluntary payment, or right, to any perſon, in defraud of the "more timeous diligence of another creditor, having uſed horning, &c. The "prior creditor ſhall be preferred to the con-creditor, who being poſterior in dili-"gence, has obtained preference by the partial favour of the debtor, or his in-"terpoſed confident." But this preference by horning, hath only effect, when the common debtor is inſolvent: whereas the former diligence prefers, though the debtor be not inſolvent.

XIX. Seventhly, Any ground of fraud is a ſufficient reaſon of reduction, or preference, againſt the committer of the fraud, or thoſe who are partakers of the fraud, but not againſt ſingular ſucceſſors, who are not partakers of the ſame.

XX. Eightly, There is yet no determination by ſtatute or cuſtom, whether infeftments obtained by illegal violence or concuſſion, are reducible, not only againſt the purchaſer or his heirs, but againſt ſingular ſucceſſors: yet the parity of reaſon in fraud or force, ſhould ſecure the innocent purchaſer, who neither was acceſſory to the force, nor knew of it when he purchaſed, which requires a ſtatute; for force, as well as fraud, are *labes reales* by common law.

XXI. Ninthly, all infeftments voluntarily granted after inhibition, are reducible *ex capite inhibitionis*, not only as to infeſtments voluntarily granted, but even as to infeftments upon appriſing or adjudication, if the debt whereupon they were deduced, be poſterior to the executing of the inhibition, at the market-croſs of the head-burgh of the juriſdiction, where the inhibited perſon dwelt; which ought not to be extended to the market-croſſes where the lands lie: for the law having provided, that the inhibition muſt be executed at the market-croſs where the perſon inhibited dwells, both againſt him and againſt the lieges, and that by open proclamation in market-time of day, by three Oyeſſes, and affixing a copy on the croſs; prudent men ought to have ſome intruſted for them, to give notice of that publication; for it is for that end theſe ſolemnities are uſed, and they may know where their debtor dwells, but it were unreaſonable to oblige them to inquire, wherever he has lands, and to have ſome to attend for them at the croſſes where theſe lands lie, ſeeing the inhibition is null, if not done at the croſs where the debtor dwells [1]. Yet the inhibition will be effectual againſt a voluntary diſpoſition, preferring a creditor; but not to the borrowing of money, and granting bond therefore, which an inchoate diligence of inhibition cannot exclude, but only an inhibition compleat.

Inhibition is only effectual againſt poſterior voluntary rights; but if there was a prior obligement to grant that right, it is not reducible, becauſe not voluntary; ſeeing the granter might have been compelled by law to grant it. Inhibitions being compleat, are not only relevant to reduce voluntary infeftments being poſterior,

[1] See below, IV. 50. 10.

rior, but even infeftments on appriſing or adjudication, if the debt whereon they proceeded was poſterior to the compleating of the inhibition.

Interdictions are a kind of inhibitions, whereby a weak or laviſh party, obliges himſelf to do nothing in prejudice of his heritage, without conſent of ſuch perſons, who are called interdictors, and who thereupon procure letters to inhibit him to act contrary to that interdiction: ſo it hath the ſame effect as another inhibition, if the party was truly weak or laviſh.

XXII. Tenthly, Seiſins, inhibitions and interdictions, are ordained to be regiſtrate, as before is expreſſed, or otherwiſe they are null as to any who have a compleat right, who thereby are preferable, if they be prior to the regiſtration; *but* even after the days required for regiſtration, they may be regiſtrate by warrant of the Lords, and will exclude rights after that regiſtration, according to the cuſtom which hath been uſed, which ought not to be continued: for when a purchaſer waits forty days after his agreement, and then ſearches the regiſters, and goes on in confidence to perfect his ſecurities; if, when he is gone, an excluſive right or diligence may be put in the regiſter, before he compleat his right; if it exclude him, the regiſter is of no ſecurity.

It is a great wakening of this excellent ſtatute for regiſtration, that the keepers of the regiſters, do not book and inſert ſo ſoon as they receive the writs to be regiſtrate; and that upon pretence that they cannot do it, becauſe many may come together, and parties will not attend till they be filled up; ſo that there is nothing to inſtruct when they were preſented, and upon this pretence the keepers may prefer thoſe who were laſt preſented to thoſe who were firſt, and thereby evacuate the ſecurity of purchaſers; wherein their gain, or other grounds of partiality, may inſtigate them. And therefore, as the act of regulation has appointed them to keep minute-books; ſo the Lords, by act of Sederunt, 15th *July* 1692, publiſhed by proclamation; ordained the keepers to cauſe the preſenters immediately as they preſent, to ſign the minute: ſo that now they can neither alter the minute-book, nor wrong any party by the booking; whereas formerly they might writ over the minute-book, yea, a whole regiſter, which now they cannot do without the concourſe of all the preſenters *. This was ſo much the more neceſſary, that by a late deciſion and ſtatute following thereon, *P.* 1686, *c.* 19. parties getting ſeiſins marked on the back, and ſigned by the keeper, are preferred accordingly; although the ſeiſin be not found in the regiſter: whereby all ſecurity by the regiſters, terminates in the ſolvency of the clerks, and their cautioners, which hath enervate the whole deſign **. To prevent this miſchief, the Lords, by the foreſaid act of Sederunt, have appointed all keepers of regiſters for publication, upon the firſt application, to inſert the ſubſtance of what is offered to be regiſtrate, in their minute-books, to be ſigned by the preſenter, which minute-books they cannot be able to alter as before.

XXIII. Eleventhly, Appriſings and adjudications are appointed to have a minute on the back thereof, ſigned by two of the Lords, which muſt alſo be regiſtrate for the ſecurity of purchaſers: and therefore, if they be not ſo regiſtrate, a poſterior valid right, will be preferable thereto; and the allowance ought not to be regiſtrate after the time appointed, for the foreſaid reaſon ***.

XXIV. Twelfthly, All *debita fundi et onera realia*, are excepted from the general rule of preference by the dates of the infeftments on perſonal rights. Theſe real burdens are many, and to be differently ranked; 1. What is due to the ſuperior by the tenor or nature of the inveſtiture, is preferable to all; ſuch as the feu-duties in feu-holdings; the non-entry duties in ward-holdings; and the avails

* An act of Parliament was ſoon after made in terms of the act of Sederunt here mentioned, *P.* 1693, *c.* 14. See below, Appendix, No. 3.

** This was altered by act 18. *P.* 1696, by which it is declared, that no ſeiſin, or other writ, appointed to be regiſtrate, ſhall have effect againſt third parties, unleſs found inſerted in the regiſter.

*** See above, III. 2. 25. regulations 1695, article 24. Regulations 1696, article 3. and act of Sederunt, 18th *Jan.* 1715.

vails of marriages, whether by the nature of the fee in ward-holdings, or by the tenor of the inveſtiture in feu-holdings *cum maritagio*: for all theſe the ground is poinded, and the appriſing thereupon is preferable to all voluntary or legal rights affecting the vaſſal's right. 2. In the next place, infeftments for warrandice, if they be in the ſame inveſtiture with the infeftment of the principal lands, albeit neither the infeftment of the principal nor warrandice-lands be publick, but baſe, holden of the granter, and that there be no other poſſeſſion of the warrandice-lands, but the poſſeſſion of the principal lands; yet thereby both are valid: but the infeftment of the warrandice-lands can take no effect till diſtreſs, and then they are drawn back to the date of the infeftment. 3. In like manner infeftments reſerved in the infeftments of vaſſals, are preferable to the vaſſal's infeftment, and to all infeftments flowing from him. 4. Infeftments granted for ſecurity of ſums, are real burdens upon the fee of him that grants the ſaid infeftment for ſecurity. Theſe are not infeftments of property, but they are as ſervitudes upon the infeftments of property, and as real impignorations: for they cannot take poſſeſſion, but the ſum they ſecure may be the ground of an appriſing or adjudication, which will not be preferable according to their dates, but according to the date of the infeftment for ſecurity; wherein this infeftment differs from a wadſet, which is an infeftment of property, under reverſion, which can take poſſeſſion: it differs alſo from an infeftment for payment or ſatisfaction of a ſum, which doth not only poſſeſs for the annualrent, but likewiſe for the principal ſum, and ceaſes ſo ſoon as both are paid, in the ſame way as an appriſing or adjudication ceaſeth. Albeit there be no appriſing or adjudication upon the ſum, for which the infeftment for ſecurity is granted; yet, in competition, that ſum will be preferred according to the date of the infeftment; and whoſoever obtains right to the ſum by aſſignation, arreſtment, or otherwiſe, carries the right. 5. If an infeftment be granted with the burden of a ſum, it makes that ſum a real burden, whereupon the fee may be appriſed or adjudged, and the appriſing or adjudication thereon will be preferred, as of the ſame date with the infeftment burdened; whereby a purchaſer proceeds on his own hazard, if he buy without ſight of his author's infeftment; and if he get but right as a creditor, the party having right to the ſum burdening, will be preferred as an anterior real creditor, and not perſonal only.

XXV. And laſtly, The general rule of preference of infeftments and equivalent rights, is exceedingly altered by *c.* 62. *Parl.* 1661, which brings in appriſings before the firſt effectual appriſing by infeftment or charge, and all poſterior appriſings within a year of the firſt effectual appriſing, to be *pari paſſu*, as if one appriſing had been deduced for all; which holdeth in adjudications come in place of appriſings: and alſo muſt ſo hold in adjudications upon renunciation to be heir. So that there is no need to repeat appriſings, ſeeing adjudications are now the ordinary courſe. So then the firſt effectual adjudication is the adjudication for all, as if all were purſuers in that adjudication; and therefore the adjudger cannot renounce that adjudication ſimply, but for his own ſhare: and tho' he were paid or ſatisfied by intromiſſion, yet the adjudication ſtands good for the reſt of the adjudgers; and any of them have intereſt to call for production and tranſuming of that adjudication. The adjudications coming in *pari paſſu* doth not import equality of ſhares, but proportionally according to the ſums in the ſeveral adjudications: and if the penalties be too great and unequal, the Lords will modify the ſame.

Albeit the foreſaid act of Parliament mention diligence, upon the charge againſt the ſuperior, yet cuſtom hath required no more but the charge; it being incongruous for an adjudger, who deſigns to be a vaſſal, to uſe caption againſt his ſuperior; and therefore the adjudication, with the charge, hath (during the legal) all the effects, as if infeftment were expede: for during the legal, the adjudication is but *pignus prætorium*, not denuding the vaſſal. And the ſuperior cannot compel the adjudger to take infeftment; ſo that, during the legal,

he is free of a year's rent, which he behoved to pay, while infeftments were neceſſary [a].

XXVI. This courſe of adjudications hath bred ſeveral queſtions amongſt adjudgers competing with annualrenters, or competing amongſt themſelves, when any of the competitors have ground of reduction againſt any of the reſt, upon any of the grounds of preference before mentioned; and that as to ſeveral effects: as, 1. Tho' the eſtate affected be fully ſufficient to ſatisfy all adjudgers and annualrenters, yet ſtill there muſt be a ranking of them, to the effect it may be determined who ſhall firſt have acceſs to the tenants, or to diſtreſs the ground: for if they may promiſcuouſly diſtreſs the tenants, the lands may be laid waſte. And therefore, where there are but two competitors for annualrents, the Lords allow ſome days to the firſt annualrenter to uſe execution, and ſuperſede execution by the ſecond annualrenter till that day: but if there be many, and if the parties agree not among themſelves upon a common factor, the Lords will appoint a factor upon their application, and intimation to all parties concerned, albeit there be no proceſs depending amongſt them.

Secondly, If the eſtate affected be not ſufficient to pay the annualrents of all the annualrenters and adjudgers, the queſtion is, How the common factor ſhall pay them their ſhares of the rent? Or, in caſe there be a judicial ſale, how they ſhall ſhare of the price? Or, in caſe there be not buyers found, but that there muſt be a diviſion of the eſtate to the creditors, how they ſhall have acceſs to what ſhall be their ſhare of the land, correſponding to their ſums? As to which the annualrenters, prior to the firſt effectual adjudication, do not come in with the adjudgers *pari paſſu*, but are preferred according to their dates, and ſo muſt chuſe accordingly, with the leaſt detriment to the reſt, taking off at a ſide, and taking off a whole room diſtinct, and not *pro indiviſo*; which, if it exceed their proportion of the ſum, the Lords muſt determine the rate of the room, and they muſt pay in the ſuperplus, which the next annualrenter muſt accept as a part of his ſatisfaction, and take land for the reſt in the ſame way. And as to the adjudgers, tho' they come in *pari paſſu*, as to the proportion of their ſhares, yet the firſt adjudger hath ſtill ſo much preference, as to chuſe the rooms correſponding to his intereſt, and ſo the reſt in order. And if there be one adjudication in favour of diverſe creditors, they muſt have their preference in choice by lot.

XXVII. As to the diviſion of the rents till a ſale be made, or of the price after the ſale, both of theſe proceed by the ſame rule, which hath been in a great part determined in the competition of Lantoun and Cockburn's creditors. Theſe having been mutual cautioners each for other, did ſuddenly break, and upon the firſt ſuſpicion, gave infeftments of annualrent to many of their creditors, and all the reſt adjudged within the year, and ſo came in *pari paſſu*; and ſome of the annualrenters did likewiſe adjudge, whereby they had two titles. At the firſt hearing of the competition of theſe annualrenters who had adjudged, with the other adjudgers, the Lords inclined to give them their option of either title, but not of both; becauſe it was ſo determined by the common cuſtom, when annualrenters or wadſetters did appriſe, they were neceſſitated to charge for their ſums, and thereby to make them liquid and moveable, which was a paſſing from their firſt infeftment for the time, yet ſo as they might paſs from the appriſing, and return thereto: but afterward creditors did in their ſecurities provide, that they might make uſe of their infeftments, or of appriſings on their ſums, the one but prejudice of the other; and thereby in competition they made uſe of their appriſings, in ſo far as they were upon their annualrents, whereby theſe annualrents being *debita fundi*, were preferred to any other appriſing for perſonal debt only; and they made alſo uſe of their appriſing as to the ſtock of their ſums. But ſince adjudications came in place of appriſings, the making ſums moveable by a charge hath not been required: yea, albeit in appriſings againſt apparent heirs,

[a] See above, II 3. 30.

heirs, there behoved firſt to be a decreet againſt the apparent heir, as lawfully charged to enter heir, and after that a ſpecial charge to enter heir in ſuch lands, or heritable rights; yet this is not neceſſary in adjudications, which are mainly declaratory actions *contra hæreditatem jacentem*, wherein the heir needs not be charged to renounce, if the adjudication have no perſonal concluſion againſt him to pay. And to the effect creditors may come in within the year, if there be one adjudication extracted, neither the debtor nor his apparent heir, nor the concreditors, can poſtpone any creditor from adjudging, upon any exception not inſtantly verified: and therefore, tho' they ſhould propone payment, or compenſation to be proved, they will be repelled *hoc loco*, but reſerved *contra executionem*; and ſo compenſation in that caſe will be allowed *poſt ſententiam*, in the ſecond inſtance, becauſe it was proponed, and not admitted to probation in the firſt inſtance. And therefore an adjudger, adjudging for bygone annualrents, and for the ſtock, may crave preference by his adjudication for the bygone annualrents in his adjudication, as being *debita fundi*; and for the annualrents thereof, as becoming a ſtock by the adjudication, and may inſiſt for the principal ſtock to come in *pari paſſu pro tanto.*

It were neither juſt nor fit, to put annualrenters to a poinding of the ground by appriſing, for their bygone annualrents: for the adjudication ought to be ſuſtained as a poinding of the ground, where it is not only for the ſtock, but for the annualrents due by infeftment of annualrent; yea, ſeeing adjudications are put in place of appriſings, annualrenters may adjudge for the annualrents rather than appriſe; and to the ſame effect as if they did appriſe; and therefore, in adjudications, where poinding of the ground is competent, if the creditor adjudge not both for principal and annualrents, but only for bygone annualrents, he may libel his action of adjudication "for poinding the moveables on the ground, not "exceeding the tenant's term's mails, and alſo for adjudging the ground-right and "property, and all other right of the land, or other heritable right, for ſatisfy-"ing the ſaid annualrents, in ſo far as they ſhall not be ſatisfied by poinding the "goods on the ground:" which is a far more ready proceſs than a poinding of the ground, which hath only a warrant for letters for poinding the ground, whereupon an appriſing with all its formalities muſt follow: whereas here the decreet of adjudication hath immediate acceſs for both.

XXVIII. To return then to the diviſion of the rent, or price of incumbered eſtates, there is no difficulty if the free rent exceed the annualrent; for then all will be paid of their current annualrent, and of their ſtock by a ſale. But if the free rent come ſhort of the annualrent, the method of diviſion ordered by the Lords was thus: That the adjudgers were to be accounted as joint proprietars, and the annualrents as ſervitudes on the property: and therefore, 1. The annualrents affecting the property, and every part thereof, behoved firſt to be ſatisfied in order according to their dates; ſo that if the rent do not ſatisfy the whole annualrenters, thoſe who were prior would carry all, and the whole adjudgers would be excluded. 2. If the free rent exceed the annualrent of all the annualrenters, then the ſuperplus is to be divided proportionally to the adjudgers, in reſpect the annualrents being all prior to the firſt effectual adjudication, the adjudgers could have nothing till the annualrenters were ſatisfied.

XXIX. This is the rule of diviſion; but all the former grounds of reduction are exceptions from the rule. So that if any of the competitors could reduce the right of another, in a proceſs of reduction, they may make uſe of the ſame reaſon in the competition. For inſtance, if any of the competitors had uſed inhibition againſt any others, in that caſe they would draw out of the ſhare of thoſe whom they could reduce, ſo much as to make up the ſhare they would have had, if that reducible right did not exiſt: and yet that reducible right, albeit prior to the other rights, could not recur upon them, to make up what the reduction had carried from it, in favour of the reducing right; becauſe the ground of reduction

duction is always upon the fault or defect of the right reduced: as in the preſent inſtance, a right reducible *ex capite inhibitionis* is faulty and defective, as proceeding againſt the King's authority, prohibiting to take any ſuch right; and therefore it cannot claim to be made up out of any other right, which is not faulty; which holds in the other grounds of reduction, as the being *in curſu diligentiæ, &c.*

If then the inhibition be againſt ſome of the annualrenters, in favour of another annualrenter, then the reducing annualrent, if by its order it would fall laſt, would carry from the reducible annualrents its ſhare: but if both annualrents by their order fall to be ſatisfied, and are not cut off by their poſteriority, then the reducing annualrent can claim no more but preference to the reducible annualrent, in the choice of lands in the caſe of diviſion.

If any of the adjudgers have inhibited before the conſtitution of any of the annualrents, theſe adjudgers would draw from the ſhares of theſe annualrenters, as much as will make up the adjudger's ſhare, to that quantity they would have got, if theſe annualrenters were not exiſting. For inſtance, ſuppoſe there were two adjudgers, and one annualrenter prior to both, and ſuppoſe that one of the adjudgers had inhibit before the conſtitution of the annualrent, and the other had not; ſuppoſe alſo that all the three had equal annualrents, as if each of them were upon a ſum whoſe annualrent were 400 pound, and yet the free rent of the eſtate they affected were only 600 pound; the queſtion is, How ſhould this 600 pound be divided amongſt them? The annualrenter would claim his full annualrent, being 400 pound, as being prior to both the adjudgers, whereby there would remain to the adjudgers but 200 pound, which would be equally divided betwixt them, becauſe they are equal; ſo each of them would carry 100 pound; yet the adjudger who had the inhibition, would claim as much of the 600 pound, which is the common ſtock, as he would have had if there were no annualrenter, and ſo he would draw 300 pound; ſo that the annualrenter would have only remaining 200 pound, but could not return upon the other adjudger, as being prior to him: and therefore the firſt adjudger would retain his 100 pound: which would ſo hold if the annualrent had been reducible upon the other grounds before expreſſed.

If the ground of reduction be for one adjudger againſt another, as if there were three adjudgers, whereof each claims a yearly annualrent of 400 pound, in all 1200 pound, and yet the free rent were only 600 pound; if there were no ground of reduction, each adjudger would have 200 pound. But ſuppoſe the ſecond adjudger had uſed inhibition againſt the common debtor, before the contracting of the third adjudger's debt, in that caſe the queſtion is, How ſhould the 600 pound be divided amongſt the three adjudgers? The firſt adjudger would have 200 pound, becauſe the inhibition ſtruck not againſt him, ſo that he would have his ſhare, as if there had been no inhibition, which ſhould neither profit nor prejudge him. The ſecond adjudger having the inhibition, behoved to have his ſhare, as if the third adjudger were not exiſting, in which caſe the 600 pound would have been equally divided betwixt him and the firſt adjudger, and ſo he muſt have 300 pound, but he can claim no more, to abate the laſt adjudger's ſhare, ſeeing his reduction does not ſimply annul the laſt adjudication, but only in ſo far as it is prejudicial to the ſecond adjudication; and therefore the firſt adjudger having drawn 200 pound, and the ſecond 300 pound, the third hath 100 pound.

This will hold, whatever be the number of the annualrenters or adjudgers, who have inhibitions, or other grounds of reduction againſt any of the reſt.

XXX. There is another caſe that hath not been determined, *viz.* ſuppoſe an annualrent be after ſome of the adjudications which come in *pari paſſu*, and before others of them, the queiſtion is, what ſhould be the ſhare of that annualrent? There occurred a caſe of this kind, *Brown of Colſtoun contra Nicolas*, decided *Feb.* 6. 1673, wherein the ſtatute bringing in appriſers *pari paſſu*, being new

new and dubious, the annualrent was brought in as if it had been an adjudication *pari paſſu* with the adjudications [b]. I know no deciſion ſince to ſecond this, and ſo there is no formed cuſtom in the caſe. It is certain, that the ſtatute leaves annualrenters as they were before, and ſo they can never come *pari paſſu* with adjudications, unleſs the date of the firſt effectual adjudication and the annualrent were the ſame: and therefore, there is much more reaſon that the annualrent, which was conſtitute *in curſu diligentiæ* of the firſt effectual adjudication, ſhould be poſtponed to all the adjudications. (*The firſt effectual adjudication is only conſidered in this queſtion*) albeit ſome of them were before the firſt effectual adjudication, becauſe the real right of adjudications is only by the infeftment of the firſt effectual adjudication, or charge thereupon. But if the infeftment of annualrent be after the infeftment or charge upon the firſt effectual adjudication, all the adjudications within the year, before or after the annualrent, ſhould be preferred thereto: becauſe the firſt effectual adjudication is, as if all the prior, and poſterior adjudications within the year, were contained in it, and ſo the diligence for obtaining of that adjudication is for them all: and therefore, if the annualrent were after the citation, whereupon the firſt effectual adjudication did proceed, the annualrent is reducible as *in curſu diligentiæ*, unleſs the adjudger have been negligent, not obtaining infeftment, or giving a charge, ſo ſoon as by ordinary diligence he could do it: for where diligence prefers, it muſt be continued diligence.

It were alſo very inconvenient, if the common debtor might, by voluntary infeftments, prefer one creditor, by conſtituting an annualrent, to the diligence of other creditors, who, by adjudications within the year, are *fictione juris*, ſtated as if their ſums were in the firſt effectual adjudication; which is more than any preſumption.

TITLE XXXVI.

Actions extraordinary.

HItherto ordinary actions of all ſorts have been explained; all which had an ordinary form of proceſs, and muſt be inrolled and diſcuſſed according to the order of the roll. Beſides theſe, there are extraordinary actions, which proceed ſummarily, without the courſe of the roll; whereof theſe following are the prime. 1. Adjudications being brought in place of appriſings, and all adjudications within the year of the firſt effectual adjudication by infeftment or charge, or before the ſame, coming in *pari paſſu*, as if they were all contained in the firſt effectual adjudication; therefore ſo ſoon as any adjudication is extracted, all other adjudications within the year, are called amongſt the acts without inrolment. And all defences and exceptions are repelled *hoc loco*, and reſerved *contra executionem*; that is, theſe ſummary adjudications are not only liable to ſuſpenſion or reduction, but even in any proceſs founded upon them, all defences and exceptions which might have been proponed in the firſt inſtance, are competent againſt them. This is admitted by the Lords, upon account of the extraordinary prejudice, that creditors would ſuſtain, if they were neceſſitated to abide the courſe of the roll; for then, they could not expect to come in within year and day of the firſt adjudication. Yet the firſt adjudication muſt have all the formalities of other proceſſes, wherein not only the defender who is called, but con-creditors will be admitted for their intereſt, they producing the ſame.

II. Proceſſes of ſale of broken eſtates, being a kind of adjudication, having an extraordinary and proper form by ſtatute; whereby, in the firſt inſtance, the evidences of the debtor's being *cbæratus*, muſt firſt be inſtructed, either as notour,

[b] See above, II. 5. 11.

or by competitions of many creditors, whom the debtor cannot ſatisfy, unleſs he could ſell all his eſtate at once: and then a term is aſſigned to prove the rental of the lands and caſualities thereof, and the ordinary rate of lands of ſuch holding and caſuality in the ſhire where they lie: after which the probation being adviſed, and the loweſt rate determined by the Lords; there is a ſecond inſtance and a new citation and intimation. Now, if both theſe ſhould abide the courſe of the roll, it would be a great detriment to creditors; therefore the Lords, by act of Sederunt, have ordered theſe proceſſes of ſale to proceed ſummarily without inrolling, reſerving all defences to be proponed before the auditor of the ſale by roup. And it is only competent to the defender to object againſt his being alledged inſolvent; for in this caſe, bankrupt is an improper term, being proper only to merchants, and others whoſe eſtates are in moveables; but as to heritors, if they be *obærati*, ſo that by the real diligence of creditors, they cannot ſell their eſtates, except all be ſold together, this proceſs is not to their diſcredit; ſince it only ariſeth from the bringing in appriſers or adjudgers within the year *pari paſſu*; but it was their fault, that they did not offer their evidents, and poſſeſſion of lands proportional to the ſums; in which caſe only a partial adjudication could proceed, redeemable in five years.

III. All incident actions are extraordinary, and need no inrolment; as ſequeſtration of charter-cheſts; inſpection thereof; nomination of factors in competitions of many creditors, whether the ranking be paſt or not; proceſſes for tutors nominate to accept or be excluded, and the like. And when reductions of acts are inſiſted in, they are ſummarily diſcuſſed: for the reaſon why they muſt be raiſed, is, becauſe parties are not obliged to attend but at the diets of proceſſes; and therefore, if at any other time bills be given in to alter acts, if they proceed upon informality of proceſs, or that acts are not conform to the minutes, in theſe caſes there needs no reduction, if the complaints be in due time before the acquieſcence of parties is preſumed by law. But if the complaint be upon matter of fact, which ought to be conſulted with the clients; the Lords ſhould not admit of the ſame upon bill, unleſs the party were in town, but there muſt be reduction to oblige the party to attend at the term in the reduction, which therefore is ſummarily diſcuſſed. Alſo, when any party is appointed to be called *incidenter*, and the proceſs continued againſt that party, then that citation is diſcuſſed ſummarily.

IV. Transferrences of proceſſes upon the death of either party, are ſummarily diſcuſſed, albeit probation muſt proceed; as when the paſſive title cannot be inſtantly verified, but proceeds upon behaving as heir, lucrative ſucceſſion, or vitious intromiſſion, both the relevancy and probation of theſe proceed ſummarily; becauſe they are acceſſory to the principal cauſe, which remains in the roll as it was, and is marked by the ordinary to continue till theſe incident proceſſes be diſcuſſed.

V. The King's cauſes proper to the Crown, and not belonging to donatars, are, by the act of regulation, to be ſummarily diſcuſſed; the King's advocate intimating to the defenders, a fourth-night before he inſiſt, that they may be ready.

VI. Actions upon invaſion of either party in proceſs, againſt the other, proceed ſummarily without inrolment; and that by bill, if the party-injurer be preſent, or by citation under the Signet, if he be abſent.

VII. All complaints upon contempt of authority, proceed ſummarily by bill, if the party be preſent, or by citation if abſent; as when execution proceeds after ſuſpenſion, or fiſt duly intimated, either *apud acta*, or by inſtrument of citation.

VIII. All incident penal actions for vindicating the Lord's authority, are to be diſcuſſed ſummarily, whether the penalty be by amerciament, impriſonment, or corporal puniſhment. For though the Lords are not criminal judges, yet all ſovereign courts have implied in their juriſdiction, theſe penalties, without which the ſame cannot be explicated; and therefore all affronts or contempts of the Lords,

Lords, or any of them, may be ſo puniſhed. And where parties are found acceſſory to malverſations in proceſs, they are ſo to be puniſhed. Thus in prevarication, or excuſable acceſſion to forgery, or falſe teſtimony, parties are frequently ſet upon the pillory, or have their ears nailed to the trone, with papers upon their brow, ſhowing their crime, when yet the Lords do not find reaſon to commit the offenders to the criminal judges.

TITLE XXXVII.

Advocations.

ACTIONS ordinary and extraordinary, which are competent to be diſcuſsed before the Lords of Seſſion, in the firſt inſtance, having been explained in the former titles: the proper method leads us now to actions competent before the Lords in the ſecond inſtance, by advocation, ſuſpenſion of their own decreets, or of the decreets of other courts, and reduction of the ſame. Of which in order; and firſt, of advocations, theſe being before decreets. As for ſuſpenſions and reductions of decreets, theſe being after decreets, are to be explained after decreets.

II. Advocation, as the name imports, is an action craving a cauſe to be removed from another judicature unto the Lords, to be diſcuſſed by them, or to be remitted to another competent and unſuſpected judge.

III. The Lords may advocate cauſes, where, though they cannot be judges in the cauſe advocate, yet they are competent judges in the advocation: for as they are the King's ordinary council in matters of law, they have that amplitude of juriſdiction, that whatſoever hath not an ordinary judicature to determine it, is at the Lord's determination.

IV. The ſubject matter of every juriſdiction is commonly known. All matters of ſtate, and for maintainance of the public peace againſt riots or violence, are proper to the Privy Council *, which was inſtituted for theſe effects, and ſo diſtinguiſhed from the Kings ordinary council, whereunto the College of Juſtice hath ſucceeded: and therefore the Lords are denominated Lords of Council and Seſſion. All crimes which occur not in the explication of the juriſdiction of the Seſſion, or other courts, are proper to the criminal judges, chiefly to the Juſtice-General, Juſtice-Clerk and five of the Lords of Seſſion, aſſociated to them, by the act of regulation of judicatures. All actions criminal committed at ſea, or within the ſea-mark, are proper to be judged by the Lord High Admiral of Scotland, and his deputes, and the civil actions accuſtomed in that court, as the adjudication of prizes, and actions among ſeamen. All actions for confirmation of teſtaments, or adherence, or divorce, are proper to the Commiſſaries. All actions for debt not exceeding two hundred merks, are by ſtatute only competent to the ordinary judges in the firſt inſtance, and are not to be advocated by the Lords, (*P.* 1663. *c.* 9. *P.* 1672. *c.* 16. § 16.) unleſs the parties be members of the College of Juſtice, who are obliged to attend the Lords, which ſtatute was made, that the Lords might have more time to decide matters of greater importance. All actions for valuation of teinds, plantation of kirks; modification, augmentation and locality of ſtipends, are proper to the commiſſion for plantation of kirks, and that not only in the firſt inſtance, but in the ſecond inſtance by ſuſpenſion or reduction **. There is ordinarily a commiſſion for

* By act 6. *ann. c.* 5. it is declared, that after the 1ſt May 1708, there ſhall be but one Privy Council for the kingdom of Great Britain, which ſhall have the ſame powers, as the Privy Council of England had at the time of the Union, and none other.

** The court of Seſſion is now in place of the Commiſſioners of teinds, *P.* 1707. *c.* 9.

for criminal cauſes upon the Border, which is proper to them according to the tenor of the commiſſion. Bailies of regality are competent judges of crimes committed within their regalities, unleſs the ſame be firſt purſued before the Juſtice-General, in which caſe the bailies of regality cannot repledge from, but ſit with the Juſtice-General, and have a vote deciſive, as is ſtatute in relation to church-men's regalities, in the act of annexation of the temporalities of kirk-lands to the Crown. It is not determined by the act of regulations, adjoining five of the Lords of the Seſſion, whether the bailies of regality are reſtricted in their juriſdiction, from having a vote with the Juſtices either in the ordinary or circuit-courts: but it appears more rational, that theſe bailies ſhould have a vote, when there are many criminal judges, than when there was but one. All ſheriffs, ſtewarts, bailies of regality, bailies of burrows, barons and their bailies, have criminal juriſdiction, unleſs they be prevented by ſuperior courts; but they cannot repledge and are reſtricted as to the kind and order of procedure.

V. It would not be conſiſtent with the juſtice and ſecurity of the kingdom, that there were no remedy to ſtop the courſe of any of theſe criminal judges, albeit they were never ſo partial and ſuſpect; and therefore upon complaints to the ſecret council, the execution of ſentences of criminal judges can be ſtopt; yet they can neither be advocated nor reduced by the Privy Council, who have no ſuch form. So that it is both neceſſary and accuſtomed, that the King's ordinary council, the Lords of Seſſion, ſhould advocate all theſe cauſes proper to particular juriſdictions, which cannot begin before the Lords, nor be determined by them; if there be juſt ground of advocation; *viz.* upon the point of competency of juriſdiction, as if one court proceed in that which belongs to another, or if the crime be not committed within their juriſdictions, or if the parties be not liable thereto; or if they be declinable by reaſon of relation to either party, or of enmity againſt either party; or if they have given partial counſel, while they were judges; or if the crimes be peculiar crimes of the Crown; or of ſuch moment or difficulty, as requires the pleading of the learnedeſt lawyers, and determination of the ſkilfulleſt judges, or the like. Yet the advocation is to this effect, that the Lords may appoint competent unſuſpect and impartial judges; and therefore they do remit ſuch cauſes if they be of moment or intricacy, unto the juſtice-court; or otherways name delegates in place of the Judges-ordinary, for theſe particular cauſes remitted to them: but where there is a collegiate court, ſo long as there remains a *quorum*, againſt whom there is no exception; there ought no advocation to be paſſed.

VI. It were of great importance for the ſecurity of the lieges, if the time of citation and execution, were determinate in the matter of crimes. For ſome courts cannot judge in ſome crimes; unleſs it be within three ſuns from the commiſſion of the crime. And the law hath ſecured the lieges moveables, and other ſmaller intereſts, that execution may not be done within term of law, which is fifteen days. How neceſſary then were it, that there ſhould be a fixed time for capital execution of criminal ſentences, or theſe of like import *, for the right of parties, and for preparation for death, and that acceſs might be made to the Privy Council to ſtop execution, that the King might give pardon, if he found cauſe, and that the juſtices and their conjuncts might give their judgment, whether all things had legally proceeded, as is contained in the criminal proceſs, or that they might reduce the ſentence upon nullity or injuſtice; which were much more ſafe and fit than the accuſing criminally the inqueſt.

VII. The

* By act 2. Geo. I. *c.* 25. No ſentence importing capital or corporal puniſhment, can be executed on the ſouth-ſide of the river *Forth*, for 30 days, or on the north-ſide of that river for 40 days after it is pronounced. But by act 3. Geo. II. *c.* 32. corporal puniſhments importing leſs than death or diſmembering, may be executed after eight days on the ſouth-ſide of *Forth*, and after twelve days on the north-ſide.

VII. The ordinary advocation, is of civil proceſſes, in matters which may be judged by the Lords in the ſecond inſtance. It was introduced in place of appeals, and is a far more excellent remedy.

VIII. Appeals were accuſtomed, and in vigour with us, as in moſt other nations, but more peremptory than in any nation: for there was no time to appeal, but inſtantly at the pronouncing of the ſentence; and there was a long train of appeals from court to court, and at laſt to delegates appointed by the King, before the Inſtitution of the Seſſion. But of a long time there hath been no appeals allowed, or admitted in this kingdom; but, in place of appeals, advocations were introduced, ſtopping and removing proceſſes, not at the humour or pleaſure of parties, but by the judgment of the Lords. Thus,

IX. The manner of paſſing advocations, is by bill preſented to the ordinary upon the bills, and containing the reaſons of advocation: which bill doth not paſs of courſe, but upon ſpecial conſideration of the reaſons, by the ordinary, and competent inſtructions produced; all which do appear from the copy of the proceſs craved to be advocated, which ought to be produced, and which may not warrantably be refuſed by the clerk of the proceſs, if required to give a double of the libel and minutes; or at leaſt there ought to be produced an inſtrument bearing theſe duplicates to have been required, and either refuſed, or a competent time propoſed by the clerk to tranſcribe them, and an inſtrument at that time, bearing, that a copy was not delivered, ſigned by the clerk. If the ſigned copy be produced, advocation ſhould not be granted upon any alledgeance, but what was proponed and repelled, otherwiſe it would evacuate the juriſdiction of all inferior courts: for albeit when advocations are paſt and come to be diſputed, the Lords may remit; yet the party delayed hath no more ordinarily but the proteſtation-money for his expences and prejudice: and if the cauſe were remitted, there were too much probability, that the inferior judge would be too ſevere againſt him, who did advocate, and few perſons againſt whom advocations are paſſed, will refuſe to advocate of conſent, if the other party will inſtantly inſiſt in the principal cauſe before the ordinary.

X. For eviting theſe inconveniencies, the Lords do of courſe grant warrant to the ordinary on the bills, to diſcuſs the reaſons of advocation on the bill: for if the advocation paſs the Signet, it muſt abide the courſe of the roll; and albeit the roll of ſuſpenſions and advocations, never be ſo far behind, as the roll of ordinary actions, yet it would be too great a delay of juſtice, if the advocation behoved to go to the roll.

XI. If no reaſon of advocation were ſuſtained, but what was ſuſtained or repelled, or where a copy of the proceſs was not delivered; advocations now would make little delay. But the pretence of unſkilfulneſs in procurators before inferior courts, and of parties being unwilling to propone declinators of the judges, is the ground that other reaſons of advocation are admitted; which ſhould not be ſuſtained, ſeeing there is ſtill a remedy by ſuſpenſion.

XII. The moſt ordinary reaſon of advocation, is, upon the incompetency of the judge; which is elided by a party's prorogating the juriſdiction by proponing defences, without proponing declinators: for *primus actus judicii eſt judicis approbatorius*; yet if the defender propone declinators with other defences *ſimul*, theſe will not prorogate the juriſdiction, but will be underſtood as a vindication of the defender, that he is not litigious. But by the nature of the defences, the declinator muſt be firſt anſwered: and if it be repelled, it will be a relevant reaſon of advocation, if the verity of it be notour; as if the matter of the proceſs be not under the juriſdiction of the judge; or the defender not dwelling within his diſtrict; which ordinarily are notour, and need no further probation. But if it be incompetency upon relation to the parties, which muſt have probation, if it be not notour; the proponer ought to come *paratus*, inſtantly to verify the ſame, by the oath of the party, the knowledge of the judge, or by witneſſes ready to prove, who will not be rejected as ultroneous; becauſe it being a dilatory defence

muſt be inſtantly verified; ſo that, if witneſſes without citation were not admitted, that juſt defence could not be proved, though it be matter of fact probable by them.

XIII. The relation declining the judge, is the ſame with the relation declining particular Lords of Seſſion, which is lately, *P.* 1681, *c.* 13. extended to uncles and aunts, nephews or nieces, by conſanguinity; but as to affinity, only to brothers and ſiſters, and not to good-brothers (*by*) marrying two ſiſters or good-ſiſters (*by*) marrying two brothers. *Vid. lib.* 4. *tit.* 39. § 14.

XIV. Declinature upon enmity muſt alſo be inſtantly verified, and may be referred to the judge himſelf generally; but if it be otherwiſe proved, the facts inferring enmity muſt be particularly condeſcended upon; which may be proved by oath of the judge, by writ, or by witneſſes, though not cited before.

XV. The next reaſon of advocation is the judges intereſt in the cauſe; or if it be inſtructed that *fovet conſimilem cauſam*, having a cauſe in the ſame circumſtances depending before another court; which alſo muſt be inſtantly verified, as aforeſaid. This is not a reaſon of incompetency, but of ſuſpicion of prejudice.

XVI. The fourth reaſon of advocation, is the exemption of the defender from that court; which ſome have obtained by way of action, upon frequent acts of injuſtice; or otherwiſe by exemption upon privilege, as the members of the College of Juſtice, are privileged by ſtatute. But, in either caſe, if the parties propone other defences, they cannot return to their exemption.

XVII. The fifth reaſon of advocation is, upon the intricacy and importance of the cauſe, as if it come to a competition of heritable rights, or to a diſcuſſion of the nullity of decreets: for inferior judges have not power of reduction; except the commiſſaries of Edinburgh, who can reduce other commiſſaries decreets, and the judge of admiralty, who can reduce the decreets of other judges of admiralty, (*or review his own decrees*, *P.* 1681, *c.* 16.) This will not exclude manifeſt nullities of original writs, as wanting of witneſſes or deſignation of them. And as inferior courts cannot reduce, ſo neither can they improve any writ, that being proper to the Lords, either by certification, or by probation of the forgery, which uſes to be remitted to the criminal court, if the Lords inflict not a leſſer puniſhment, than that of forgery.

XVIII. The ſixth ordinary reaſon of advocation is, that probation appears to be requiſite *ex nobili officio*, which is not competent to any inferior court: and therefore, where there is reaſon to give acts before anſwer, for adducing evidences on the part of one party or more, from whence the point in queſtion is to be inferred; it is a ſufficient reaſon of advocation, as if old bonds be quarrellable upon circumſtances or matters of fact, to prove their payment, or retiring, or if matters of truſt be in queſtion; no inferior judge can uſe ſuch probation.

XIX. After litiſconteſtation, there is no relevant reaſon of advocation, except upon iniquity in the material juſtice of the cauſe, by ſuſtaining an irrelevant libel, or an irrelevant defence, reply, duply, *&c.* or by rejecting a relevant libel, or repelling a relevant exception, reply, duply, *&c.* or by determining an incompetent manner of probation; which muſt alſo be inſtructed by a copy of the proceſs, as aforeſaid, or by inſtruments for not obtaining of the ſaid copy ſubſcribed.

XX. There are three ſtatutes limiting the Lords juriſdiction in advocations. The firſt is in the end of *c.* 39. *P.* 1555, anent the warning of tenants, in theſe terms: "That no advocation of cauſes, be taken by the Lords, from the judge-"ordinary; except it be for deadly fead, or the ſheriff-principal or judge-ordi-"nary be party, or the cauſes of the Lords of Council, their advocates, ſcribes, "and members." Which, tho' it appears to be general; yet, being an article in the act for warning of tenants, it is not to be generally extended, but in the advocation of removings. And yet even in theſe actions, it is in deſuetude in ſeveral points, which, by cuſtom, are ſuſtained; as if the deputes have intereſt in the cauſe, unleſs the principal judge ſit, or another depute; or in the caſe of iniquity: but the Lords uſe to order that advocations of removings in the vacant

time

time, be only paſſed by three Lords met together. The ſecond ſtatute reſtraining advocations, from competent judges, is, where the action is for ſums within 200 merks *, or whereunto the inferior judges are by law expreſsly appointed to be judges, *c.* 9. *P.* 1663, which is to be underſtood, where the inferior judges are by law appointed to be proper judges, as the commiſſaries in confirmations and divorces. Yet even in theſe, inquity is a competent reaſon of advocation. The third ſtatute limiting advocations, is, *c.* 16. *P.* 1681, whereby advocations are excluded in cauſes intented before the Admiral, even upon iniquity, becauſe of the neceſſary diſpatch of cauſes before that court; and therefore they are only remeidable by ſuſpenſion or reduction.

XXI. There is no neceſſity to offer a tenor of advocation, becauſe it is uniformly obſerved amongſt the writers.

TITLE XXXVIII.

Preliminaries of Proceſs.

WE have now gone through the ſeveral kinds of actions, which precede litiſconteſtation and decreet; after which, only actions preſuppoſing decreets do remain; ſuch as reductions of decreets, or ſuſpenſions thereof (under which are comprehended ſuſpenſions *ſuper ceſſione bonorum*) diligences or executory actions, as inhibition, arreſtment, actions for making arreſted ſums forthcoming, and adjudications. We come now to conſider actions as they become proceſſes; that is, till they receive further progreſs by ſentences interlocutory or definitive; ſo that an action, though depending, is not yet a proceſs, till there be an interlocutor upon it. Yet the ſummons, with the inſtructions thereof, either for the title paſſive or active, or for probation, is called a proceſs, albeit properly it be not, until an interlocutor be upon it: for the firſt defence, and the moſt general in all actions, is dilatory, in this form, "no proceſs for ſuch a reaſon;" that is, there can be no further procedure in favour of the purſuer, whether by an interlocutory ſentence, or by a decreet.

II. An action imports more than a cauſe, *viz.* That there is a warrant granted to cite parties, which ſhould not be granted, unleſs the grounds of it be relevant, *i. e.* ſuch as being proved, would infer the concluſion claimed; and therefore actions which have a fixed form go of courſe, and are expede by the writers to the Signet, as they were before by the brieves out of the chancery, which are unqueſtionably relevant. But when they proceed upon bills, it would be too laborious a taſk, narrowly to conſider what bills are juſt, but they are paſt of courſe, *periculo petentium*, except in the caſe of bills of advocation and ſuſpenſion, which paſs not of courſe, but are read before the ordinary, and paſt upon conſideration if the reaſons be relevant, and have competent inſtructions. Yet a warrant for citing is not properly an action, till actual citation be added thereto; for a ſummons is ſo named *à ſummonendo*, becauſe it advertiſes the party to appear before the judge; and a citation is *à citando*, becauſe it haſtens the defender to compear, at the term contained in the ſummons. But ſeeing the defenders may compear any moment in the hour of cauſe that day, they are not called till the next Sederunt day, or any day after; ſeeing ſummonſes before the Lords are with continuation of days, which laſteth for a whole year; yet ſo, that the defenders are not obliged to attend all that time: for they may produce the copy of the ſummons which they received, the next day after the term, or any day thereafter within that year, and thereon crave proteſtation, bearing, that ſeeing the purſuer inſiſts not, he can have no proceſs till a new citation: but becauſe the purſuer needs not then be preſent, ſeeing his advocate can do all that is then needful without

* By act 20. *Geo.* II. *c.* 43. actions for ſums within *L.* 12 Sterling, cannot be advocated.

without information, the defender gets no expences or proteſtation-money, upon the admitting of ſuch proteſtations; and if any advocate appear and produce the ſummons, the clerk marks upon the margin thereof, the purſuer and defenders advocates, and appoints the defenders to ſee the ſummons, executions, and inſtructions: and though none appear for the purſuer, the proteſtation is not admitted that day, but the ſummons is called the next day, with certification; and the third day proteſtation is admitted and extracted; which formerly was paſſed of courſe by a clerk, but now muſt be ſigned by the ordinary.

III. The executions do ordinarily bear, that ſuch perſons were cited to compear, "day and place within contained;" becauſe, executors of ſummonſes, adventure not to determine upon what days the citation ſhould proceed: and therefore the defender's advocate ſhould not call upon the copy, to obtain proteſtation, till the competent days for ſuch a ſummons be paſt, of which formerly. See *lib.* 4. *tit.* 3. § 33. But if the ſummons be privileged as to the days of compearance, the term may be ſix days on this ſide of *Dee*, or fifteen on the other *.

IV. When the purſuer's advocate produces the ſummons, to exclude the proteſtation; the day of compearance is oft-times left blank, that the purſuer's advocate may fill in what day he pleaſeth; but he ſhould not fill up a longer day from the giving the execution, than the law requires; for thereby the defender would be obliged to an uncertain attendance; and therefore he may crave the incompetent day to be changed, as it ſhould have been; which the clerk may do at the calling of it.

V. Sometimes the proceſs is given out with the day of compearance blank. And tho' the defenders advocates ſcore the blank, or make it to a wrong day; it may be mended at the bar; ſeeing there is a rule as aforeſaid, which, upon neither ſide, ſhould be tranſgreſſed, and it deſerves no new ſight upon that alteration.

VI. If there be many defenders, and different advocates; the clerk marks the proceſs to be ſeen in ſuch an advocate's houſe, who is anſwerable for the return of it: and unleſs the reſt come to his houſe and adviſe, he ſhould ſend it with a ſervant to be ſeen in his hand. But the purſuers do moſt prudently, who cauſe take it up, and give it to the ſeveral defenders a-part.

VII. Before the regulations 1672, there was great contention and trouble to the Lords, anent the getting back of proceſs, and concerning the writs in the proceſs: but by that act, the purſuer ſets down an inventary of his production, and under it a minute, bearing, "given out by ſuch an advocate, to ſuch an advo-"cate, ſuch a day;" which being ſigned by the out-giver, prevents all queſtions about the production, and the time of returning; which is now little controverted, becauſe the cauſe cannot be ſuddenly called, but muſt come in by its courſe in the roll; whereas, before the regulations, it might have been called the ſame day on which it was returned; and this inventary of the proceſs is a great ſecurity for the writs produced, which the defender's advocate is anſwerable for, ſeeing he may refuſe to take in the proceſs, if the inventary anſwer not the production. This inventary is alſo a mean to inſtruct what writs came to the clerk's hands; whereas, before this regulation, there was no remedy for recovering writs, but the oath of the receiver.

VIII. When a proceſs is returned, the advocate who returns it muſt write thereon, "ſeen and returned by me," and ſign the ſame. But if, upon inſpection, he find his clients not concerned, he then writes "returned, as not being "for the defender," and ſigns it. And when ſeveral advocates compear, for ſeveral parties, they ſhould all write their returns upon the proceſs when they have ſeen it; whereby, at calling of it in the roll, they cannot pretend they have not

* The inhabitants on the north-ſide of the river *Dee* have a privilege, that all hornings againſt them, muſt be on 15 days at leaſt, but no privilege as to citations. The inhabitants of *Orkney* and *Zetland* muſt be cited on 40 days, and horning againſt them, muſt be alſo on 40 days, *P.* 1685, *c.* 43.

not ſeen it, as oft-times they do, and delay proceſs, nor can they diſclaim their appearance afterward.

IX. After a proceſs is returned, it may be offered to the keeper of the books of inrolment, upon any Saturday, at the hours appointed; and the producer may then ſee it inſert according to the dates of the returns of theſe that are preſented that day, in the book that is proper for that kind of proceſs; for there is one book for ſuſpenſions, advocations, removings, ejections, and recent ſpuilzies, which are to be called upon Tueſdays and Wedneſdays weekly; and another book for all other cauſes; except concluded cauſes, which have a particular book for the inner-houſe; and there is another book for actions to be diſcuſſed in the inner-houſe; yet theſe actions muſt firſt be inrolled for the outer-houſe, and are thereafter inrolled for the inner-houſe, not by the date of the returns, but by the great aviſandum made in the outer-houſe; as when great aviſandum is made in the outer-houſe for diſcuſſing the reaſons of reduction of heritable rights of lands or annualrents, after the production is cloſed; or in probation of the tenors of writs deſtroyed or loſt, after the adminicles are diſcuſſed; or in *ceſſiones bonorum*; or for determining of any point, which, upon report from the outer-houſe, the Lords for its importance or intricacy, have ordained to be heard in their own preſence. Yet, before it be inrolled, the Lords *in præſentia* may call the cauſe then in debate, while it is recent in the minds of the pleaders, and makes no uncertain attendance; which cannot extend to more than a ſingle point at once. But if once the cauſe be inrolled in the inner-houſe roll, it cannot be called again, till it come in, in its courſe.

X. The execution of ſummonſes, and all diligences, was of old done by the ſheriffs, while proceſſes proceeded upon brieves out of the chancery, as they do yet execute theſe brieves which remain. But ſince the Inſtitution of the College of Juſtice, tho' any perſon was ſufficient to execute ſummonſes, wherein there was no ſpecial certification; yet the old ſtile was ſo far retained, that the ſummonſes are ſtill directed to ſheriffs in that part ſpecially conſtitute by the Lords, for whoſe name there is a blank left to be filled up by the purſuers at their pleaſure. But if the certification in the ſummons be, that if the party cited to give his oath, appear not, he ſhall be holden as if he did appear and did confeſs the verity of the points referred to his oath; then the execution muſt be by a meſſenger at arms *, againſt the party perſonally apprehended, unleſs the party be out of the country; for then the meſſenger muſt execute the ſummons at the market-croſs of Edinburgh, and pier and ſhore of Lieth [d]; and in either caſe, the ſummons muſt bear the certification "to be holden as confeſt." The reaſon of this certification is, becauſe Edinburgh is *communis patria*, and every provident man is ſuppoſed to have an ordinary procurator there, who may take notice of publick citations at the croſs; and when the proceſs is called, if he be ſtill out of the country, he will either get a long term, or a commiſſion to depone.

XI. If parties be latent, vagabonds, or have no domicile, or if they dwell or haunt where there is not *tutus acceſſus*, the ſummons bears ſpecial warrant upon the notoriety thereof, to cite them at the neareſt market-croſs to the places where they dwell or haunt, to which there is ſafe acceſs; wherein there may be certification to be holden as confeſt, as againſt perſons out of the country.

XII. The executions of ſummons do properly ſignify the acts done by the executor thereof; but becauſe theſe acts are expreſſed in the atteſtation of the executor, that atteſtation is called the execution, or the indorſation, becauſe the ſame uſes to be written on the back of the ſummons. Theſe executions of old were called "the rehearſe of the ſummoner made in court by writ or word, having ſufficient witneſſes of diverſe baronies, who ſhall ſwear in court that they

* All ſummonſes are now executed by meſſengers at arms, and to the firſt and ſecond diets at one time, *P.* 1693, *c.* 12.

[d] See above, IV. 3. 31. below, IV. 47. 4.

" by-ſtood, ſaw and heard, and for witneſſes were tane, where the ſummoner " made the ſummons, *&c. cap.* 112. *Parl.* 1429." And thereafter executions of ſummonſes did only require that the ſame were ſtamped or ſealed by the officer, otherwiſe to make no faith, *cap.* 32. *Parl.* 1469. The ſignet or ſtamp muſt have upon it the firſt letter of the executor's name, or ſirname, or ſome other thing that ſhall be univerſally known to be his ſignet, *cap.* 74. *Parl.* 1540. The reaſon hereof was, becauſe at that time few executors could write. But little notice was taken what was upon the ſtamp, and any veſtige of a ſtamp in old executions was ſufficient. But now all executions muſt be ſubſcribed by the executor, and the witneſſes; ſo that there is no neceſſity of a ſtamp: for wherever the executor does ſubſcribe and deſign himſelf, it is more effectual than the ſtamp; for thereby there is a better mean to improve the executions, than by the ſtamp, *cap.* 4. *Parl.* 1686.

XIII. Executions of ſummonſes are of diverſe tenors: for if the parties cited be perſonally apprehended, or if he be cited at his dwelling-houſe, or at the market-croſs neareſt his dwelling or haunt, or if at the market-croſs of Edinburgh, and pier of Leith, as out of the country, the executions muſt differ accordingly. But in all executions the executor's name and deſignation muſt be expreſſed, and the letters which are his warrant; as alſo the names and deſignations of the parties, purſuers and defenders, muſt be expreſſed, and not related generally, as they uſed formerly to bear only, " the perſons within written," *cap.* 6. *Parl.* 1672; yet if the executions be written on the back of the ſummons, and not in ſchedules a-part, tho' the execution bear but " the perſons within written" generally, it may ſuffice. The executions muſt alſo bear the day of compearance, which is ordinarily left blank till the ſummons be called, as hath been ſaid. They alſo uſe to bear the place of compearance, " at Edinburgh, or where it ſhall happen the Lords to be for the time;" becauſe of old the Seſſion had no fixed place; but being now fixed, the mention of the place is not neceſſary, unleſs the King ſhould command the Seſſion to ſit elſwhere.

XIV. The days of compearance at firſt were very long, but were ſettled to be on twenty one days warning, *cap.* 6. *Parl.* 1466, which is to be underſtood of the firſt ſummons: for the ſecond ſummons is upon ſix or fifteen days. But executions at the market-croſs of Edinburgh, and pier of Leith, muſt be upon ſixty days for the firſt ſummons, and fifteen days for the ſecond. But ſecond citations againſt parties within Edinburgh, or the ſuburbs, paſs upon twenty four hours. Privileged ſummonſes are ordinarily upon ſix days. But as to this, the Lords made an act of Sederunt, of the 21ſt *June* 1672, of which we have already ſpoken, *lib.* 4. *tit.* 3. § 33. The executions muſt alſo bear, " for the " cauſe, to the effect, and with certification contained in the ſummons."

XV. Executions of ſummonſes againſt parties perſonally apprehended, muſt bear ſo: and it were very fit, that they bear the place where, which would be a mean of improbation, if there were ſtronger evidence of the parties being *alibi*. They muſt alſo bear a copy delivered, or at leaſt offered and refuſed: which copy muſt be ſubſcribed by the executor thereof, *cap.* 141. *Parl.* 1592. The giving of a copy is the moſt eſſential part of the execution, which contains all the other points which uſe to be expreſſed, and may ſupply the defect of them, eſpecially where the party cited is perſonally apprehended; but in other executions the manner of leaving the copy is neceſſary, and is preſcribed by *cap.* 75. *Parl.* 1540, bearing " That if the executors cannot apprehend the perſon, they ſhall paſs to the gate " or door of the principal dwelling-houſe, where he actually reſides for the time " and there ſhall deſire to have entrance, and ſhall ſhow the letters to the ſervants of the houſe, or other famous witneſſes, and offer the copy thereof to " the ſervants; but if they refuſe, he ſhall affix the ſame upon the gate or door " But if they get not entrance, they ſhall firſt knock at the gate or door ſix " knocks, and ſhall affix the copy upon the ſaid gate or door." Theſe knocks are not to be given if there be acceſs to the rooms where the ſervants are. And certainly

certainly the giving of the copy to the wife or bairns, is more effectual than to ſervants. But thoſe who deſign to ſteal through ſentences, without lawful executions, do either give no knocks, or not ſuch audible knocks as may be heard in the rooms of the houſe; and ſometimes they cauſe carry away the copy after they have affixt it, whereby their executions will not only be a falſhood, but a forgery.

XVI. All executions at market-croſſes, or at the pier of Leith, muſt be by meſſengers, and muſt bear his going to the market-croſs in due time of day, when people may take notice; and before he read the ſummons, he muſt, with audible voice, cry three oyeſſes: the deſign whereof is to convocate people, to hear and give notice; and then he muſt read the letters, and require the witneſſes being preſent, and muſt aſſix a copy upon the croſs or pier. All which muſt be expreſſed in the executions.

XVII. Before executions were ſubſcribed by the executors and witneſſes, if objections were made againſt them at the bar, the purſuer was allowed to amend the ſame, abiding thereby as true, which cannot be now done. Yea, if an execution be once produced, another execution of a different tenor will not be admitted, tho' ſubſcribed by the executor and witneſſes; becauſe it is not ſafe to fix the verity of the execution upon their memory: and therefore the executor and witneſſes ſhould ſign the execution when it is done.

XVIII. In all ſummonſes there muſt be purſuers, one or more, and defenders one or more. There muſt alſo be an active title of the purſuers, and a paſſive title of the defenders, expreſſed or implied. And if theſe titles require writ, the ſame muſt be produced before decreet. The active titles muſt be anterior to the day of compearance, at leaſt before calling of the proceſs in preſence of the judge: yet in acceſſory titles the judge will allow them to be produced *cum proceſſu*; as when an heir purſues for an heritable debt, and claims likewiſe the bygone annualrents, he muſt produce his retour as heir: but he may confirm the annualrents, and produce the confirmation *cum proceſſu*. If the purſuer expect a decreet without litiſconteſtation, he muſt inſtruct the paſſive title when the proceſs is called by the judge: but if he take a term to prove, it is ſufficient to prove the paſſive title at that term.

XIX. Active titles are either original or by progreſs. Original titles are where the right is originally in the purſuer. But titles by progreſs are either retours on ſervices of heirs, or confirmation of executors, or aſſignations, or tranſlations, or gifts to donatars, or diſpoſitions voluntary or judicial, or a collateral intereſt from whence the concluſion of the ſummons is juſtly and legally inferred.

XX. Paſſive titles are theſe wherein the defenders muſt be paſſive, either by being decerned to pay or perform, or to ſuffer, permit, or not repugn; which is in all declaratory actions, wherein parties cited muſt not hinder the effect of the ſummons, (*after decerniture*) except by way of reduction upon juſt reaſons.

XXI. When there can be no ſpecial defender condeſcended on, citations are allowed to be at the market-croſs againſt all and ſundry, to the effect that if any have intereſt, they may appear and defend. And in ſome actions citation muſt be upon the ground of the land, and a copy left there; which is alſo to give notice to any poſſeſſors, that they may defend. Yea, if any other have intereſt, tho' neither called generally nor ſpecially, and that intereſt be evident from the proceſs, or otherwiſe be produced, they will not only be admitted to defend, but to compete and crave preference.

XXII. In ſummonſes *cognitionis cauſa*, the apparent heirs muſt be called, tho' they have renounced to be heirs. And they are called in declaratory actions tho' they be not entered. And likewiſe the neareſt of kin muſt be called in ſummonſes *cognitionis cauſa*, for obtaining confirmations, if the debt be not liquid, that the purſuer may be confirmed as executor-creditor. And ſummonſes of adjudication proceed againſt apparent heirs.

XXIII. When

XXIII. When pupils and minors are purſued, their tutors and curators muſt be cited; but it will ſuffice that they be cited at the market-croſs without naming them, but only "that the minor is cited with his tutors and curators, if he any "have, for their intereſts."

XXIV. The paſſive titles by progreſs are, as heirs, executors, wives, bairns, legatars, or as behaving as heirs, by intromitting with the heirſhip-moveables, or rents of lands, or the ſtock, or annualrents of ſums, whereunto they have right as heirs; or by lucrative titles after contracting of the debt in queſtion; or as vitious intromitters with the moveables of defuncts. All theſe ſpecial titles, active and paſſive, are largely explicated, *lib.* 3. of theſe Inſtitutions.

XXV. The implied titles are oft-times without writ; thus in purſuits for debt the purſuer's title is as creditor, and the defender's is as debtor, which needs not be ſo expreſſed; but in progreſſive titles they muſt be more particularly expreſſed, eſpecially the active titles, as having right by progreſs, or as having good and ſufficient intereſt to purſue the action.

XXVI. In all ſummonſes there muſt be a certification expreſſed or implied. In ſpecial certifications the ſame muſt be expreſſed; and other certifications are but generally expreſſed: as that "the Lords will proceed to do juſtice," which is ſufficiently expreſſed when the ſummons bears with certification, *&c.* Or tho' no certification be mentioned, yet it is implied when the ſummons bears to cite the defenders "to hear and ſee it found and declared," or "to hear and ſee the pre-"miſes verified and proved, and them decerned:" for thereby it is implied, that the Lords will proceed to do juſtice againſt them, as well when they are contumacious in not appearing, as when they do appear: or when parties are cited to depone, it imports the certification of being holden as confeſt.

XXVII. It is an uſeful point in the law of this kingdom, that all civil judges do proceed to do juſtice, altho' defenders compear not, if they be lawfully cited; and that becauſe of their contumacy: and therefore, if the ſummons bear, that the purſuer refers any point to the defender's oath, either ſimply or in ſo far as ſhall not be proved by writ, he will be holden as confeſt. And if the purſuer purſue for improbation of any writ, the certification is, that if the writ be not produced, it ſhall be holden and reputed as falſe and forged; and therefore can never be made uſe of againſt that purſuer, his heirs or ſucceſſors, as to that cauſe only. Or if the purſuer produce writs to inſtruct his ſummons, the Lords will adviſe the ſummons and writs, and decern as if the defender did appear. Or if the purſuer libel relevantly, the Lords will aſſign a term to prove. Upon all ſuch proceſſes all execution proceeds, as well as upon decreets wherein the defenders have compeared. But if the relevancy of probation be dubious, the ſame is repreſented to the Lords before they give act or decreet; and yet, in the ſecond inſtance, they will hear the parties thereupon, as if the decreet had paſt of courſe; but they ſo adviſe proceſſes in abſence, that defenders be not put to trouble where there is no relevant cauſe, albeit they be abſent.

The law of many civil nations hath been defective in this: the Romans did ſeldom ſo proceed; but in poſſeſſory judgments they put the purſuer in poſſeſſion, much to the ſame purpoſe as we do in ſingle reductions, wherein the implied certification is, that the defender's rights ſhall be reduced, ay and while they be produced; whereby the purſuer enjoys the fruits till he be put *in mala fide* by a reduction, and by production of a better right in that reduction: and therefore the Romans did compel defenders to compear, and did give warrant to the purſuers to bring them by force before the judge, which ſometimes they might do without a ſpecial warrant: but that is not in uſe with us, as being the occaſion of reſiſtance and breach of peace. Likewiſe the law of England gives no judgment againſt defenders abſent, as to the cauſe, (but only gives an out-lawry againſt them, whereby they loſe the benefit of law till they appear) except in caſes of treaſon

treaſon, wherein they proceed to condemn abſents, but give them a year thereafter to appear and vindicate themſelves [e].

But tho' our law proceed againſt contumacious abſents in civil matters, yet not in criminals: for there muſt be more caution, in decerning againſt the life, members, fame, or freedom of perſons, than againſt their eſtates; and therefore the Secret Council, and all criminal judges, muſt ſtop till parties be preſent. But criminal libels contain a certification, that parties cited ſhall be declared fugitives, and denounced rebels; and thereupon caption is granted. And ſometimes they are commanded to appear under the pain of treaſon, and letters of fire and ſword are given out againſt them. Yet the Parliament proceeds in matters of treaſon againſt abſents. And the criminal judges are, by a late ſtatute, authoriſed to proceed againſt abſents in treaſon for open rebellion, and bearing arms againſt the King, *cap.* 11. *Parl.* 1669 *.

XXVIII. The reaſon juſtifying the certification of being holden as confeſt, is, that it is a preſumption of law, that the defender abſents himſelf, becauſe upon his oath he dares not deny the libel. And the like reaſon is for the certification againſt writs to be declared falſe and forged; for there the law preſumes that the defender keeps them up, becauſe he knows that if they were produced, they would be proved to be falſe, and he would be remitted to the criminal judges, to be puniſhed as a forger. This certification is the great mean to ſecure the rights of the people, eſpecially land-rights: for all who by the records, or by fame, or any ſuſpicion, may be feared to pretend right, being called, are excluded for ever from making uſe of the writs againſt which ſuch a decreet of certification is extracted; which is the ſtrongeſt certification, and is ſcarce capable of reduction, or being reponed againſt, if there be no nullity, or forgery of the executions, and that recently queſtioned, for thereafter none are obliged to produce executions. But there are more eaſy remedies againſt other certifications, *viz.* by ſuſpenſion or reduction: for if probable excuſes of the contumacy be adduced, parties will be reponed to their oaths recently, before other rights proceed upon the decreet. And parties are heard againſt other decreets in abſence, of courſe, and are not put to pay the expence of the decreet or attendance, before they be heard, even tho' they pretend no excuſe for contumacy: but the conſideration of expences is reſerved to the event of the cauſe.

XXIX. By what hath been ſaid, it will be evident what is the reaſon of the name certification, *viz.* that thereby it is made known to the defender for certain, what the judges will do againſt him if he do not compear.

XXX. Formerly ſummonſes were continued, and act and letters granted for a ſecond citation, till by *cap.* 6. *Parl.* 1672, it was appointed, that inſtead thereof, there ſhould be two diets in all ſummonſes, which before uſed to be continued. Summonſes were not to be continued which were inſtantly verfied by writ **. But if they were to be proved by witneſſes, or oath of party, they were to be continued, and ſo required two citations. The ſecond citation may not be made till the term of compearance in the firſt be paſt [f].

* This act was repealed by act 31. P. 1690.
** Unleſs the matter was of importance, *Nov.* 22. 1672, *Strachan.*
[e] See above, IV. 3. 29. *et* 30. *et* 31.
[f] See above, IV. 2. 2. & and act 12. P. 1693.

TITLE XXXIX.

Proceſſes in ſo far as diſcuſt without Litiſconteſtation.

WE come now to the diſcuſſing of proceſſes, wherein the chief duty of the judge, and the intereſt of parties is concerned; for what was done before, paſſed for moſt part of courſe. But now the proceſs is conſidered, as it is called before the judge, to determine either the relevancy or probation, or both. And here is to be explained, the diſcuſſing of proceſſes without litiſconteſtation; which frequently occurs. And in this, our forms differ from the Roman law, in which no ſentence could be without litiſconteſtation: for by that term, they underſtood the purſuers deducing his cauſe before the judge, in preſence of the defender, who had power to anſwer and diſpute if he pleaſed, there being no ſentence in the cauſe till the defender appeared; and therefore they by litiſconteſtation, and by the *etymon* of the word, underſtood the parties contraverting or conteſting in a plea. But our law underſtands not the term in that ſenſe: for by litiſconteſtation, with us, is meant a judicial act of proceſs, for proving ſuch points by either party, as the judge determines to be relevant, the proving whereof, or the failing in proving of the ſame, will give a decreet condemnator or abſolvitor, without further diſpute on the relevancy, or manner of probation (for both are determined by that act.) Unleſs ſome point be emergent, or new come to knowledge before concluſion of the cauſe.

II. By acts of litiſconteſtation ſometimes one, and ſometimes both parties have terms admitted to their probation. And therefore conteſtation of pleas with us, is to be underſtood by its *etymon*; importing a warrant for either, or both parties, to adduce *conteſtes*; and *teſtes* by their native ſignification, comprehends not only witneſſes, but writs, whereby parties teſtify the truth of things contained in the writ, as well as by their depoſitions. Inſtead of this term, the Engliſh uſe the term of joining iſſue; that is, of ſettling the points, whereupon the iſſue of the proceſs will follow.

III. Proceſſes with us, are ſaid to be diſcuſt, when the relevancy thereof is determined; for the whole office of judges is in determining the juſtice and truth of pleas, or the point of fact, and the point of right ariſing from that fact; *ex facto enim jus oritur*.

IV. The Engliſh do commonly join the point of fact and right, and ſo allow witneſſes for either party upon any point they think fit, and then judge what point of right there ariſeth from the fact proved by either party. Our antient cuſtom did not allow this way in any caſe, being tenacious in this axiom, *fruſtra probatur quod probatum non relevat*, and with very good reaſon, that people ſhould not be put to the trouble and expence to adduce witneſſes, before it were determined what points would be effectual if they were teſtified; beſide that oaths ſhould not be taken in vain. And therefore a great part of our debates were, which of the parties ſhould have the benefit of probation, or be burdened to prove; for ſometimes it is a benefit to have the choice of the witneſſes, and oft times it is a burden to be neceſſitated to prove: for what the law or the judge preſumes to be true, needs no probation, and ſometimes admits no contrary probation; but where it admits contrary probation, it burdens that party to prove, againſt whom the preſumption lies. For inſtance, it is a common brocard, negatives prove themſelves; that is, they are preſumed, and need no probation: but on the contrary, *affirmanti incumbit probatio*. As to the burden or benefit of probation; whenever alledgeances to be proved were contrary, the diſpute run who ſhould be preferred to prove; as in reductions upon minority, if the defender offered

offered to prove the party when obliged was major; or if in ſpuilzies or wrongous intromiſſion, the defender offered to prove voluntary delivery or lawful poinding, or a warrant for intromiſſion, theſe alledgeances were contrary to the libel [g], or when in reductions on death-bed, the purſuer offered to prove that the defunct when he granted the right in queſtion, had contracted ſickneſs, and the defender offered to prove *liege pouſtie* and health [h]; in which conteſt, the moſt ſtrong and pregnant probation offered, was preferred; as that which was by writ or inſtrument, againſt that which was by oath or witneſſes; or that which was offered to be proved by witneſſes above all exception, and perſons of great reputation, was preferred to ordinary witneſſes. And unleſs there were great odds in pregnancy, the purſuer was preferred to the defender in alledgeances contrary to the libel; and the defender was preferred to prove his defence, contrary to the reply of the purſuer; and he in his reply was preferred to the contrary alledgeance of the defender in his duply.

V. But by more recent cuſtom, the Lords have of a long time, *ex nobili officio* preferred neither party to the proving of contrary alledgeances; but before anſwer for determining the relevancy, they have allowed either party to adduce ſo many witneſſes, to be examined upon ſuch points as the Lords found fit to be cleared, for inſtructing of the cauſe; but did not allow contrary probation, but only allowed the choice of the witneſſes to either party, and in that caſe they admitted witneſſes, though not above exception, when the point of fact was of difficile probation. Theſe acts, are therefore called acts before anſwer, and have the ſame effect as acts of litiſconteſtation; for in both, the parties muſt propone all their alledgeances, and will ordinarily get no more witneſſes but what are in the firſt diligence. And there may be in the ſame act ſome points to be proved before anſwer, and ſome to be proved *peremptoriè*, the relevancy being before diſcuſſed.

VI. There are ſeveral caſes, in which decreet may be obtained without litiſconteſtation. As, 1. When the cauſe proceeds upon ſpecial certification, as to be holden as confeſſed, if the advocate for the defender compear, and produce his client to depone, who inſtantly doth depone at the bar, if the oath be plain and clear without doubtfulneſs, the ordinary will inſtantly take the oath and adviſe it, and condemn or abſolve accordingly. Here there is no act of litiſconteſtation, nor any term taken to prove. But if the defender's advocate take a term to produce his client not appearing, there is a term aſſigned, and litiſconteſtation made.

VII. The ſecond caſe, is, in improbations, wherein the certification is, that if the writs called for be not produced, they ſhall be holden as falſe and feigned; if none compear for the defender, a decreet of certification is pronounced of courſe: or if there be compearance, and ſome writs be produced, the defender may alledge that he hath produced ſufficiently to exclude all that the purſuer hath produced, which the ordinary may preſently determine, and if he find the production ſufficient may aſſoilzie, or give the Lords anſwer; whereby if that defence be repelled, the defender may produce more writs, and the ordinary may in the ſame way determine thereanent: but the defender can make no further partial productions: otherways he might debate ſo long as he had a new document to produce; unleſs he declare he will produce no further: for then he may diſpute upon the third production; and though he do not ſo declare, yet he will get a term to produce, as if he had not produced, and yet that term is not accounted as litiſconteſtation, but it is called a term for production, albeit if nothing be produced, decreet of certification will follow and if production be made, ſo that the reaſons of reduction came to be diſputed, there rarely follows litiſconteſtation; becauſe the defenders can alledge upon no other writ, ſeeing certification is extracted *contra non producta* although production be made, unleſs the purſuer hold the production ſatisfied, or the defender declare he paſſeth from any more.

[g] See above I. 9. 19. *et* 20.

[h] See above IV. 3. 2. 6. IV. 20. 48.

more. But the purſuer is not excluded from offering to prove by other writs than his titles produced, and thereupon litiſconteſtation may be made: otherways the decreet is without litiſconteſtation; unleſs in the diſcuſſing of the reaſons of reduction, there occur points which are probable by oath or witneſſes, as preſcription part and pertinent, *&c.*

VIII. Thirdly, In ſimple reductions without improbation, the certification expreſſed or implied, is, upon the general reaſons libelled; as that the writs called for are vitiated, or are null as wanting witneſſes, or wanting the deſignation of witneſſes: and therefore, if there be no compearance, or ſufficient production to exclude the purſuers there follows a decreet without litiſconteſtation.

IX. Fourthly, If the purſuer verify his ſummons by writ, the defender being abſent, the ordinary alone can adviſe and determine; but, in caſe of difficulty, he will repreſent the caſe to the Lords, whereupon decreet will follow without litiſconteſtation. But if the defender compear, and do not propone a relevant alledgeance, decreet will alſo inſtantly follow.

X. Fifthly, In the action to inſiſt, with certification not to be heard thereafter (of which formerly, *lib.* 4. *tit.* 16.) If none compear, or compearing do not take a term to inſiſt; certification is admitted, and it is declared that the defender ſhall never be heard again in that cauſe. Which alſo is a decreet abſolviture without litiſconteſtation.

XI. Laſtly, In proceſſes where all is proved by writ produced at firſt, by either party; there is no term, nor litiſconteſtation, and little diſpute concerning the relevancy; becauſe the defender, before he produce any writs for his defence, will diſpute firſt the relevancy; and if that be ſuſtained, will then produce; and in the diſpute, there is no mention of relevancy, but the ordinary terms are, the the points alledged, or the writs produced are not to be reſpected, for ſuch reaſons.

XII. Relevancy is only diſputed, when acts of litiſconteſtation are craved, and terms to prove. The meaning of relevancy (which is more accuſtomed with us, than elſewhere) imports, the juſtice of the point, that is alledged to be relevant. But under the alledgeance that ſuch points are not relevant, the meaning is, that though the points alledged were proved, they would not juſtly infer the point deduced from them: for relevancy imports the relieving or helping the alledger: and the Engliſh mean the ſame thing, when they ſay, the plea is not good; for by goodneſs, that ſpecial kind of goodneſs, *viz.* juſtice is meant.

XIII. It will be proper here to conſider dilatory defences; the effect whereof, when they are juſt, terminates the inſtance, and gives an abſolvitor from that inſtance, without any term to prove: for all dilators muſt be inſtantly verified, and have no acts of litiſconteſtation, unleſs they be proponed *peremptoriè*; in which caſe they ceaſe to be dilators, and become peremptors; as when improbation is proponed againſt executions, if it be proponed *peremptoriè*, a term will be aſſigned to improve; and therefore dilators being common to actions that are without, and with litiſconteſtation, they are moſt proper to be handled here: ſo that there will remain for the next title, the relevancy of ſummons, exceptions, replies and duplies, and the ſpecies of them which are common to many actions: for thoſe which are proper to the ſeveral actions have been conſidered with their proper actions; as alſo their proper dilators are inſinuated in the requiſites of every action, implied or expreſſed.

XIV. The firſt common dilatory defence, comprehends all declinators, according to that common axiom in all nations, *primus actus judicii eſt judicis approbatorius*. This defence extends to all judges ſupreme and ſubordinate; but not to arbiters, who have no authority, and whoſe ſentences have legal execution only by virtue of the clauſe of regiſtration in the ſubmiſſion, and at the end of the blank on the other ſide thereof, wherein the decreet-arbitral is to be filled up: and ſo it is effectual for compelling the parties to attend the diets of the arbiters, and to obey their orders; wherein the certification is, the penalty in the

ſubmiſſion.

ſubmiſſion. But a judge-ordinary having authority, albeit it be limited; yet if the defender decline not, he becomes competent for that action; and therefore advocations ought not to be granted, where parties have proponed defences peremptory or even dilatory, if the ſame be not proponed *after* [z], or at leaſt with declinator. But here we are only to conſider declinators againſt the Seſſion, or members thereof. Declinators from the members of the Seſſion, are not competent upon account of the clerks; becauſe they are but ſervants, and muſt be under the command and over-ruling of the Lords, and even under command of the ordinaries, in that which is proper to their charge. There is more reaſon of declinator of clerks in inferior courts, where there is but one judge, and commonly the clerk has a great influence; and therefore, if he be declined, the judge may ſubſtitute another for that action.

The declinators againſt particular Lords of Seſſion, are determined by two ſtatutes, as to affinity or conſanguinity. The firſt is, *cap.* 216. *Parl.* 1594, bearing, "That no Senator of the College of Juſtice, ſhall ſit or vote, in any acti-" on or cauſe, where the purſuer or defender is either his father, brother, or ſon, " but be declined therein." The other ſtatute is, *cap.* 13. *Parl.* 1681, whereby declinators of the Lords are extended to theſe degrees of affinity, as well as conſanguinity, ſo that a Lord cannot ſit or vote, where the purſuer or defender is either his father-in-law, brother-in-law, or ſon-in-law; nor yet where he is uncle or nephew. And theſe declinators are extended to all other judicatures. But affinity to the wives or huſbands of uncles, aunts, nephews or nieces, affords no declinator, but under father is comprehended grand-father, or great-grand-father, *&c.*

It is a competent reply againſt all theſe declinators, that the judge declined is of equal relation to either party: for then the ground of ſuſpicion upon inequality of affection ceaſeth.

Declinators are alſo competent againſt a particular Lord, upon other common grounds; as if he be intereſted in the cauſe, or even *ſi foveat conſimilem cauſam*, if he have the like cauſe depending; or if he hath given partial counſel in the cauſe, by inſtigating the plea, giving poſitive advice in law, or being preſent at conſultations in the cauſe. But it doth give no ground of declinator, if a party inform any of the Lords before intenting the cauſe, and he diſſuade him from intenting it, and tell him that it is not juſt, legal, or not honourable; or if judicially in exercing his office, he do poſitively offer what may be ſuſtained, though it be not propoſed, whether it be *in jure* or *in facto*, by ſhewing that the alledgeance as proponed is not relevant, but might be relevant in ſuch other terms.

Declinators are not competent againſt any of the Lords upon pretence of enmity, hatred, or prejudice againſt either party: for the Lords are ſuppoſed to be men of greater virtue, than to entertain ſuch: for they muſt ſpeak to any of the King's lieges, who come before them in their office; and none may refuſe to ſpeak to them in exerciſing the ſame, or ſhow any token of diſreſpect or prejudice, by murmuring againſt their judicial actings, which is puniſhable by the Inſtitution of the College of Juſtice.

Declinators are alſo competent againſt ſeveral Lords, ordinary or extraordinary, by act of Sederunt, 6th *Nov.* 1677, if they have received or heard any ſollicitation, or verbal information in the cauſe, during the dependence thereof; or if any miſſive letter be offered, if they read the ſame before they preſent it to the Lords; if they did not uſe all means they could to ſtop or withdraw from hearing any further thereof, except in the verbal informations of parties, or other perſons for them, required or allowed judicially; or before auditors in diets appointed for both parties to be heard; or before ordinaries upon the bills in paſſing of bills; or in caſe of accommodation by conſent or order of the Lords. And likewiſe the Lords, by a late act of Sederunt, 11th *Nov.* 1690, have obliged themſelves upon their honour, to obſerve that act, though they be not declined; and this they do ſubſcribe every Seſſion; which now is much more eaſy to be obſerved, ſeeing (*by act of Sede-*

[z] F. before.

runt, 29th *Nov.* 1690,) all informations and bills relating to interlocutors given, or to be given, are conveyed to the Lords, by boxes placed in the Seſſion-houſe, having ſlits, at which the ſame may be put in, but cannot be taken out, but by the ſeveral Lords themſelves.

Declinators againſt the whole Lords, is upon the limitations of their juriſdiction, which are all ſet down at large, *tit.* 1. of this fourth book.

XV. The ſecond branch of common dilators, is, upon the incompetency of diſcuſſing the cauſe *hoc ordine*, which differs from the defence againſt relevancy: for a proceſs may be juſt, and yet not competent in the way propoſed; as in all cauſes where declarator muſt preceed an action petitory, all petitory actions thereupon are incompetent, till declarator preceed. All the titles upon declarators above explained do ſhew, what are theſe actions petitory, which declarators muſt preceed; and therefore there are as many dilators upon incompetency, as are the declarators in theſe titles. In theſe titles there is no declarator inſiſted in, but what muſt preceed a petitory action, and not other declarators: for there is no right, but is capable of declarator.

XVI. The third branch of dilators, is upon the executions, and upon all the formalities required therein. And, 1. Upon the common formalities of ordinary ſummons, which are contained in the preceeding title; any of which being omitted, affords a dilatory defence. As if the executions of ſummons have not witneſſes deſigned; it is a dilatory excluding proceſs; or if the deſignation be too general, it muſt be made more ſpecial, that it may be capable of improbation, which is of that moment, that if the verity of the executions be improven, it will annul the decreet following upon ſuch executions, albeit it be a decreet *in foro contradictorio*: or if the executor and witneſſes ſubſcribe not, after the act appointing the ſame to be ſo ſubſcribed; in which the witneſſes muſt be ſo deſigned, as they may be found out.

And, ſecondly, Any of the ſolemnities requiſite in executions, being proved not to be true; it is a forgery, and is not a falſe aſſertion only, which many times is no forgery: for what is aſſerted in writs, though it be not true, makes not the writ falſe as forged; but it is not ſo in executions; for thereby the meſſengers, or other executors forge or make up executions, which they never did act; as if their executions bear to be done at the dwelling-houſe, becauſe the executor could not find the party perſonally, if it be proved, that there was patent acceſs to the party without cloſs doors or gates, or that upon the knocking they were opened, and yet the execution was not made by giving a copy to the party, or to ſome of his domeſticks; or if it bear that the party was perſonally apprehended, and a copy given, or offered and refuſed; or if it bear that the executor knocked, when yet the doors or gates were patent; or if it bear ſix knocks given, when yet ſo many were not given, or if they were not audibly given; or if it bear a copy left and affixed upon the moſt patent door, when yet it was not ſo affixed and left, but that either it was not affixed, but put in the hole of a lock, that there might be no veſtige of it, or being affixed, it was not left, but taken away in the view of the executor and witneſſes; or if the day of executing be not true; or if the oyeſſes at the market-croſs be not audible; or if the reading of the ſummons, and affixing copies on the croſs be not true, and ſo at the Pier of Leith; theſe, or any of theſe being found not true, make the executors forgers, and the witneſſes acceſſory, and do turn the decreets albeit *in foro* unto libels; wherein the reply of competent and omitted is not receivable, unleſs they be proponed and ſuſtained *peremptorie*; becauſe, being proponed *dilatorie*, they could not then be proved.

But, thirdly, If the competent days be not given by the execution, till the day of compearance, it is a ſufficient dilator. But if it be paſt over, it cannot annul the following decreet, becauſe it was competent and omitted; and when parties do appear, albeit the days be not full, they do not ſtick at it, if the difference

ference be ſmall, or if they do, the Lords may over-rule it; and yet it will be no nullity: for theſe formalities in proceſs, make only nullities, when the Lords give no interlocutor, but they paſs of courſe, and are left to the diligence of parties and their advocates, as when any point neceſſary to be proved, is not proved, or when the extracted decreet is not conform to the minutes, when recently queſtioned. The competent days are not to be reckoned by the privilege of ſummons, unleſs they have a competent privilege: for any other privilege of time is *periculo petentium*, as was formerly ſhown.

And, laſtly, dilators do ariſe from the number of citations, *viz.* Where all is proved by writ or by preſumption, there needs but one citation; but if the probation be by oath, or witneſſes, there muſt be two citations.

XVII. The fourth branch of dilators, is upon the not production of the titles requiſite to be produced *in initio litis*, as is declared in the former title; wherein is ſhown what may be produced *cum proceſſu*, which therefore affords a reply to that dilator.

XVIII. The laſt branch of dilators, is, that the date of theſe titles that muſt be produced *ab initio*, is poſterior to the citation; for the deſign of citations is not only to give time, that parties may come to the place of judicature, but that they may prepare themſelves to defend, and conſider whether they will ſatisfy or plea; for if they offer due ſatisfaction, though it be refuſed, they eſcape expences of plea.

TITLE XL.

Diſcuſſing of ordinary Actions, till final Sentence, or till Litiſcontеſtation.

ORDINARY actions are here meaned, in oppoſition to ſuſpenſions or reductions of decreets, which are to be conſidered after decreets; and ſo advocations are here to be comprehended. The reaſons of advocation, and the exceptions againſt the ſame, are treated of *lib.* 4. *tit.* 38. which relates only to them, as the cauſe is advocated, but not as to the cauſe itſelf; for when it is advocated, it proceeds as any other action in the firſt inſtance.

II. The manner of diſcuſſing advocations is thus. When an advocation is called by the roll, the defender in the advocation produces the copy of the advocation, formerly called by the clerk; and craves a proteſtation and remit; that is, that he may have a ſentence of the Lords, remitting the cauſe to the court from which it was advocated. And if there be no appearance for the raiſer of the advocation, proteſtation and remit is granted of courſe; without conſideration, whether the reaſons of advocation were inſtructed, or not; which is a kind of decreet-abſolvitor. And this proteſtation contains fifteen pounds Scots to be paid, which is the ordinary expences; but if there be extraordinary litigiouſneſs, and no probable ground, the Lords may, and ſometimes do, add further expences.

III. If the raiſer of the advocation compear, he repeats his reaſons of advocation, which muſt be in writ, and if they be not in the body of the advocation, they are added in a paper a-part. And he ought to mention what reaſon he inſiſts on, for he may choice what order he will follow in his reaſons. If the ordinary find not the reaſons inſiſted on relevant, and inſtructed, he will remit the cauſe. But he will allow no term to inſtruct the reaſon: for in this part of the proceſs, there are no terms to prove, but all muſt be inſtantly verified. And albeit teſtificates will not prove in the principal cauſe, they will inſtruct reaſons of advocation; where the ſuſpicion of the inequality of the judge, on any account, is ground enough to call the proceſs from him. And ſo the ordinary proceeds in the ſeveral reaſons, and ſhould not allow the other party to anſwer ſuch reaſons as he

ſees

ſees clearly are not relevant. And when he finds any reaſon relevant and inſtructed, he requires the other party to anſwer, and ſo determines; and he ſeldom reports, the matter being ſo ordinary, and of ſo ſmall moment. If he ſuſtain a reaſon as relevant and inſtructed, he then advocates the cauſe; whereupon there uſed an act to be extracted, before the act of regulations; and till that were done, there was no further proceſs: but now, the ordinary ought immediately to proceed to the principal cauſe; in the ſame way, as if the principal cauſe had been raiſed before the Lords in the firſt inſtance. So there is no more ſpeciality in diſcuſſing of advocations.

IV. By the diſcuſſing of cauſes, is here underſtood the bringing them to a decreet, or act of litiſconteſtation; by which act the points to be proved by either party are fixed and determined, that according as theſe points ſhall be proved or not proved, decreet condemnator or abſolvitor will follow, without any further diſpute as to relevancy, unleſs ſome point emergent, or new come to knowledge, be repreſented by bill. But if the Lords find not the bill to be relevant and competent, it ought to be inſtantly rejected without an anſwer; yet if the point propoſed be dubious, or do contain pregnant grounds of law, tho' no new point of fact, with ſome excuſes of not proponing theſe alledgeances before extracting of litiſconteſtation, and which do, at leaſt indirectly, debate againſt the juſtice of the interlocutor, (wherein there is ordinarily much keenneſs and clamour expreſſed, and if there be any impertinent reflection, the Lords will call and cenſure the drawer of the bill, and will appoint ſuch words to be expunged) the Lords will either refuſe the bill, or pitch upon the points they think deſerve hearing, and will remit to the ordinary who heard the cauſe, to hear the parties on theſe points. But now they do not admit written anſwers, which take up ſo much time, and ſo ſwell decreets with impertinent clamour, unleſs the bill relate to interlocutors upon hearing *in præſentia*, and then they ordain the other parties to anſwer: but they either refuſe the bill, if they ſee cauſe, or pitch on the points they think deſerve hearing, and appoint the parties to be heard *in præſentia* thereupon; but do not change the interlocutor till new hearing. But if, upon the new debate, the Lords be not generally convinced, they will not alter by the mere plurality; otherwiſe there could never be certainty in acts of litiſconteſtation. For ſuppoſe one *quorum* have determined *pro*, and another *quorum* of different members determine *contra*, carrying the point by a vote or two, parties would ever watch their opportunity, as they conceived the Lords of the ſeveral Sederunts to favour them, and would never miſs to preſs new clamorous bills, to obtain an alteration, and ſo a third Sederunt might make a ſecond alteration, and ſo forth; ſo that juſtice could not be diſpatched: and therefore the firſt vote, when no party could make a choice, is always to be ſuſtained, unleſs a new *quorum* do generally alter; which will rarely occur, but when it doth occur, the Lords ought to concur in it; for they do not own an infallibility of their judgment, nor ſhould they ever prefer their honour (in that they ſaw not ſo much at firſt as at laſt) to juſtice, which ſhould ſtill have place till the laſt ſtroke of juſtice be given, by a formal decreet *in foro contradictorio*, which the Lords have no authority to recal, becauſe of that great and univerſal law, abſolutely neceſſary for the ſecurity and quiet of nations, that in every well governed commonwealth, there muſt be ſome definitive ſentence, which muſt ſeclude all fear or ſuſpicion of being alterable, or even to come to a new diſpute upon the matter, but that the opponing of that ſentence, without ſaying further, muſt be *hic murus ahæneus eſto*[a].

V. To prevent the inconvenience of altering interlocutors, the Lords are accuſtomed, immediately upon the hearing of a cauſe in the outer-houſe, to call in a dubious and nice debateable point to be determined in their preſence. And if after interlocutor, they find probability of alteration, upon repreſentation by bill, they alſo call the ſame in their preſence. And if, after all, the matter be very dubious and important, as a leading caſe, whereof full informations have been given to

[a] See above, IV. 1. 46.

to all the Lords, they determine it when all are preſent, except the ordinary upon the bench. But after the ſecond hearing in preſence, there having been a former hearing in the outer-houſe, they will not permit lawyers to urge for an interlocutor of the whole houſe, but only when it is *ex proprio motu*, leaſt a difference of decreets *in foro* ſhould on that head be introduced, whereby few would acquieſce, but in ſuch a determination; which could not poſſibly diſpatch the affairs of a nation.

VI. Therefore the Lords ought not to admit any alteration of acts of litiſconteſtation orderly extracted, upon new arguments of law, unleſs at a diet of proceſs when the other party is obliged to attend, that the party may furniſh the beſt lawyers he pleaſeth to chuſe. But if new matter of fact be repreſented by bill, after the act of litiſconteſtation is extracted, the Lords will reject the ſame in that way; yet if they find the point propoſed relevant, they will allow that party to raiſe reduction of the act of litiſconteſtation, that the other may be obliged to attend, and inform his advocates of the matter of fact; which reductions are always taken in ſo ſoon as they are called, after the term of compearance, and do not go to the roll, becauſe they are but incidents acceſſory to the principal cauſe.

VII. When the Lords ſee fit not to prefer one party, in chuſing the witneſſes for probation, they do, *ex officio*, before anſwer to the relevancy, allow witneſſes to be examined *hinc inde*, upon ſuch points as the Lords think fit to be proved, and then there is extracted an act before anſwer, and the diſpute upon the relevancy is reſerved till the adviſing of the probation *. Such acts have the ſame effect as acts of litiſconteſtation, and are only to be determined *in præſentia*; but they ſhould not be inrolled amongſt concluded cauſes by ordinary acts upon litiſconteſtation, for which Saturday is proper; and the determining one act before anſwer might conſume ſeveral Saturdays, if both relevancy and probation were to be determined together: and therefore ſuch actions ought be inrolled in the ordinary roll for the inner-houſe, ſo ſoon as the probation is cloſed, and a great aviſandum made for that purpoſe.

VIII. Litiſconteſtation is accounted as a judicial contract betwixt parties, when it is upon compearance; yea, it is eſteemed as a tranſaction, whereby parties agree, that the cauſe ſhall have its event, according as the points contained in the act ſhall be proved or not proved: and therefore there can be no more litiſconteſtations, or terms for probation but one, in the ſame cauſe. And to prevent alterations upon emergencies, diligences are given out before the acts be extracted, that any alteration occurring may be inſert therein. This is requiſite to terminate pleas, becauſe defenders, or parties appearing for their intereſt, may paſs from their compearance, before they enter into litiſconteſtation, if they pleaſe, as well as they may forbear to appear upon citation, and ſuffer a decreet in abſence, wherein litiſconteſtation is made *parte non comparente*: and therefore they may propone all dilatory defences, or may diſpute againſt the relevancy or competency of the libel; but with this difference, that when they do not appear in the firſt inſtance, they may in the ſecond inſtance propone all defences dilatory and peremptory, but when they do appear, they cannot again propone the defences which were repelled before they paſt from compearance; and therefore the act of regulations appoints theſe points which were decided, to be inſert in the decreet, albeit the parties paſs from their compearance.

IX. Litiſconteſtation is made, not only when the defender appeareth, but alſo when he appears not. And if the purſuer do not inſtantly prove his libel, he takes a term to prove the ſame, which by our ſtile is called litiſconteſtation *reo abſente*, or *parte non comparente*. So litiſconteſtation does not import with us a conteſting or debating, but a taking a term to prove by the teſtimony of witneſſes writ or oath; all which come under the name of teſtimony.

* By the preſent practice proofs are generally allowed by acts before anſwer; and acts of litiſconteſtation are ſeldom pronounced.

When litiſconteſtation is thus made, if it be in an action that hath a fixed tenor, it paſſeth of courſe at the firſt calling by the clerks; but if it be a circumſtantiate action *præſcriptis verbis*, the clerks ought to report it to the Lords, who if they find it not relevant, will give no decreet upon it: and tho' they find it relevant and inſtructed, yet in the ſecond inſtance, they will allow the relevancy to be diſputed again, and the probation to be re-conſidered, becauſe it paſt *parte inaudita*; and therefore may be altered, either upon matter of fact, or arguments of law.

X. Nothing does more retard juſtice, and bring the Lords and lieges greater trouble, than the multiplicity of bills: for there be few things to be done, but what have an ordinary courſe to be diſpatched *vivâ voce*. But the inadvertence of ſome, and the litigiouſneſs of others, make them forbear to acquieſce in, and extract acts of litiſconteſtation, of deſign that the matter may be forgot, and then they bring all over by bills; whereby the Lords are neceſſitated to read what hath formerly paſſed, and upon what grounds, as contained in the minutes; eſpecially where the parties in their bills and anſwers differ in their relation of the caſe, as to what hath preceeded; whereby they become ſo large, that they require far more time, than if nothing had been ſaid or done, and are very expenſive to the lieges, by cauſing write over ſo many large informations. But which is yet worſe, bills are oft-times drawn by unſkilful agents, mendicating the hands of advocates thereto, wherein ſuch undigeſted ſtuff is multiplied, as none would have impudence to offer at the bar, wherein fact and law is jumbled together, without diſtinct propoſal of points of fact inſtructed, or to be proved, as they behoved to propone at the bar: ſo that the Lords are neceſſitated to gather the matter out of that maſs, wherewith there are mixed long narrations and alledgeances, neither true nor competent to be proved. And beſides this, when an ordinary gives the Lords anſwer to a point, both the informations before the interlocutor, and the bills after, repeat all pretended to have been ſaid at the bar, repeating interlocutors unfaithfully.

For preventing theſe inconveniences, the ordinary ought to cauſe write diſtinctly, the point whereupon he gives the Lords anſwer, and the clerk of the proceſs ſhould be ſtrictly prohibited to read any bill, but that which hath been delivered to him the night before; and no other clerk ſhould read bills relating to proceſſes, except the clerk of the proceſs, who ſhould peruſe the bill the night he receives it, and ſhould be peremptorily injoined, that if the bill be for altering any interlocutor, and if the interlocutor be not expreſſed truly therein, he ſhould not read it till that be amended *: for it makes a great ſtop in the Lords procedure, to call for the proceſs, and read the interlocutor, which the clerk alone may do. And if there be any new matter of fact proponed in the bill, that was not determined by a prior interlocutor, the clerk ſhould not read the bill, but return it back to be amended, until the point of fact be ſet down by itſelf, in greater characters, bearing expreſsly, that the alledger either ſhows that the ſame is inſtructed by the writs produced, and marked by figures or letters at the clauſes inſtructing the ſame, or otherways offer to prove the ſame, condeſcending upon the manner of probation; adding to the point of fact the arguments to inforce it: and if there be more points, that they be ſet down ſeverally, with their reaſons as aforeſaid **. By this order the clerk ſuffers no prejudice, having the ſame benefit for reading the bill, when orderly, as when diſorderly, and the Lords can much ſooner and clearlier determine the points of fact propoſed.

XI. By

* Copies of the interlocutor's complained of, are appointed by act of Sederunt, 13th November 1691, to be produced with every reclaiming petition.

** An act of Sederunt was made, 6th February 1692, directing petitions and informations, to be arranged in the manner here propoſed, which was renewed, 19th December 1710; and advocates appointed to ſign all petitions anſwers and informations, which is again appointed 15th June 1738, and the advocate is declared anſwerable, for whatever is contained in papers ſigned by him.

XI. By theſe means, the loſs of time and trouble by bills may be much prevented. And by the acts of Sederunt, *November* 4. 1686, and *July* 7. 1691, the ordinary in the outer-houſe, and he only, is not only allowed, but ordained to ſit in the outer-houſe the week immediately following his proper week, from nine a clock in winter, and from half nine in ſummer, till that week's ordinary come out, that he may hear any parties, who make application for ſtopping or altering any ſentence, given by him in his week; providing the alledgeances be delivered to him in writ, that if he find them altogether irrelevant, he may refuſe the ſame; and if he reſolve to hear them, he is to give the copy of them to the clerk, to be ſhown to the other party, that he may be in readineſs when called. And the clerks are ordained to affix a roll of theſe orders given to them for hearing of the ſaids cauſes. And after that week, the ordinary is allowed to hear parties at the ſide-bar, upon the alledgeances preſented, as aforeſaid *, being preſented within ſix days after the date of the ſentence craved to be ſtopped or altered, a copy being given to the other party, and the cauſe affixed on the wall as aforeſaid, conform to the act of Sederunt, November 7. 1690, whereby all ſtops thereafter, are prohibited to be granted by the ordinary: albeit theſe acts do not exclude the Lords *in præſentia*, the chancellor or preſident to ſtop ſentences after theſe days are elapſed, that there might be place for extraordinary caſes. But after the ordinary's time of ſitting in the outer-houſe is elapſed, and ſix Sederunt days after any act, proteſtation or decreet; the ordinary cannot then help the parties **, unleſs upon a bill, the Lords remit a point to him to be heard: or if any alledgeance be inconſiſtent with the Lords interlocutor upon report, the ordinary cannot hear nor report; unleſs it be remitted to him upon a bill. And there is no injury can be pretended, though after elapſe of theſe days, there were admitted no further hearing: for by the general cuſtom of moſt civil nations, there is no place for interpoſing appeals, if they be not offered within ten days, after pronouncing the ſentence appealed from, whether definitive or interlocutory; for then the law preſumes, that parties have acquieſced. And by our antient ſtatute, allowing appeals or falſing of dooms, they were only allowed immediately at pronouncing of ſentences. Upon which grounds, decreets by ordinaries have the ſame effect as decreets *in præſentia*; becauſe acquieſcence is preſumed, if application be not made as aforeſaid, within ſix days after pronouncing of the ſentence craved to be altered. Yet the Lords do rather amerciate the parties in fines, to be applied to the poor, for not proponing their alledgeances in due time, and do then hear them.

XII. To come now to the particular points, upon which litiſconteſtation may be made, which is only where ſome point is admitted to probation. If the purſuer inſtruct his libel *inſtanter*, or if the defender do inſtantly inſtruct his exception, *&c.* there is no litiſconteſtation, albeit the exception doth not import the verity of the libel; but if any point be admitted to probation, for any party, litiſconteſtation is made, even though it be by an act before anſwer, which may be many different ways.

Firſt, If the defender be abſent, or paſs from his compearance, and if the purſuer crave a term to prove his libel; litiſconteſtation is thereby made. But if the defender compear and propone only dilators, or objections, but doth not paſs from his compearance, and either propones no peremptory exception, or the ſame is not found relevant and competent; the decreet following is a decreet *in foro contradictorio*, as well as when peremptory defences are ſuſtained, and the defender hath

* The regulations now obſerved as to the ſide-bars, were eſtabliſhed by act of Sederunt, 6th June 1733, and 5th June 1734, and the time of putting up rolls for the ſide-bars, is appointed by acts of Sederunt, 25th November 1738, and 23d November 1752. See above IV. 2. 11. 8.

** By act of Sederunt 11th November 1708, verbal ſtops are diſcharged and written ſtops can only be granted on repreſentations. And by act of Sederunt 16th February 1723, the time allowed for repreſenting to the Lord ordinary, againſt any interlocutor, is limited to ten Sederunt days.

hath ſuccumbed in not proving the ſame. But if he paſs from his compearance, before he propone a peremptor, albeit he cannot in the ſecond inſtance make uſe of peremptors, which he then had in his power, and *dclosè* omitted; yet albeit he knew of a relevant defence, but had not the writs for proving thereof in his power, he might prudently and innocently rather paſs from his compearance, than propone a relevant exception, whereof he was not ſecure in the probation; becauſe he could not obtain an incident diligence for production of his own writs, which for the preſent might be a-miſſing, or out of his power; and therefore he might give way; and let the purſuer attain his intent, whereby he might be neceſſitated to pay, or by ſuffering the purſuer to attain or retain poſſeſſion, loſe the profits for a time, rather than ſuccumbing in probation, loſe the cauſe for ever; in which caſe his paſſing from his compearance is ſufficient evidence of his not acquieſcence.

Secondly, If the defender propone a relevant exception, importing the verity of the libel, but *yet* eliding and excluding the ſame, and for which he gets a term to prove; litiſconteſtation is made upon the exception only, which, if proved, will aſſoilzie the defender. And there are many ſuch exceptions, as if the defender propone payment, he acknowledges the debt, which the purſuer needs not prove; unleſs the defender do expreſsly propone that he paid *indebite per errorem*, which if he do not inſtantly verify, that it was *indebite ſolutum*, or at leaſt by the purſuer's oath, the alledgeance of *indebite ſolutum* ſhould be repelled, and only reſerved to reduction; becauſe it might make a general pretence of delay: and therefore improbation by exception, is not admitted without conſigning a conſiderable ſum for an amand, in caſe the proponer ſuccumb; and the alledgeance of *indebite ſolutum* ſhould not be otherwiſe received by exception. And in a purſuit of ſpuilzie, the exception of lawful poinding acknowledges the libel, in ſo ſo far, that the defender intromitted with the goods in queſtion; yet defenders do frequently deny the libel *quoad* the prices and quantities, which therefore the purſuer muſt prove. And it hath been ſometimes contended, that even where the defence imports not the verity of the libel, unleſs the defender deny the libel, he is underſtood not to controvert it; yet of a long time that hath not been ſuſtained, but the decreet hath been found null for want of neceſſary probation. But if the defence acknowledge the verity of the fact libelled; and if the defender deny not the prices, he is underſtood to acquieſce in them, and the purſuer's not proving thereof, will not annul the decreet; but if he deny the ſame expreſsly, the purſuer muſt prove it.

Thirdly, If the defender propone a relevant exception, which doth not import the verity of the libel, a term is aſſigned to the purſuer to prove the libel, and the ſame term to the defender to prove the exception; and if the purſuer take a long term to prove the libel, he cannot refuſe the ſame for proving the exception. For inſtance, if the defender propone compenſation, or a general diſcharge; theſe, or the like, do not acknowledge the verity of the libel, nor are they contrary thereto, but both are conſiſtent to be true.

Fourthly, If an exception be proponed acknowledging the libel, the purſuer may propone a relevant reply, importing the verity of that defence, and then litiſconteſtation is only made upon the reply, and the event of the cauſe depends upon the proving or ſuccumbing in it, and the purſuer may take as long a term to prove his reply as he pleaſes: yea, many points will be competent to him by reply, which would not be competent to the defender by exception; becauſe the purſuer is not preſumed to reply *animo differendi*, as the defender is ſuſpected to do: and therefore inhibition, interdiction, and other reaſons of reduction, will be ſuſtained by reply, though not by exception; yet not always, for where there muſt be a production ſatisfied, and ſuperiors and authors cited, it cannot be by reply.

Fifthly, As many defences may be relevant, and do not acknowledge the libel; ſo replies may be relevant, which do not acknowledge the verity of the exception

exception: and therefore a term muſt be aſſigned to the defender to prove the exception, and to the purſuer to prove the reply. But if the exception acknowledge the libel, if the defender ſuccumb in probation thereof, the purſuer will prevail, though he neither prove the libel nor reply; yet the ſame term is aſſigned, for proving both the exception and reply: becauſe otherways it would protract the proceſs, and diſorder the form of litiſconteſtation. But if the term be circumduced againſt the defender, the purſuer prevails, and the defender cannot urge the circumduction of the term againſt the purſuer, unleſs he adduce ſome probation of his defence.

Sixthly, If neither the exception acknowledge the libel, nor the reply the exception; then a term will be aſſigned for proving all the three: but if the term be circumduced againſt the purſuer for not proving the libel, the defender will be aſſoilzied; or if the purſuer adduce probation, and the defender ſuccumb, he will be decerned, though the purſuer's reply be not proved; and if the defence and exception be proved, yet if the purſuer ſuccumb in the reply, the defender will be aſſoilzied.

Seventhly, Litiſconteſtation may be made upon the duply only, if the exception acknowledge the libel, and the reply acknowledge the exception. But litiſconteſtation may be ſo made, as neither the exception acknowledgeth the libel, nor the reply the exception, nor the duply the reply; and then a term will be aſſigned to the purſuer to prove the libel and reply, and to the defender to prove the exception and duply: but if the purſuer ſuccumb in proving the libel, by circumduction of the term, the defender is aſſoilzied by the ordinary; but if he adduce probation, if the term be circumduced againſt the defender for not proving the exception, he is in the ſame manner decerned; and if both prove, yet if the purſuer ſuccumb by circumduction of the term for not proving the reply, the defender is aſſoilzied; and if all the three be proved, yet if the defender ſuccumb in the duply, he will be decerned; and the like holdeth, if there be a triply and quadruply. If probation be adduced, the ordinary cannot adviſe it; but if writs having no contingency or probability to prove, be offered, the ordinary may reject them, and circumduce the term.

XIII. Having thus cleared the form of litiſconteſtation, it remains that we conſider the matter thereof, which would be almoſt inſuperable, if we ſhould condeſcend upon all the relevant exceptions, replies and duplies, which might be admitted, and the irrelevant which might be repelled: but it will be neceſſary to conſider theſe, which are common to all or many actions; for we have already conſidered the prime peculiar exceptions and replies, with the particular actions wherein they are competent, which preceed decreets, and ſhall conſider the ſame as to actions executive of decreets, and ſuſpenſive of them.

XIV. Exceptions are ſo termed by the Roman law, from the formulæ of actions in that law, and the edicts of the Prætors, which, if they did bear conditions, not to hold in ſuch caſes, theſe conditions were thence called exceptions. They were alſo called preſcriptions; becauſe they were not competent, but when they were preſcribed by the law, or by the Prætor; but that term is now otherwiſe reſtricted. But ſtill the term exception is retained, though not for the former reaſon, but becauſe all proceſſes proceed upon the rules of law, which have many fallacies and exceptions; and therefore, whenſoever the preſumption of verity is on the part of the purſuer, he needs not otherwiſe prove, but obtains his decreet upon preſumption; as when declaratory actions proceed upon negatives, which prove themſelves, that is, are proved by preſumption alone; yet there is place to a ſtronger probation on the part of the defender, which therefore is the exception of that general rule. And as the exception is to the libel, ſo is the reply to the exception, and the duply to the reply: for ſtill the preſumption or probability of the alledgeance, being ſtronger for the one party than the other, doth either exclude the other from any probation, or at leaſt lay the burden of the probation upon the other.

XV. A defence is a general name, comprehending all alledgeances, which may defend defenders, whether they be dilatory or peremptory defences. And they comprehend both objections againſt libels and exceptions. Objections do reject the libel, and conſiſt only in negatives, ſhowing ſomething to be wanting, for attaining the concluſion libelled: ſuch as theſe; the want of a ſufficient title; or the want of a legal order of citation; or that all parties neceſſary to be called are not cited; or that the libel is not relevant; that is, that the premiſes do not infer the concluſion to be juſt according to law; or that the matter therein contained is not competent to be purſued in that way. But exceptions are always poſitive alledgeances, ſuppoſing the ſufficiency of the libel.

A reply doth in the ſame way differ from objections againſt the relevancy or competency of an exception: for it muſt be a poſitive alledgeance, ſuppoſing the exception to be relevant and competent, if it were not excluded by a poſitive probation eliding the ſame: and ſo is the duply in reſpect of the reply, *&c.* but though in other ordinary diſputes, any anſwer is called an exception, and any anſwer to that anſwer is called a reply (and ſo unſkilful pleaders or clerks argue or conceive diſputes in that way) yet legal diſputes require another accuracy; and therefore nothing ſhould be called an exception, but what is a poſitive alledgeance eliding a libel, nor ſhould any thing be called a reply, but a poſitive alledgeance eliding the exception; but all other arguings ſhould be expreſſed by the terms of alledgeances and mutual anſwers.

XVI. The firſt and moſt common exception in all proceſſes, is *exceptio rei judicatæ*, that the controverſy is already decided, by a competent judge; which is relevant, albeit it were a decreet of an inferior court, which, if it have no evident nullity, is relevant till it be reduced. Neither is the nullity a reply, but an objection ariſing from what appears in the decreet; for if it be a nullity appearing from the proceſs and minutes, it cannot be inſiſted in till theſe be called for and produced in a reduction.

Res judicata is relevant, not only being a decreet between the purſuer and the defender; but it is ſufficient, if it was between their predeceſſors or authors.

But the exception *rei judicatæ* muſt not only be, that the decreet had the ſame concluſion; but alſo, that it proceeded upon the ſame *media concludendi*, if the decreet was an abſolvitor: for though abſolvitor was pronounced againſt a purſuer; it could not hinder him to inſiſt for the ſame concluſion upon a different medium, in which caſe competent and omitted takes no place, but only in decreets condemnatory *in foro contradictorio*. So he who purſues a reduction of any decreet or other right, may raiſe as many actions, as there are relevant reaſons [a]: but he cannot multiply ſuſpenſions upon different reaſons, which were competent the time of the decreet. This might be a reaſonable ground for a ſtatute, to exclude purſuers from multiplying proceſſes, upon mediums competent and known the time of the firſt proceſs; and to appoint that all the mediums might be libelled in the firſt proceſs, and inſiſted in together, as well as many defences or reaſons of ſuſpenſions muſt be inſiſted in together; or elſe what was competent and omitted ſhould be loſt. But now there is no other remedy, but that if there be ſuch multiplication of actions upon different *media*, the purſuer ſuccumbing ſhould be condemned in large expences.

XVII. It is a relevant reply againſt the exception *rei judicatæ*, that the decreet whereby the matter was judged, is reduced or renounced. But if it be alledged only to be under reduction, unleſs the production be ſatisfied, ſo that the reaſons of reduction may be repeated, it will not be ſuſtained by reply.

XVIII. The ſecond common exception is *exceptio litiſconteſtatæ*: for litiſconteſtation being as a contract or tranſaction between parties, either party hath the benefit of it; and neither party can reſile from it; and therefore, if either party inſiſt in another action, the other may except upon the litiſconteſtation, whether made in the ſame court or another, even though inferior. And albeit iniquity had

[a] See below, IV. 52. 2.

had been committed therein; yet the habile way of remedying it, were by advocation or reduction. But the defender in the new cauſe, may at his option uſe this exception or not; becauſe the other party having diſowned that mutual contract by litiſconteſtation, he cannot be obliged thereby, and yet if he pleaſe, he can compel the other to ſtand to it.

XIX. This exception may rather appear to be a dilatory than a peremptory defence, and ſo not to have a term to prove: and indeed it is not *peremptoria litis et cauſæ*, becauſe it hinders not the party to inſiſt in that litiſconteſtation; neither yet is it only *peremptoria inſtantiæ*, which is proper to dilators, whereby there muſt be new ſummons, but no new ſummons can in this caſe be uſed without mutual conſent, but only the old, wherein litiſconteſtation was made.

XX. The third common exception is preſcription, which is largely treated, *lib.* 1. *tit* 12. to which there needs no more here be added, but that which is proper to be in litiſconteſtation, as a common exception againſt all purſuits, *viz.* the preſcription of forty years, which is our longeſt preſcription. And it hath a two-fold conſideration; the one is, as it excludes all title and action upon rights, if there hath been neither poſſeſſion nor proceſs within forty years: and therefore may be proponed negative without alledging forty years poſſeſſion in the defender, and ſo it proves itſelf, unleſs the purſuer propone interruption, which doth elide the preſcription; ſo that, in neither caſe, there is a term to be aſſigned to prove the preſcription. The other conſideration of preſcription, is, as it eſtabliſheth and compleateth a right by forty years poſſeſſion uninterrupted; and being ſo propoſed, the poſſeſſion muſt be proved to have been ſo long. And though it be not proved to have continued every quarter, month, or year: yet ordinary poſſeſſion will be ſufficient *ad victoriam cauſæ*, albeit it be proponed in the terms of a continual poſſeſſion, *quia probatis extremis præſumuntur media* [b], if the diſtance be not great; yet ſo, that interruption of any conſiderable time being poſitively proved, will afford a reply. The act of preſcription, *Parl.* 1617, *cap.* 12. maketh preſcription not only ſufficient to defend againſt other rights preſcribed; but alſo to purſue and recover poſſeſſion, when it is loſt; and to declare an abſolute unqueſtionable right, not only of moveables, or of obligations, but of heritable rights of lands and annualrents.

The ſhorter preſcriptions are proper for the ſeveral caſes to which they relate and to the actions and proceſſes concerning the ſame.

XXI. The fourth common exception, is, *ex capite doli mali*, viz. That the purſuer's title and right was obtained by fraud. But this is not relevant againſt all actions, as the former exceptions were. For if the title be rights of lands or annualrents, fraud is not competent by exception, but by reduction. Neither is it competent, to be proponed as a reply or duply; becauſe ſuperiors and others having intereſt muſt be cited, and the production muſt be ended before debating of the reaſon of fraud. This ariſeth from the ſpecial nature of feudal rights, and likewiſe fraud being of a criminal nature, it is not relevant againſt ſingular ſucceſſors, not partakers of the fraud, but only againſt the committers of the fraud, and theſe repreſenting them, eſpecially as to feudal rights: for ſo it is expreſsly provided by the fore-mentioned ſtatute: the reaſon whereof is, to ſecure land-rights, and that purchaſers be not diſappointed; and therefore no action can be effectual againſt them, upon the fraud of their authors, unleſs they were acceſſory thereto, at leaſt by knowing the ſame when they purchaſed: but ſupervenient knowledge will not prejudge them. Yet if a decreet were obtained againſt the author upon fraud, before the purchaſer's right, it would be relevant againſt the purchaſer; becauſe his author's right was thereby annulled; and as to this point and other nullities, purchaſers muſt run their hazard, and lean to their warrandice, there being no regiſter appointed for publiſhing ſuch decreets: yet, by the minute-books of decreets of the clerks of Seſſion, accurate diligence may diſcover ſuch decreets, if pronounced within forty years, by which time they preſcribe,

[b] See below, IV. 45. 22.

preſcribe, unleſs there be interruption, which, by the late act, muſt be ſo oft renewed, and only by meſſengers, that little more can be done to ſceure purchaſers.

But in perſonal rights the fraud of authors is relevant againſt ſingular ſucceſſors, tho' not partaking nor conſcious of the fraud, when they purchaſed; becauſe aſſignies are but procurators, albeit *in rem ſuam*: and therefore they are in the ſame caſe with their cedents, except that their cedents oaths, after they were denuded, cannot prejudge their aſſignies.

Yet in moveables purchaſers are not quarrellable upon the fraud of their authors, if they did purchaſe for an onerous equivalent cauſe. The reaſon is, becauſe moveables muſt have a current courſe of traffick, and the buyer is not to conſider how the ſeller purchaſed, unleſs it were by theft or violence, which the law accounts as *labes reales*, following the ſubject to all ſucceſſors, otherwiſe there would be the greateſt encouragement to theft and robbery.

XXII. By what hath been ſaid upon the exception of fraud, it doth appear what may be the replies and duplies of the caſe: for if the defender do except, that the purſuer's right was acquired by fraud, it is a relevant reply that it is a land-right, and the purſuer is a ſingular ſucceſſor, or that it is a purchaſe of moveables, by commerce, for an equivalent cauſe: to which the relevant duplies are, that the defender was partaker of the fraud, and at leaſt knew of it before he purchaſed; or that a decreet was pronounced upon the fraud before his acquiſition. Each of theſe alledgeances acknowledges the former; ſo that the duply is only to be proved, and litiſconteſtation is made upon it alone.

XXIII. It is not to be expected that the ways how fraud may be committed, ſhould here be determined, and how *dolus bonus* is innocent, and different from *dolus malus*, which is *hydra multorum capitum*; upon which there are large treatiſes. Only in general, it is never *dolus bonus* that doth hurt or prejudice to the parties, who are induced by acts altering their judgment or inclination. But if they be induced for their own good (either by word or other ſigns) ſo to change, albeit theſe words or ſigns do not truly infer the concluſion deſigned, it is *dolus bonus*: but ſtill theſe acts muſt be without lying. Thus all ſtratagems of war are juſtified, as *ex dolo bono*. Jacob's putting the peelled rods before the ſheep and goats could not eſcape to be accounted *dolus malus* to the prejudge of Laban, if he had not a divine warrant for it, which is inſinuated in the context of that hiſtory, that God gave Jacob the cattle of Laban by that means. Grotius (III. 1. 17. 20.) holdeth lying to enemies to be lawful, becauſe ſpeaking of the truth becomes only a duty of love; and therefore is not due to enemies. But God having abſolutely prohibited lying, and having declared truth a diſtinct virtue from love, the reaſon is of no moment: but the rule of the Goſpel doth not only preſcribe love to all men, but even to enemies, who may only be puniſhed, or put out of capacity to do hurt, either by plain force or ſtratagem.

XXIV. The fifth common exception is that of *errore lapſus*: for generally lawyers treat theſe two as congenerous alledgeances, *errore lapſus et dolo circumventus*. But the exception upon error is ſeldom relevant, becauſe it depends upon the knowledge of the perſon erring, which he can hardly prove. Neither will error have any effect, if it be not *in ſubſtantialibus*. For it will be no defence for a purchaſer to alledge, that he was deceived in the value of the thing bought, or that the thing bought was inſufficient, by a viſible fault: for in theſe the anſwer will only be, *caveat emptor*; and if it be a latent inſufficiency, it will rather be eſteemed that he was *dolo circumventus*, than *errore lapſus*; for it will rather be preſumed, that the ſeller knew that fault and concealed it, than that the other was ignorant of it. Yet certainly there are many caſes in which a defence may be, that a party was *errore lapſus*, and that either on the part of a purchaſer, or of his author: as if one ſhould ſell a barony, and the enumeration of the lands ſhould include diſtant lands, that were never united in the barony, nor in the rental by which it was ſold, if the ſeller were purſued to perfect the bargain, or

or on the warrandice, he would have the exception of *errore lapſus*, it were a hard thing to determine whether Jacob were *errore lapſus*, or *dolo circumventus*, when Leah came into his bed inſtead of Rachel; but certainly he might have repudiated Leah, as not being his wife, if he had not ratified the marriage by continuing therein: and no doubt he was not only *dolo circumventus* by Leah or her father, but he was alſo *errore lapſus*, yet it was by his own fault; for altho' ſhe came to him in the dark, yet if he had but ſpoken to her, her voice could not but have diſcovered who ſhe was, to him who had ſo long converſed with her.

XXV. The ſixth common exception is, that the right in queſtion was yielded to by the defender *ex juſto metu*. For tho' a true aſſent, whatever were the motives, is of itſelf effectual, yet poſitive law doth juſtly annul ſuch conſents as are obtained by juſt fear; juſt on the part of the ſufferer, but unjuſt on the part of the actor; which conſent is juſtly rendered ineffectual, as the penalty of the injury, in the ſame way as he who conſents being *dolo circumventus*, his aſſent is of itſelf effectual, but poſitive law hath taken away its effect, for the common intereſt; and therefore there are two excellent edicts *in edicto perpetuo*, as to both, *quod dolo malo factum eſt, ratum non habebo*; as well as, *quod vi metuve factum eſt*.

But it is not any other fear that gives this exception, but ſuch fear *quæ cadit in virum conſtantem*, as it is commonly deſcribed, but too narrowly: for certainly that may be a juſt fear to a woman that will not be to a man; and to a weak perſon that will not be to a reſolute; ſo women's conſent to the alienation of their liferent, if it be total, the very deed imports, that it was for the reverence of their huſbands, and for fear of offending them, if they were the movers; or tho' it be the alienation but of a part of their proviſion, if their huſbands were *viri feroces*, and uſed to keep them in terror, tho' no menaces were proved, it would be ſufficient: and therefore our cuſtom hath well provided, that a wife's conſent ſhould be judicially, *& extra præſentiam mariti*. There was an eminent caſe of *James Stuart* of *Minto*, who being taken priſoner by Sir *John Whitfoord*, with another man's caption, was carried in the night, from place to place, in muirs far from neighbourhood, till he diſponed his eſtate for a very unſuitable cauſe; the Lords reduced the diſpoſition *ex capite metus*, in reſpect of the perſon, albeit a man of ordinary reſolution would have reſiſted it.

It is not *juſtus metus* relevant to reduce a diſpoſition, or other deed, that it was granted to perſons of power and intereſt, by mean perſons, or thoſe that were capable of being in danger of crimes, altho' the ſame was deſired by perſons in power, unleſs threatenings were uſed, or inſiſting againſt the party upon refuſal in criminal matters, which might reach life, members, or eſtate; yea, tho' the circumſtances may infer preſumption of juſt fear; yea, if the party upon oath depone, that what he did was voluntary, and not upon account of fear, it would be a ſufficient reply, even againſt wives and weak perſons.

XXVI. There are variety of caſes of juſt fear; as, 1. When the deed is done by compulſion, or concuſſion *ex vi majori*, by poſitive acts of force, as by wounding, or beating to the hazard of life, eſpecially with weapons invaſive, which will not reach to ſwitching, unleſs it be long continued; for vexation may be more intolerable than death, altho' the ſingle acts be inconſiderable; as by tickling, ſome have been made laugh to death. It is too well known that the French dragoons, by vexation of Proteſtants with quartering, reproaching, affronting, ſtraitening in the conveniencies of life, and in the requiſite acts of religion, have made Proteſtants do more to diſſemble, and counter-act their religion, than fire or gibbet, or any other ſudden death could ever do; yet every ſingle act would not infer juſt fear. 2. Juſt fear is inferred not only by poſitive acts inferring conſtraint but by reſtraint; as by long and unlawful impriſonment, or by hindering of neceſſary food, ſleep, reſt, cloathing, or by affording only corrupt meat and drink, which the extremity of hunger would make the injured perſon take, tho' it were known

to infer the hazard of life. 3. Violence upon the chaſtity infers juſt fear, as when men are abuſed with ſodomy, or women with raps or ſodomy. 4. It is inferred by diſgrace; as by cutting off members, ſlitting up noſes, cutting out of tongues or eyes. 5. It is inferred by threats to do ſuch things, by thoſe whoſe inclination, cuſtom, and opportunity befitted them to do the ſame: ſo frequently perſons have drunk up poiſon offered unto them, without any actual violence, but knowing that if they did it not, they would be compelled by violence and torture to do it, and ſo behoved to endure both: and others have diſpatched themſelves, to prevent cruel deaths or torture. Yea, there be innumerable ſuch acts which the malice and cruelty of men can invent.

XXVII. But legal execution, though by force, affords not the exception of *juſtus metus*, if it be not upon a capital cauſe: and therefore bonds or diſpoſitions granted by perſons incarcerated upon caption, are not reducible upon that head, and yet may be quarrelled upon other relevant grounds: for if payment were made, it will not hinder reduction of the decreet and repetition of the ſum. Yet if a perſon were taken by caption, being ſick and unable to travel without hazard of life, and to prevent the ſame did give bond or other right; it would afford the exception of *juſtus metus:* becauſe it were not truly a legal execution, ſeeing it ought not to be done in that caſe.

XXVIII. Fear and fraud have much the ſame effects, as to ſingular ſucceſſors, except in the caſe of robbery, which as well as theft, is *vitium reale* in moveables: and therefore what hath been ſaid of fraud in that point [d], needs not here be repeated.

XXIX. The ſeventh common exception, is, the purſuer's acknowledging or approbation of the defender's right, directly and expreſsly by conſent thereto, or ratification thereof, or indirectly, and tacitly by doing deeds importing the ſame, which is called homologation, from a mathematical term, by which one figure doth quadrate with another, having like angles thereto; ſo homologous triangles are theſe which have equal angles, ſeverally, each of them being of equal wideneſs to the angles of the other.

This exception is only relevant againſt the parties conſenting or homologating, or thoſe repreſenting them; unleſs the conſent be adhibited in the inveſtiture, for then it is relevant againſt ſingular ſucceſſors, as being a part of the real right; or being a judicial conſent in proceſs, whereby the matter became litigious, before the purſuer's right.

Homologation ariſes from many ſeveral deeds, and is largely treated. *lib.* 1. *tit.* 10. § 11. wherein many deciſions are adduced importing homologation, which may be ſeen in that place.

XXX. The eighth common exception, is, renounciation of all pretence of intereſt to the defender's right, which is only effectual againſt the renouncer, his heirs or ſucceſſors repreſenting, but not againſt ſingular ſucceſſors, which holdeth not in wadſets, which are habilely extinguiſhed, as well by renunciation, as by grant of redemption, or reſignation. Reduction or declarator are comprehended under the firſt exception, *viz. exceptio rei judicatæ.*

XXXI. Theſe are the common exceptions in all actions. There are alſo ſeveral exceptions, common to actions upon perſonal-rights and obligations. As firſt, *pactum de non petendo,* when the purſuer has obliged himſelf not to inſiſt for payment or performance: which if it be abſolute, importeth a renounciation of the right purſued on; but if it be only temporary, for a ſhort time, it is not a peremptory but a dilatory exception, and doth not exclude a decreet, but only the preſent effect thereof, whereby the decreet is granted conditionally, to pay or perform at the time to which the delay is granted. But it maketh the purſuer liable to the expences of plea, *plus petendo tempore.* And being dilatory, it muſt be inſtantly verified, yet if it be a long delay, it will procure a term to prove it, and will

[d] See above § 21. *h. t.*

will abſolve the defender from that proceſs; ſeeing he is not obliged to lie under the proceſs for ſo long delay; and therefore a new citation will not revive that proceſs: yet it will not hinder a new proceſs to be raiſed, after the time of delay is paſt.

XXXII. The ſecond common exception in perſonal actions, is, payment or performance made to him, who had the full right to diſcharge.

XXXIII. The third common exception in perſonal-actions, is, payment made *bonâ fide* to him, who had not the true right, but where there was another preferable right, which the defender neither did, nor was obliged to know: and therefore the law ſecures the payer, without prejudice to the purſuer to inſiſt againſt the obtainer of the payment [e].

Of this there are many caſes: for inſtance, tenants are ſecure, by paying to their maſter, albeit there be citation againſt them much more when againſt him and (*not*) them alſo, upon a better right; unleſs there were arreſtment upon their maſter's perſonal debt: for even arreſtment upon dependence of real actions, will not make tenants liable for double payment, ſo long as their maſter's right is not fully diſcuſſed and excluded: it doth alſo defend them againſt teind-maſters, when they pay a joint duty for ſtock and teind. Alſo if a ſum due by many debtors co-principals or cautioners, be aſſigned, and intimation made to one of the debtors: it becomes a right preferable to the cedent's right, as to them all: and yet, if the cedent charge any of them to whom the aſſignation was not intimated and he make payment, not knowing of the intimation, he will not be liable to double payment. Which alſo takes place in arreſtment, though decreet for making forth-coming be obtained againſt a principal debtor, which carries in conſequence the right as to the cautioners, yet if they be diſtreſſed and pay, they are ſecure. Or if a debtor pay to a perſon denounced, before citation in a ſpecial declarator, he is ſecure: for he is not obliged to ſearch the regiſter of hornings. A main ground of theſe and the like, is, that common brocard in law, *bona fides non patitur ut idem bis exigatur*, which yet takes only place, when the firſt payment is made *bonâ fide*.

XXXIV. The fourth common exception in perſonal actions, is, a diſcharge or exoneration, whether it be ſpecial, or general, and that without neceſſity to prove payment or performance. But if the general diſcharge be with ſpecial diſcharges, it is not relevant for any greater cauſe, than is the greateſt contained in the ſpecial diſcharge.

XXXV. The fifth common exception in perſonal actions, for annual payments or preſtations, is, upon three ſubſequent diſcharges of three ſubſequent years or terms: for thence the law preſumes, that all prior years or terms are payed or renounced, unleſs they be reſerved. Againſt which, this reply is relevant to be proved by writ or oath of party, that the prior years or terms are yet reſting unpayed.

Under this exception is comprehended acceptilation, whereby the purſuer hath accepted any thing in ſatisfaction of the obligement, which is equivalent to a diſcharge or renounciation.

But partial receipts albeit they exceed three terms, or three years, are not relevant to exclude bygones; becauſe they import only to be to an accompt of all bygones.

XXXVI. The ſixth common exception in perſonal actions, is, confuſion, when the defender comes to ſucceed in the purſuer's right, whether by a general or ſpecial title. This exception is not always total; becauſe though the defender ſucceed in the right as heir, yet if he render the ſame moveable, it will not belong to his heir, but to his executor, and ſo the action revives againſt that executor. Yet it is not a dilatory but a peremptory defence, and that ſeparation is as a new right ſupervenient.

XXXVII. The

[e] See above, I. 18. 3.

XXXVII. The ſeventh common exception in perſonal actions, is, upon compenſation, which takes only place, where both the purſuer's and defender's titles are liquid, and of the ſame kind. And it hath the ſame effect as a diſcharge; and it operates from the concourſe of the two liquid debts, ſo that though the defender's debt bear not annualrent, or be not regiſtrable, yet it will elide the purſuer's debt from the time of the concourſe, from which no annualrent will be due. But by ſtatute, compenſation is not competent in the ſecond inſtance, by ſuſpenſion or reduction. *Parl.* 1592, *cap.* 143.

That which was not liquid, may be liquidated by the purſuer's oath, but will have only effect from the time of that liquidation. And ſince the act of regulation, if there be any diſtinct defence, for which a term is granted; compenſation is ſuſtained to be liquidate by witneſſes, being proved within the term aſſigned for the other defence, albeit the foreſaid ſtatute require that compenſation be inſtantly verified, ſeeing the act of regulation is a ſupervenient law, therefore the favour of ending pleas, may allow the liquidation by witneſſes, as aforeſaid; or if witneſſes be at hand, and may be called by a macer; or if the purſuer take a term to prove.

Recompenſation is a relevant reply againſt compenſation, as is particularly explicated, *lib.* 1. *tit.* 18. § 6. wherein alſo the former exceptions in perſonal rights, are largely treated.

XXXVIII. This is peculiar in perſonal actions, that the common exceptions of fraud or force are not competent by exception, if the perſonal action proceed upon a regiſtrable writ, the nature whereof is to give ready execution by a decreet without citation: which muſt alſo hold in bills of exchange, theſe by a late ſtatute having the effect of regiſtrable writs: and likewiſe in other caſes, where ſummary charges are granted by law or cuſtom.

XXXIX. The laſt of all exceptions is improbation, offering to prove the purſuer's title or inſtructions to be falſe and forged; after which no exception is competent, either in real or perſonal actions, or in declarators. And therefore, if defenders intend to propone improbation, they muſt propone all the prior exceptions with reſervation of improbation, at leaſt in ſuch as do import the verity of the libel; ſeeing what the defender acknowledges as true, he cannot improve as forged, except he reſerve improbation: for tho' of its own nature he might propone it in any order, yet our cuſtom excludes all exceptions after improbation; and therefore proteſting for reſervation of improbation is not *proteſtatio contraria facto*.

Improbation being tedious, and requiring much delay, our law eſteems it as ſuſpected to be proponed *animo differendi litem*; and therefore admits it not by exception, unleſs the proponer conſign ſuch a ſum as the Lords appoint, according to the importance of the cauſe, as an amand, in caſe by the event it appear, that improbation was proponed *animo differendi*.

Seeing regiſtrable writs, and theſe of like nature, have *paratam executionem*, improbation ought not to be ſuſtained againſt them by exception, but ought only to be reſerved by way of action. Yet ſo, that if the purſuer be not very ſolvent, he may be put to find caution, in caſe the ſum be recovered by improbation.

XL. All theſe points which are competent by exception, are alſo competent by reply. And in ſeveral caſes they are competent by reply, when they are not competent by exception or duply; becauſe the purſuers are never preſumed to delay themſelves; and therefore improbation by reply ought always to be ſuſtained without an amand.

XLI. In all acts of litiſconteſtation the manner of probation muſt be determined, eſpecially what is to be proved by witneſſes; for all things may be proved by oath of party or writ. But as to the particulars, they will be expreſſed when we come to treat of probation.

XLII. In

XLII. In like manner incident diligences are not competent, unleſs they be ſuſtained in the act of litiſconteſtation, or in acts before anſwer. For albeit formerly it was ſufficient to proteſt for the ſame, yet the act of regulations hath very fitly appointed it to be proponed and determined in theſe acts. Likeas the ſame may be proponed and ſuſtained either for the defender, or the purſuer, or both.

XLIII. The laſt point in acts of litiſconteſtation is, the term aſſigned for probation. Ordinary diligences for probation paſs of courſe, and are not expreſsly mentioned in the act. Extraordinary diligences cannot paſs but by the Lords *in præſentia*, upon bills.

XLIV. When points are admitted to be proved by writ, parties do ordinarily proteſt for reſervation *contra producenda*; that is, that what alledgeances emerge from the writs produced, may not be excluded; which proteſtation is not neceſſary, becauſe it will reach no further, than to ſuch alledgeances as the proponer could not know when litiſconteſtation was made, otherwiſe it would give occaſion to unneceſſary delay; as if a defence of compenſation were proponed, this reſervation would not allow a term to prove recompenſation, or a general diſcharge which would take away that compenſation, becauſe it was competent and omitted at the time of litiſconteſtation, yet what is inſtantly verified will be received even at adviſing of the cauſe: and this is the difference of competent and omitted againſt acts of litiſconteſtation, and againſt decreets *in foro contradictorio*. And tho' that proteſtation be omitted, alledgeances that could not be foreſeen, ariſing from the writs produced, cannot be excluded, eſpecially theſe which ariſe from the inſpection of the body of the writ, as vitiations or nullities.

TITLE XLI.

Diligences *pendente proceſſu.*

ACTS of litiſconteſtation would have no effect if law had not preſcribed the way to make them effectual, by the authority and warrant of judges competent, whereby they are put to execution by precepts direct to meſſengers at arms, commanding parties, witneſſes, or havers of writs, to compear before the Lords, upon the day aſſigned as the term of probation, with continuation of days, to depone upon the points contained in the act, and found relevant therein. The precepts againſt parties to whoſe oath of verity any point is referred, do only command them to compear at the term, with certification, that if they compear not, they ſhall be holden as confeſſing the point referred to their oath; but precepts againſt witneſſes cannot have that certification, but all that can be done againſt them, or againſt the havers of writs, is to compel them to appear, and depone; and therefore theſe precepts are called executorials, becauſe they are for putting the acts to effect by execution: they are alſo called compulſators for the ſame reaſon. And they are called diligences, becauſe they excuſe the uſers thereof from negligence, whereby poſterior diligences being exactly followed, are preferable to prior diligences being neglected, *vigilantibus non dormientibus jura ſubveniunt*, which is founded upon that great intereſt to haſten pleas to an end. They are alſo called diligences, becauſe tho' the effect do not follow, yet the uſer thereof hath endeavoured what he could, and ſo is held as in the ſame caſe, as if he had obtained the command of the precept. Theſe precepts are called executorials before executions be thereupon; but they are only called diligences, when they are executed in due time.

II. Diligences are of three ſorts, being either upon precepts before decreets, upon acts, or upon decreets.

The laſt ſort of diligences and executorials, *viz.* theſe after decreets, which ſerve for putting of decreets to execution, and making them effectual; are ordinarily horning, caption, poinding, charges to remove, and thereupon letters of poſſeſſion, (which are granted on all decreets in petitory and poſſeſſory actions, but declaratory actions need none) together with the executory actions upon arreſtments, and of adjudications of lands and annualrents.

III. Diligences before decreet are either ordinary or extraordinary. The ordinary diligence againſt parties to depone, to whoſe oaths points are referred with certification, are only by citation to compear under that certification.

IV. Diligences upon facts are theſe, againſt havers of writs requiſite to prove, or to produce writs for eviting certification *contra non producta*, and they are partly ordinary and partly extraordinary. Their form is much altered by the act of regulations [f], before which the ordinary diligence was only a ſummons, to cite the havers of writs, which might have been done by a ſummons of exhibition, at the inſtance of the defender, ſo ſoon as he was cited, or even before citation, whereby he might call for production of any writ belonging to himſelf; but if he neglected the ſame till the act of litiſconteſtation, then he might take out a ſummons to cite parties to produce his own writs, or the writs of others, who were obliged to produce the ſame on ſuch occaſions. But if he behoved to prove with any other men's writs, in that caſe he had no title or intereſt to force them to produce writs, other than by occaſion of the act; which he could not do, unleſs the time of the act he had proteſted for incident diligence, which was a ſummons of exhibition againſt the havers of writs requiſite for probation, wherein the defender had no other intereſt, but the common duty of all in the ſame ſociety, to aſſiſt the diſpatch of juſtice by their oaths, or by the writs in their hands. But this proteſtation uſed neither to be admitted nor repelled, until the term of probation, when the purſuer inſiſted for circumduction of the term, and then the defender did produce that exhibition, with the executions thereof, which is called an incident diligence, as every action that is only competent *incidenter* in a principal action, is called an incident action: as when a proceſs is continued againſt a party, neceſſary to be called, and not called in the principal ſummons: as if a woman be cited, and ſhe marry *pendente proceſſu*, the ſummons muſt be continued againſt her huſband, before it can have further progreſs againſt herſelf.

This incident diligence was neceſſary in many caſes: as if a cautioner were purſued for payment of a debt, moſt exceptions competent to the principal debtor would be ſuſtained for the cautioner: and if the ſame were found probable by writ, his incident diligence would ſtop the circumduction of the term, or any further procedure in the principal cauſe, till that incident exhibition took its ultimate effect. So in real actions for lands or annualrents, of old the defender had a term to call his warrant, his ſuperior, or his author: but in place of that, law required that ſuperiors and authors ſhould be called *ab initio*, otherwiſe no proceſs is to be ſuſtained as to their rights, or as to the defender's rights founded upon their rights; ſo that it was a good defence, That all parties having intereſt are not called: but when they are called, the defender is not thereby ſecured; for if they do not appear, proceſs proceeds againſt their rights, ſo far as they continue to have intereſt: but the defender's right will alſo fall in conſequence, unleſs he force the ſuperiors or authors to produce, which muſt be by incident diligences.

V. When incident diligences at the term were ſuſtained, the uſer thereof was not obliged to refer the verity to the party's oath; yea, tho' he did, and that the haver were holden as confeſt, that would not prove againſt the purſuer in the principal cauſe: yet he might have further a cloſe of that diligence, by a decreet of exhibition, whereupon horning and caption would have followed. But defenders commonly were glad of opportunity to get long delay; and therefore when

[f] See above, IV. 33. 3.

when they were not ſure to recover the writs, they libelled the exhibition to be proved *prout de jure*, and ſeldom did the haver concern himſelf, but the purſuer in the principal cauſe turned defender in the incident: and if the uſer of the incident did not uſe diligence to proceed therein, he was allowed to crave proteſtation, and to do all that the other, *viz.* the defender in the principal cauſe, who is purſuer in the incident, could do to haſten it to an end, either by any defence upon informality in the incident, or by urging ſhort terms for proving. Yet probation by witneſſes then having four terms, and after obtaining decreet of exhibition, the execution thereof was by the letters of four forms, having four ſeveral ſubſequent charges, the laſt whereof was caption; this way of incident diligence was exceedingly tedious and expenſive, ſo that it was juſtly and fitly changed by the ſaid act of regulation; whereby incident diligence was not competent, unleſs it were ſuſtained in the act, and then diligence was granted by horning againſt the havers, charging them to compear and depone, whether they have, or had the writs contained in the charge, and to produce ſuch of them as they acknowledged by their oaths; and upon production of this charge, with the executions, a ſecond diligence is granted againſt the ſame parties by caption, and a term aſſigned for executing of the caption, whereby the havers might at any time be taken, and kept in priſon till they were produced at the term, and did depone, unleſs they were ſet at liberty upon caution, to appear at the term, with conſent of party, or by authority of the Lords. This method is very juſt; for there is the ſame reaſon to force parties, tho' unconcerned in the proceſs, to prove by their writs, as by their oaths, when called as witneſſes.

VI. The diligences againſt witneſſes were of old ſo very tedious and expenſive, for they were four in number, and as many terms to prove. The firſt was a precept to appear and bear witneſs, without any certification. And if this were produced at the term, a ſecond diligence was granted, commanding the witneſſes to compear with certification, that if they compeared not, horning would be direct, and a term was aſſigned for their compearance. If the defender produced not that precept with the executions, the term would be circumduced; but if he did appear, horning was direct, and a third term aſſigned. And if that were produced, caption was granted, and a fourth term aſſigned. But this method was changed by an act of Parliament, in the reſcinded Parliaments, taking away letters of four forms; and tho' that act was not reſtored, yet the Lords continued the cuſtom as very convenient.

VII. All theſe diligences are granted by the ordinary, in the outer-houſe. But there are other extraordinary diligences granted by the Lords *in præſentia*, upon bill, on many divers occaſions, during the dependence of the proceſs. As, firſt, In competitions about lands or annualrents, if the proceſs be dubious and intricate, the Lords, upon ſupplication, do ſequeſtrate the rents, and do remit the competitors to an auditor, to determine their rights and preferences, by a decreet of ranking, when the competitors are many, that it cannot be diſcuſſed at the bar: and the Lords do name factors after hearing, if the parties offer perſons, nominating the fitteſt, appointing them ſalaries, and warranting them to ſet lands by roup. In theſe proceſſes there is diſpute, decreets and acts between every competitor and the reſt, whereby ſome are utterly excluded, and others are preferred to have acceſs in order, according to the validity of their rights. As alſo, ſequeſtration is obtained by bill, when any piece of ground, or corns thereon, are in a dubious controverſy.

Secondly, There is an incident proceſs, for citing parties, who are not preſent at the bar when litiſconteſtation is made, to appear to give their oath of calumny; which is competent at any time, before concluſion of the cauſe by probation, or before decreet by circumduction of the term. This incident proceſs doth not go to a roll, but is taken ſummarily in, whenever it is ready, as being only incident.

Thirdly,

Thirdly, When witneſſes are old, valetudinary or ſick, the Lords, even before litiſconteſtation, upon ſufficient teſtificate bearing this to be true, upon the teſtifier's conſcience, will examine witneſſes to lie *in retentis*, and grant diligence for that effect.

Fourthly, If any party diſcover witneſſes he knew not, and ſo declare upon oath; the Lords will grant diligence againſt theſe witneſſes, and ſometimes have granted the ſame, without ſuch declaration. But now, when the teſtimonies of witneſſes are patent, whereby the ſupplicant may ſee, that his witneſſes prove not; no other witneſſes ſhould be admitted without ſuch an oath, ſeeing he hath temptation to corrupt the witneſſes.

Fifthly, If parties ſupplicate for commiſſion to examine parties or witneſſes, who are not able to travel, through age or infirmity; the Lords will grant commiſſion to examine them in the country: and if the ſupplicant have been negligent or faulty in propoſing the ſame, the time of litiſconteſtation, they will nominate perſons out of a liſt, to be named by the other party. But if the commiſſion be to examine witneſſes in probation of tenors, or in improbations; they will name more commiſſioners, becauſe two ordinaries are requiſite to examine ſuch witneſſes, when they are able to come.

Sixthly, When witneſſes or parties to be examined are many, and the matter plain; the Lords will eaſily grant commiſſion to be inſert in the act of litiſconteſtation, but not if the matter be intricate; unleſs both perſons conſent, or in caſe of infirmity: in which caſe, the Lords allow the interrogators to be inſert in the act of commiſſion.

Seventhly, If any point to be proved require ocular inſpection and viſitation, the Lords uſe to give commiſſion to ſome of their number to viſit the ground, and examine witneſſes upon the place, in the vacance, if any of them live near it; or otherwiſe to commiſſioners. But if it be near, the Lords uſe to execute commiſſions upon Mondays.

VIII. In all commiſſions for witneſſes, there is a term and place of examination appointed: and letters of horning are granted againſt the witneſſes, to appear at that time and place. But commiſſioners cannot examine at any other term, unleſs the commiſſion bear it, and ſo caption cannot follow, until theſe commiſſioners report be made. All commiſſions do alſo bear a term to report, and thoſe who are to prove, are to produce the report, and either party ſhould have the double of the report, which ſhould have the ſubſcriptions of the deponents, or of the commiſſioners, if they cannot ſubſcribe: and the term is not to be circumduced, till after the day of report.

IX. The hornings granted againſt witneſſes, or againſt havers of writs, need not be regiſtrate, neither do they infer the falling of eſcheat, but only the obtaining of caption. If witneſſes in the firſt diligence die or go out of the country, the Lords will grant a new diligence for other witneſſes in place of theſe, to the ſame term with the ſecond diligence, againſt the witneſſes in the firſt diligence, but will not give a new term for caption againſt theſe additional witneſſes.

TITLE XLII.

Probation by Writ.

THERE are three ordinary ways of proving points admitted to be proved in acts of litiſconteſtation, or acts before anſwer, viz. writ, witneſſes, or oath of party; of which two, and ſometimes all may concur for proving the ſame point. So writ and witneſſes may concur, and when witneſſes depone only that they know not or remember not, writ may be adhibited, and oath ſo far as is not proved by writ. And therefore the determination of the manner of probati-

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on in acts, is thus, to be proved *ſcripto vel juramento partis*, or *prout de jure*; that is ſuch points wherein witneſſes are not allowed, are to be proved by the party's writ or oath: but if oath of verity be firſt uſed, there is no place for writ or witneſſes: but if writ be firſt uſed, oath may be uſed in ſo far as is not proved by writ. Points to be proved *prout de jure*, comprehend all the three manners of probation, yet in the order aforeſaid; which occurs eſpecially in acts before anſwer, wherein particular grounds of inference are condeſcended on, which is not a direct, but an indirect and preſumptive probation; for theſe circumſtances are probable partly by writ, partly by witneſſes and by oath of party, not only as to different circumſtances, but alſo as to the ſame.

II. The proper order of theſe ways of probation, ſhould be firſt by writ, which ordinarily contains the ſolemn confeſſion or acknowledgment of parties. And as verbal confeſſion, or confeſſion without a party's ſubſcription in the ſame proceſs, do inſtantly verify; ſo the ſolemn confeſſion by writ hath a term for probation allowed: and while probation may be ſo had, witneſſes ought not to be put to the trouble of giving unneceſſary oaths. But if oath of verity be uſed, it is the end of all ſtrife.

III. Probative writs are very various and of different importance in probation; and writ comprehends both *Chirographum* and *Typographum*. The moſt direct and plenary probation by writ, is, by the written acknowledgement of the party, againſt whom the writ is uſed, whether it be declaratory or promiſſory, if the law allow the writ to be, or to be preſumed to be, marked by the party by a mark approved in law as probative, as being written by his hand, or an ordinary ſentence ſubjoined written with his hand, which he is known to have choſen for inſtructing the writ. This we ſee to have been the antient cuſtom by ſome of the Apoſtle *Paul*'s Epiſtles. 2 Theſſ. iii. 17, 18. "The ſalutation of me "Paul, with my own hand, which is the ſign in every epiſtle: ſo I write. "The grace of the Lord Jeſus Chriſt be with you all. Amen." Of a long time the atteſtation of writs was by the ſuperſcription or ſubſcription of the name, deſignation or title of the party. Kings do ſuperſcribe, and their ſecretaries ſubſcribe to their Epiſtles, or to a breviate or docquet of larger writs; becauſe Princes have not the ſame to peruſe the whole body, wherein there is much of formality. Others do only ſubſcribe.

IV. In the ruder times when few could write, the ſubſcription of the party with witneſſes inſert, though not ſubſcribing, made a probative writ, which was of great inconvenience: for if the witneſſes died, the direct manner of improbation was loſt; and alſo the indirect, by comparing the ſubſcriptions of the witneſſes with their other ſubſcriptions or hand-writ, which is competent when the witneſſes ſubſcribe: and, on the other part, if the witneſſes forgot, though they were truly witneſſes, the writ would be improven, if there were not other ſtrong adminicles. Writs were alſo probative, if the names of the witneſſes were inſert, tho' without a deſignation; and the writ was ſuſtained, if the uſer thereof did condeſcend upon a ſpecial deſignation, whereby the perſons underſtood might improve: but now, by a late ſtatute, *Parl.* 1681, *cap.* 5. writs after that ſtatute, prove not, unleſs the witneſſes ſubſcribe and be deſigned.

V. The antient form of atteſting writs, was by ſeals, being the known ſeal of the party, which was ordinarily his coat of arms, or if he had no arms, the initial letters of his name and ſirname. But ſince writing became ordinary, ſealing is much out of uſe, except where ſeals are ſolemnities, as in evidents granted by the King. Sealing was much unſurer than ſubſcription: becauſe coats of arms, or initial letters, were common to many perſons, and were eaſier to be counterfeited than the hand-writ of parties; eſpecially if they uſe their ordinary characters: for thereby their hand-writ is dignoſcible by other holograph writs or ſentences uncontroverted, and peculiar characters are eaſier forged, and leſs aſtructable.

VI. Holograph writs ſubſcribed are unqueſtionably the ſtrongeſt probation by writ, and leaſt imitable. But if they be not ſubſcribed, they are underſtood to be incompleat acts, from which the party hath reſiled: yet if they be written in compt-books, or upon authentick writs, they are probative, and reſiling is not preſumed. Writs are accounted holograph, where large ſentences are written with the party's hand, although not the whole writ.

Yet bills of exchange are probative, though neither holograph, nor having witneſſes inſert, nor ſubſcribing; becauſe of the exuberant truſt among merchants, and the ſpeedy diſpatch which their affairs require, whereby ſuch bills uſe not to be kept for any conſiderable time, and if they were ſo kept, they would not be probative; and becauſe it is the general cuſtom of nations, which particular ſtatutes cannot remedy. Alſo diſcharges by maſters to their tenants are probative, being ſigned, though not holograph, nor having witneſſes.

VII. In other nations, writs are not fully probative by the ſubſcription of parties. In England and Ireland, ſuch writs though ſubſcribed by parties and witneſſes, prove not, unleſs they be proved by the oath of the party, or by the oaths of the witneſſes. But with the ſubſcriptions of both, they require the party's ſeal, and that the writ bear ſigned, ſealed, and delivered in preſence of, *&c.* And then the witneſſes ſubſcribe: but any impreſſion upon wax makes the writ probative.

The Romans did not allow private writ, as a ſufficient probation; but they truſted moſt to publick writ, as being done in judgment, and ſubſcribed by the clerks, who could only be church-men, as the word clerk inſinuates. (But though the name continue, there is now no neceſſity, and ſeldom allowance for church-men to be clerks or nottars: yet by ſtatute, miniſters are allowed to be nottars in the teſtaments of parties, who cannot, or are not able to write.) They did alſo eſteem writs ſubſcribed by Tabellions, or publick nottars, to be publick writs, becauſe theſe were authoriſed by ſovereign authority, to redact in writ what was done or ſpoken amongſt parties.

VIII. Our cuſtom hath much more acquieſced in the ſubſcription of parties, in the ſeveral ways and terms before expreſſed, and does preſume the delivery of writs, if they be out of the granter's hands, being in the hands of thoſe in whoſe favour they are granted, or in the hands of third parties: unleſs it be proved by the oath of the party, in whoſe favour the writs were granted, or by his writ, that they were depoſitated in that party's hands, either to be returned to the granter, or not to be delivered till ſuch and ſuch conditions were fulfilled; and by the oath of the depoſitar, what the conditions were, which the depoſitars writ would not prove while he were alive, but might prove after his death.

IX. Our cuſtom doth not allow the inſtruments of nottars as probative writs, except in the particular caſes thereby approven. As firſt, When they ſubſcribe for parties that have not ſkill or ability to ſubſcribe, being at the parties command and before witneſſes. In ſuch caſes, nottars uſed to lead the hands of the parties, in ſubſcribing their names, which now is unneceſſary and out of uſe: but the touching of the nottar's pen, after reading of the matter written, is ſtill retained yet it is preſumed from the nottar's aſſertion, unleſs the writ be improven. But if the matter exceed the value of a 100 pound Scots, obligations ſubſcribed by nottars prove not, unleſs there be two nottars and four witneſſes. 2. Inſtruments of ſeiſin can only be by the inſtrument of a nottar: for it is a ſolemnity which cannot be ſupplied otherwiſe. And likewiſe inſtruments of reſignation, and inſtruments of intimation of aſſignations, tranſlations, or repoſitions, and likeways inſtruments of renunciation by parties renouncing the rights they had, or by tenants renouncing their poſſeſſion, and ſo muſt inſtruments of premonition, requiſition and conſignation upon reverſions, inſtruments of requiſition to ward-vaſſals to confer with perſons offered to match with them, and inſtruments of their keeping or not keeping of theſe diets, and what paſt therein: and whereſoever by agreement of parties, inſtruments are appointed, they are underſtood to be by nottars,

nottars, though it be not ſo expreſſed. Yet inſtruments of nottars make not full probation, without ſome adminicle to inſtruct their warrant, not only in relation to the points of right, but even as to mere poſſeſſion; as when tenants renounce their poſſeſſion, they muſt deliver to their maſter, or (in his abſence) at his dwelling-houſe, a renunciation ſubſcribed be them, containing a warrant to enter ſummarily, without proceſs. 3. In other caſes, where parties will not do acts which they are obliged to do, or declare what they are obliged to declare, inſtruments taken thereupon by nottars, having witneſſes inſert and required, are probative, which no other witneſſes could prove. And whatſoever is ſaid or done in any inſtrument ſolemn or not ſolemn, at the requiſition of the parties, the nottars are obliged to give inſtruments thereupon, although the points be not a part of the ſolemnity requiſite in ſuch inſtruments: but theſe points which are no parts of the ſolemnity, muſt be aſtructed by the witneſſes inſert in the inſtrument, unleſs it be in antient matters. The offer to pay or perform any obligation in due time, and the conſignation of what is conſignable, upon refuſal, are probative [a], although they be not neceſſary ſolemnities, becauſe they are probable by the oath of the party, which cannot ſupply any ſolemnity, though it may hinder the party to inſiſt upon ſuch ſolemnity.

All ſolemn inſtruments of nottars are, by a late ſtatute, appointed to be ſubſcribed by the witneſſes, being done after the publication of that act, *Parl.* 1681, *cap.* 5. But that reaches not to other inſtruments: yet it is very convenient that the witneſſes ſhould ſubſcribe even in theſe, for thereby their ſubſcription keeps them in remembrance, that they were witneſſes, and were required to be witneſſes.

X. All acts and deeds under the hands of the clerks of proceſſes, are probative writs, and the warrants thereof are preſumed; yet ſo, as if they be recently quarrelled, the warrants muſt be produced: and in the caſe of reduction, upon improbation of the writs produced, as titles or probation, they muſt be reproduced, unleſs they be adminiculated, or the tenor be proved; albeit the reduction be *ex intervallo*. Theſe publick writs, prove what was done by the judge, or what was ſaid or alledged by parties, but do not prove that the things alledged were true, except in ſo far as the inſtructions thereof are expreſſed, generally or particularly.

XI. Whatſoever writs are probative againſt a party, are probative againſt all repreſenting that party, and in moſt things are probative againſt their ſingular ſucceſſors. And likewiſe, all writs which were probative againſt the predeceſſors, or authors of parties, are probative not only againſt their univerſal, but their ſingular ſucceſſors in perſonal rights, yea, in appriſings or adjudications within the legal; or in infeftments for ſecurity or payment of ſums, which are ſatisfied by intromiſſion, as are appriſings or adjudications.

XII. There is no relevant objection in the firſt inſtance, againſt the extracts of clerks, or inſtruments of nottars, where they are competent, or againſt ſummoñs or diligences by writers, or executions of meſſengers, by denying that they were clerks or nottars, *&c.* Or by denying that judges or arbiters had authority: and if the ſame be alledged by way of reduction, holden and reputed, will be a ſufficient defence. For if theſe objections were allowed in the firſt inſtance, they might be generally alledged in all proceſſes, and nothing could proceed, unleſs all theſe authorities were proved, which would be a publick prejudice; and therefore even improbation by way of defence, though with the oath of calumny of the proponer, is not ſuſtained, though it be the moſt important defence, without conſigning ſuch an amand, as may take off all ſuſpicion of deſigning delay.

XIII. Writs not ſubſcribed by thoſe againſt whom they are adduced, nor by their predeceſſors or authors, and even acts and decreets, wherein they were not parties, are *inter alios acta, quæ aliis non præjudicant*, though they may give courſe in probation. And regularly the teſtimonies of witneſſes in one proceſs, prove

[a] See above, II. 10. 20. 2.

prove not in another, unleſs both the parties and cauſe be the ſame, or that other witneſſes cannot be found.

XIV. Compt-books are probative againſt thoſe who made them, although they be not ſubſcribed, nor written with their hand, if thereby there appear a long tract of their affairs; but they prove not for them.

XV. Miſſive letters are probative, except where they relate to more ſolemn writs, ſuch as bonds, bills, or accompts: for if theſe be not produced, letters relative thereto will not prove, becauſe it will be preſumed, that theſe principal writs are ſatisfied, when they cannot be produced. Teſtificates are probative in obtaining ſuſpenſions, where the reaſon is upon matter of fact, or even in inſtructing reaſons of advocation.

XVI. Hiſtories are probative in all caſes, where fame is relevant, if they be authentick, and not contradicted by more authentick hiſtories of the ſame time, as in the caſe of propinquity of blood, or of antiquity and priority of dignity, titles of honour, *&c.*

XVII. How far inveſtitures and the inſtructions thereof, are probative and effectual againſt others, than the parties therein contained, their heirs, or ſucceſſors, hath been conſidered in the titles, infeftments of property, or annualrents, reduction or competition; which need not here be repeated.

XVIII. Probation by writ is not ſo firm as probation by witneſſes, or by oath. For it admits contrary probation, by poſterior writ or by oath, and it may be taken away by improbation: but oaths cannot be improven, albeit the writ expreſſing the ſame may be improven: neither can probation be led againſt the teſtimony of concurring witneſſes, though reprobators are competent againſt the initials of their teſtimonies, for therein they are not *conteſtes*.

XIX. There are many relevant objections againſt the faith of writs, which appear from inſpection thereof. As firſt, when the body of the writ, the witneſſes and the parties ſubſcriptions do all appear to be by the ſame hand-writ; thence it is concluded that the writ is either a copy, or is forged; and therefore it will be rejected without improbation: and if the uſer tenaciouſly adhere to it as authentick, improbation may be ſuſtained againſt it by exception, without an amand.

Secondly, If the writ appear to be vitiated *in ſubſtantialibus*, by deletion, razing, or ſuperinduction of letters and words, which may alter the ſame, eſpecially if done with other ink; thence it is inferred, that it was not done at or before the ſubſcription. What points are *de ſubſtantialibus* muſt be eſteemed by the nature of the writ: the date not only as to the time, but as to the place, the name of the writer, or filler up of any blanks, or filler up of the date and witneſſes, and the deſignation of witneſſes, ſince the act requiring their deſignation to be expreſſed, are *de ſubſtantialibus* in all writs, when the queſtion is of their being true or authentick. The worſt kind of deletion, is, when the words deleted cannot be read (but if they be ſo ſcored that they can be read, it will appear whether they be *de ſubſtantialibus*,) for if they cannot be read, they will be eſteemed to be ſuch, unleſs the contrary appear by what preceeds and follows, or that there be a marginal note bearing "the deletion from ſuch a word, to ſuch a "word to be of conſent." Razing is much more incident to writs on parchment than on paper. Superinduction is not only by adding or altering of letters, but of monoſyllabs or ſhort words, as when No or Not is interlined, not between line and line, for then it would not be reſpected, but between word and word. Interlining where it only makes up the ſenſe of the ſentence, gives not ground for any objection.

Thirdly, marginal additions upon one ſide of a contract, and not upon the other, are probative againſt that party who produces that ſide, but are ſuſpect if the addition be in their favour, and is not probative till it be adminiculated by poſterior writs relative thereto, or by the oath of the party, or the witneſſes inſerted.

ſerted. Marginal additions are much more eaſily ſuſpect, than what is in the body of the writ, where the writ is not mutual, both parties ſubſcribing the additions: for it is not certain that the witneſſes ſubſcribed when theſe additions were added, and therefore though they own their ſubſcriptions, if they do not remember the additions, albeit that will not improve the writ, yet it will make theſe additions improbative, if they be in favour of the receiver of the writ. Therefore, in ſuch caſes, it is very prudent to mention the number of marginal additions, with the filling up of the date and witneſſes.

Fourthly, Large blanks in writs which may alter the import thereof, make writs improbative, if it appear by the hand or ink, that they differ from the body: for it will be preſumed, that they are filled up after ſubſcribing, unleſs the contrary be proved or adminiculated [b]; as if the filler up of the date and witneſſes, do particularly mention ſuch blanks filled up by him. But blanks for procurators in procuratories of reſignation, or bailies in precepts of ſeiſin, or blanks for filling up of particulars under a general deſignation expreſſed, or blanks for the dates of writs related, or even for the names of creditors in bonds or diſpoſitions or of aſſignies in aſſignations or tranſlations, do not render the writ improbative or ſuſpect *, but have other bad conſequences: for thereby arreſters are in hazard to be excluded, who uſe only generally to interrogate the granters, whether they were debtors to the party whoſe goods or ſums are arreſted, the time of the arreſtment? if they depone only *negativè*, as ordinarily they do, upon pretence that they knew not to whom they ſtood obliged by the blank-writ, they will be abſolved: but if they do rightly depone, they ought to acknowledge they gave a blank writ to ſuch a perſon, againſt whom the proceſs may be continued, and diligence granted againſt him to produce the writ, and ſo forward till the haver be found, which ought to be upon the expences of the granter of the blank-writ: and if the perſon be not found who hath the writ to his own behove, the granter of the blank-writ ought to be decerned, ſince through his fault the arreſter is diſappointed: and albeit he ſhould depone, that he granted the writ blank, but he ſaw the name of ſuch a party filled up therein, yet that quality ſhould not be ſuſtained, unleſs the ſame were proved by production of the writ, if it was filled up *ex intervallo* [c].

Fifthly, Writs may be improbative by inſpection of the ſtamp or ſeal of the paper, whereupon the ſame is written: as, if paper with ſuch a ſtamp or ſeal, was known not to be found at the time of the date the writ bears, the writ thereby is not only improbative, but improven. Of this there was a memorable example, when the Earl of Haddington was Preſident, at the adviſing of the articles of improbation of a very ſuſpect writ, where yet there was not ſufficient probation to annul or improve it; it fell inſtantly in the Preſident's mind to look to the ſtamp of the paper, and it was found that there was none ſuch at the time of the date the writ did bear, whereupon with common approbation, the writ was improven.

Sixthly, Writs which by their date bear to be antient, if they be written upon paper induſtriouſly ſullied to appear to be old, do thereby become ſuſpect and improbative, unleſs they be adminiculated by authentick writs relative thereto.

Seventhly, Very old writs, eſpecially charters or ſeiſins, are ſuſpected by the notoriety of the hand-writs of the nottars that then lived, and commonly practiſed, which were but very few, and their hands evidently known to all who were converſant amongſt antient evidents, if the writ, or atteſtation, did not appear to be the hand-writing of him it bears to be writer or nottary. And on the contrary, ſuch known hand-writ will confirm an antient writ, although it be much torn or worn, and though it have no veſtige of the ſeal, when ſealing ſerved for ſubſcription, or was requiſite for ſolemnity.

* Writs blank in the name of the creditor are null by act 25. *P.* 1696.

[b] See above III. 1. 54.

[c] See above III. 1. 5. 5.

XX. There remains yet to be conſidered the interpretation of writs, for which there are many rules, both general, and as to the tenor of ſpecial clauſes, ſuch as clauſes by antient ſtile, which is continued, although the effect be not extended to all the words expreſſed. So the ſtile of inhibitions, prohibits the diſpoſal of all rights, goods and gear, and yet reaches only to heritable rights; the like is in the ſtile of ſeveral gifts in exchequer and the meaning of clauſes of warrandice, of clauſes of conqueſt, clauſes of ſubſtitution, clauſes irritant, *&c.*

XXI. The general rules of interpretation of writs, are, firſt, that they ought to be interpreted according to the parties that expreſſed the ſame, and the matter expreſſed therein. So if the perſon expreſſing be vulgar, the interpretation of their words and ſentences, ought to be underſtood according to the vulgar meaning and common ſenſe thereof: and if the matter import that they muſt be legal terms, they are to be underſtood in the moſt common and vulgar ſenſe theſe terms can bear. And therefore that brocard, that *verba ſunt interpretanda contra proferentem, qui potuit ſibi clarius legem dixiſſe*, or *mentem apertius explicaſſe*, holds not in ſuch vulgar perſons, but in ſkilful perſons, or where ſkilful perſons are truſted.

Secondly, *Verba ſunt interpretanda contra proferentem*, where the parties are ſkilful, or are known to have truſted ſkilful perſons in forming of the writs; and therefore the ſame ſhould be as much extended in favour of the other party, as their ſenſe can bear.

Thirdly, Words are more extenſively to be interpreted in matters favourable, or in perſons favourable, than in other caſes, eſpecially when the matter is odious, as the Roman law ſaith, *in dubio pro dote reſpondendum.* And generally *in dubio pro libertate reſpondendum*, and *in dubio pro innocentia reſpondendum, in dubio pro poſſeſſore reſpondendum, in dubio pro debitore reſpondendum, in dubio pro reo reſpondendum.*

Fourthly, *Plus valet quod agitur, quam quod ſimulatè concipitur:* more reſpect is to be had to what appears by the writ, to have been the intereſt and deſign of the parties, than to what the ſtile bears.

Fifthly, *In claris non eſt locus conjecturis.* This is a corrective to the former rules, that judges may not arbitrarily interpret writs, or give them a ſenſe inconſiſtent with their clear words.

Sixthly, *Nemo præſumitur donare*, under which is comprehended, *debitor non præſumitur donare:* which is more pregnant than the former general rule. Yet in other caſes, when the words may bear a deſign to oblige, they are not to be interpreted as a deed of mere liberality; as if the words bear, that ſuch a perſon delivers or obliges to deliver ſuch and ſuch things, they rather import loan, than gift. Yet when the natural ſignification of the words importeth donation, or a gratuitous deed, it is to be interpreted accordingly [d].

Seventhly, Words in latter-wills, or donations or diſpoſitions in contemplation of imminent death, are more favourably to be interpreted, and to be further extended then in deeds *inter vivos.* There are large treatiſes written *de conjecturata mente defuncti*, which are much conſidered in the Roman law, but are not ſo uſeful as to us; the power of teſting with us being very much reſtricted, there being only left to the defunct a power of legating that which is called the dead's part of moveables, which is ſeldom the whole, ſometimes the half, but moſt ordinarily the third of teſtable moveables. This our cuſtom hath determined, that where defunct's legate, gift, oblige or diſpone their whole moveables; that is underſtood to be with the burden of their whole moveable debts: becauſe the gift being *per univerſitatem*, the burden is alſo meant to be *per univerſitatem*; whereas otherwiſe debts are taken off the whole head, and the wife, bairns and neareſt of kin bear their ſhares of it: yea ſuch donations, even *inter vivos*, are underſtood

[d] See below, IV. 45. 15.

derſtood to be with that burden. But if the legacy, gift or diſpoſition be ſpecial, if by evidences it appear that the defunct knew the thing legated not to be his own, the ſame is to be acquired, or the value thereof out of the dead's part; but if that be not known, the meaning is underſtood to be, that he gives it as he hath it, or pretends to it, without any warrandice, no not againſt his own preterite fact and deed: for defuncts are not ſuppoſed to have remembered what they have done; and what they do after the legacy, derogates therefrom: yet ſpecial legacies have this advantage, that they have no abatement by the defunct's debt, if they do not exceed dead's part.

XXII. As to the meaning and interpretation of ſpecial clauſes, they are congeſted in the Indexes of the Deciſions of the Lords obſerved by me. The particulars would be tedious and unneceſſary to be here repeated, but by theſe indexes and deciſions, they will eaſily be cleared; eſpecially theſe clauſes which are moſt frequently contraverted, ſuch as clauſes concerning conqueſt, ſucceſſion, and irritancies.

TITLE XLIII.

Probation by Witneſſes.

IN all controverſies witneſſes are adhibited to determine, as a common rule amongſt all nations; which is confirmed by the word of GOD, "In the mouth "of two or three witneſſes let every word be eſtabliſhed:" where, by every word, is underſtood every alledgeance to be proved. For it is not meant that words ſhould only be proved by witneſſes, but that things ſhould be ſo proved, being proponed by words written or ſpoken, if a juſt concluſion be thence inferred. But words of the mind, or thoughts, cannot be proved by witneſſes, unleſs they be expreſſed by words, or other ſufficient ſigns.

II. Thence alſo it followeth, that one witneſs cannot make ſufficient probation, whatſoever be the quality or veracity of that witneſs, and yet the teſtimony of one witneſs may produce more faith in the judges than other two will do: this evinceth, that every thing is not a ſufficient proof that makes faith to the judge. One witneſs may concur with other evidences to make up probation, tho' it be not ſufficient alone.

III. Hence it is alſo conſequent, that the probation of ſome points requires but two witneſſes, and others require three, which muſt be matters of very great importance: for if the ſentence had been, that every word ſhould be proved by three witneſſes, or at leaſt by two, it had not imported ſo much as when it is ſaid, that every word ſhall be eſtabliſhed by two witneſſes, or by three. This difference is obſerved in ſeveral caſes in the Roman law, without any particular edict, but upon the diverſity of importance of the matter, as in the making of the inventaries of the eſtates of defuncts by their heirs, improving the hand-writ or ſubſcription of a party *comparatione literarum*. And yet poſitive law may require more witneſſes than three, in the moſt ſolemn and important acts, when there is no *penuria teſtium*: ſo ſeven witneſſes were required in teſtaments, and five in codicils, which behoved to ſign; but in a military teſtament *in procinctu*, two witneſſes were ſufficient without ſigning: this doth not invalidate the natural evidence of three witneſſes in itſelf, but only refuſeth legal remedies, when the command to adhibit ſo many witneſſes is neglected or contemned, in the ſame way that legal remedies are not adhibited upon naked pactions, when the authority of law requiring ſomewhat further, (as ſtipulation) which may eaſily be done in all caſes, is neglected.

IV. Upon the like grounds our law and cuſtom hath in many things refuſed the teſtimony of witneſſes, how many ſoever they be, where writ may, and uſes

to

to be adhibited, or where it is agreed to be adhibited. So we allow no verbal or nuncupative teſtaments, and no probations of legacies exceeding 100 pound Scots, and no probation by witneſſes of the borrowing of money. But in matters of far greater importance, where writ uſes not to be adhibited, or cannot commonly be adhibited, we allow probation by witneſſes: as in all bargains, buying, ſelling, or bartering in markets, it were moſt inconvenient to require writ; and therefore in all ſuch bargains, in or without market, witneſſes are adhibited, unleſs it be agreed upon, that writ ſhall be adhibited. And we refuſe witneſſes for proving any other promiſe or paction, tho' within the value of L. 100 Scots: neither make we any difference, whether the words be framed in the way of ſtipulation or not, which was a very fit difference before the ſkill to write became ſo common. We do alſo allow witneſſes to prove the intromiſſion or receipt of any moveable, whether fungible or not, except the borrowing of current money. Neither do we allow the probation of witneſſes for payment of money, or other fungibles, where the ſame are eſtabliſhed by writ, except in the caſe of the delivery of victual by tenants, or of the performance of a contract for a viſible work, requiring a long time to work, or that which is palpably extant; ſo contracts for building a ſhip, a bridge, a houſe, *&c.* or for delivery of a ſhip, or for performing a voyage, tho' contracted in writ, may be proved to be performed by witneſſes. And tho' the intromiſſion with money-rent be probable by witneſſes; yet the payment of ſilver-rent by tenants to their maſters, tho' within an 100 pounds, is not ſo probable. And generally in all caſes where writ is not only a mean of probation, but a ſolemnity requiſite, the ſame cannot be ſupplied by witneſſes, or even by the oaths of parties; becauſe without ſuch writs, the rights whereof they are ſolemnities become null: yet the tenor thereof may be proved not only by oath of party, but by witneſſes.

V. It is a common requiſite in all witneſſes, that they be ſolemnly ſworn in preſence of a judge-ordinary or delegate, according to the common cuſtom of all civil nations: and therefore extrajudicial oaths, or oaths not required judicially, as aforeſaid, albeit in writ, are not accounted teſtimonies, but teſtificates; which, tho' they may be ſufficient to inſtruct matters of ſmall importance, as in obtaining commiſſions to depone in the country, or for inſtructing reaſons of advocation, or in concourſe with other evidences, eſpecially in matters ancient, yet they are not accounted teſtimonies in ordinary probation.

VI. Theſe ſolemn oaths of witneſſes give the chief ground of the moral duty, to acquieſce in the teſtimony of witneſſes, and it proceeds not upon ſtatute or cuſtom; for it is a ſtrong ground of confidence, that *conteſtes* will not perjure themſelves, and take God witneſs to a lie, wherein they may be redargued by their *conteſtes*, and become infamous, and puniſhable capitally. And therefore, as parties refer to, and acquieſce in the oaths of parties ſwearing to their own detriment, even then when another probation is poſſible; much more ought they to acquieſce in the ſolemn oaths of more indifferent perſons as witneſſes. And as witneſſes are habile to take away men's lives and their eſtates, ſo much more are they ſufficient in leſſer matters, where writ is not required.

VII. Yet great caution hath been always adhibited in admitting of witneſſes, becauſe many are apt to miſtake through inadvertency or precipitancy, and through the ſecret inſinuation of favour or hatred, which even the witneſſes themſelves do not perceive: therefore ſeveral perſons are, even by the moral law, inhabile to prove as one of two or three witneſſes. As firſt, thoſe who have not attained the age of diſcretion, whereby their ſenſes are confirmed by exerciſe, to advert things as they are, and when a moral principal of juſtice is not conſidered and confirmed in them, that they can have the reverence of an oath, and the abhorrence to wrong others in their right: yet when they come to have diſcretion, they may bear witneſs in palpable things, upon their memory of what paſt before they attained to diſcretion, wherein there can be little doubt of their miſtake: as when march-ſtones are ſolemnly ſet, boys uſe ſometimes to be laid down upon them and ſharply

ſharply whipt, whereby they will be able to remember, and be good witneſſes as to theſe marches when they are very old, that impreſſion on their fancy laſting long.

Secondly, Fatuous or furious perſons are not capable of being witneſſes, while they are in that condition, and even of things that then occurred, except they had long lucid intervals; for ſhort intervals are hard to be known.

Thirdly, Profligate perſons, who make no conſcience of oaths, which may be known by their frequent lying and ſwearing falſly, or inconſiderately, or their being openly vitious otherwiſe, whereupon they are accounted as infamous, *infamia facti* by ſuch vice, as relates to the matter of right, as deceivers or oppreſſors, or perſons openly profane, being atheiſtical, or contemners of religion: for ſuch are not preſumed to have the reverence of an oath, and eſpecially if they be vicious by vices relating to oaths, as if they have been corrupt witneſſes by accepting of bribes, or not diſcovering in the preliminaries of their oath when bribes were offered, or in deponing things inconſiſtent, which make them inhabile in any cauſe. This point is ſometimes too far ſtretched, as when perſons are excluded as being hereticks: for many ſuch have reverence to an oath; and tho' they may be rejected as ſuſpect, when they are to teſtify againſt thoſe of an oppoſite perſuaſion, eſpecially if they be zealous, yet that is not through ſimple inability, but upon ſuſpicion of inequality. Covenants have been made with thoſe that acknowledged not the true GOD, yet having devotion to that which they adored, it gave ground of confidence in their oaths. And certainly it is much the duty of judges, in taking the oaths of parties or witneſſes, to do it in theſe terms that would moſt touch the conſcience of the ſwearers, according to their perſuaſion and cuſtom. And albeit Quakers, or other Phanaticks, deviating from the common ſentiments of mankind, do, from perſuaſion, refuſe to give a formal oath, yet if they do that which is materially the ſame, as if they depone that what they are to ſay "is in the pre-"ſence of GOD, who is their witneſs, and who will be their judge if they lie," it is materially an oath.

Fourthly, Huſband and wife, parents and children, are commonly inhabile witneſſes. And tho' parties would conſent, yet theſe are not obliged to depone againſt one another, leaſt thereby diſguſt and prejudice ſhould ariſe betwixt ſo near relations, or they be in too great tentation of perjury: and therefore they are exeemed from being witneſſes or judges one againſt another, even in capital matters.

Fifthly, Thoſe who are in place of parents and children, as uncles and aunts, nephews and nieces, and alſo brothers and ſiſters, are inhabile to be witneſſes for one another: but they have not the privilege to exeem themſelves from being witneſſes one againſt another. But couſin-germans, and theſe of greater diſtance, are not ſimply inhabile, but where more indifferent witneſſes are found.

Sixthly, Enmity or malice incapacitates theſe to witneſs againſt thoſe they hate. And if the enmity was upon any atrocious injury done or attempted againſt life or fame, an ordinary reconciliation doth not obliterate the ſame, unleſs evident friendſhip hath followed.

Seventhly, Intereſt in the cauſe makes witneſſes inhabile as to that cauſe, if they can gain or loſe thereby. But that *fovent conſimilem cauſam*, is not a good objection: for that conjunction of intereſts relates to the relevancy, and not to the verity of the cauſe.

VIII. Poſitive law or cuſtom hath been too apt to reject witneſſes, who were not morally inhabile: which is very allowable where there is variety of witneſſes, if the other party can give ſufficient evidence thereof, as when any deed is done at a publick market, burial, or marriage, or at ſolemn conferences before friends or arbiters, or by examination of the adducer, if he knew of any other witneſſes, and who they were, or by preliminary examination of the witneſſes who were the *conteſtes* in the point to be proved; in ſuch caſes the judge may warrant-

ably forbear to examine that witneſs, till ſome others of the *conteſtes* be called: but otherwiſe to exclude theſe, who by divine law are habile, and thereby to exclude the adducer from his right, is not warrantable. And therefore, where it appears, that there could not be many witneſſes; theſe that are preſent, will be admitted, though in other caſes they will be rejected; as in encroachments upon men in or about their houſes, if there be any veſtige of the crime, witneſſes are not rejected, becauſe they are ſervants, or of ſuch other relations, as otherwiſe would exclude them. And in all clandeſtine acts, there is not to be expected variety of witneſſes; and ſo ſuſpicion ſhould not exclude.

IX. Therefore, where competent evidence is given, that other witneſſes might be had, there are many grounds allowable to refuſe theſe who are adduced, with ſuſpicion of being biaſſed, till others who are without ſuſpicion be examined; as firſt, poverty, whereby witneſſes are more capable of corruption. And therefore in our cuſtom, it uſes to be objected againſt witneſſes, that they are not worth the King's unlaw, that is the ordinary mulct for miſdemeanors. But this ought to be conſidered according to the importance of the cauſe; which, if it be great, he who is worth the King's unlaw, is not *omni exceptione major:* for in great cauſes, the tentation may be great, which cannot be preſumed in mean points.

Secondly, Witneſſes threatened by powerful and rigorous adducers, if they did engage to depone, are corrupt, although their depoſition were true. But though they did not engage, they ought in their preliminaries, to declare the threats, which would purge the ſuſpicion, ſhowing they were not afraid thereof; otherwiſe they were ſuſpect.

Thirdly, Witneſſes become inhabile, by giving partial council; as by inſtigating the plea, telling the party of his intereſt, and offering to depone in his favour, or being preſent with him at conſultations with lawyers, where it might be ſhown what was neceſſary to be proved. But it is no partial council, though perſons be interrogated by parties what they know of ſuch affairs, generally or particularly, if the motion ariſe not from themſelves.

Fourthly, Witneſſes may be rejected, if they were prompted and inſtructed in what terms to depone.

Fifthly, Witneſſes may be rejected, if they come to the place of judicature, at the deſire of the adducer, without being cited. Theſe are called ultroneous witneſſes, but ſhould rather be called officious witneſſes. But if upon other occaſions they came there, and were cited, not being deſired to come for that end, it is no ground of ſuſpicion.

Sixthly, Domeſtick witneſſes, as ſervants and others, though not in a ſervile condition, yet continued in the family of the adducer for ſome conſiderable time, are rejected as ſuſpect, either in the caſe of their maſter or miſtreſs, or their fellow-domeſticks, being in a friendſhip together, unleſs they be neceſſary witneſſes in domeſtick affairs.

Seventhly, By our cuſtom moveable tenants, who have not tacks for terms to run, are ſuſpect witneſſes.

Eighthly, Advocates, agents, factors, truſtees, are ſuſpect witneſſes for theſe who intruſt them. But they are not obliged to depone as to any ſecret committed to them.

Ninthly, Good-brothers and good-ſiſters are ſuſpect witneſſes for one another, except it be by marrying of two ſiſters or two brothers, which is but *affinitas affinitatis:* and therefore they are only to be excluded, where more indifferent witneſſes are found.

Tenthly, Extraordinary friendſhip or intimacy makes witneſſes not to be *omni exceptione majores:* for ſuch are accounted no leſs affectionate, than brethren. Yea, unlawful amours render witneſſes ſuſpect of too much favour, or otherwiſe of too much hatred, if they have gone off with diſſatisfaction.

Eleventhly,

Eleventhly, Women are rejected from being witneſſes in cauſes merely civil, except they be neceſſary witneſſes, as in the probation of a child born of that ripeneſs, as that it did cry or weep.

X. But in all theſe objections againſt witneſſes, where they are not ſimply excluded, or have intereſt in the cauſe whereby they may gain or loſe, or in near collateral relation, or enmity; witneſſes ſhould not be rejected, unleſs other witneſſes unſuſpect could be found.

XI. The verity of all theſe objections may be proved by the oath of the adducer, or by the oath of the witneſs, or by the oaths of other witneſſes, if they be cited to a term before the witneſſes be examined; but they cannot otherwiſe be offered to be proved, becauſe theſe objections are dilators which muſt be inſtantly verified, in the firſt inſtance; but in the ſecond inſtance, they may be proved, even by witneſſes, if reprobatures be proteſted for, at the time of their examination: for otherwiſe parties are held as acquieſcing, if they proteſt not; except they can give competent evidence, that the grounds of their inhability came to their knowledge after their teſtimony, and were of the nature of thoſe for which witneſſes might be ſimply rejected, as upon account of near relation, enmity, or intereſt in the plea: for there is no reaſon, that upon the other lighter grounds of ſuſpicic. (which ſhould only take place where more indifferent witneſſes are found) ſolemn decreets ſhould be reduced; eſpecially now when cauſes go to the roll, which makes a conſiderable diſtance of time between the examination of witneſſes and the decreet, whereby parties ſo ſoon as witneſſes are cited, might *incidenter* cite other witneſſes to prove their inhability, which will have ſummary proceſs, and might be terminated before decreet, *be* extracted. But it hath been, and ever will be of great inconvenience, if decreets remain uncertain by reprobatures: and therefore it were moſt convenient, that there ſhould be a ſtatute for a ſhort preſcription in reprobatures.

XII. So much for the hability or inhability of witneſſes. The next point is, how they are adduced and examined. The antient cuſtom was, that in the principal ſummons, there was a warrant to cite witneſſes, and a blank left for their names. But ſeeing now cauſes cannot come to be diſputed and determined, at the term to which perſons are cited; that way of citing witneſſes by the principal ſummons is uſeleſs, till terms be aſſigned for probation: and then the witneſſes are cited by diligences, yet with continuation of days; ſo that the adducer may bring them to the bar, any day after the term, to which they are cited, and then objections againſt them may be diſputed or referred to the ordinary on the witneſſes, before they be examined; but ſtill they muſt appear at the bar, and make faith: and there is put up, in the minute-book "Aviſandum and witneſſes," to intimate to the other party, that the witneſſes will be examined in the afternoon, unleſs they be adduced on Saturday, and then they are to be examined on Tueſday thereafter.

XIII. There are two ordinaries for examination of the witneſſes, that they be not forced to long attendance: and more are appointed, if the witneſſes be very many. If they cannot be all overtaken at one diet, the ordinaries ought to begin with theſe firſt the next day; that the oppoſite party be not uncertain when to attend, and to give in interrogators, or propone and inſtruct objections: and if they be otherwiſe examined, the party will eaſily get a re-examination, he condeſcending upon the relevant particulars. The ordinaries are judges as to the relevancy and pertinency of the interrogators, which are regulated by the tenor of the act of litiſconteſtation: and therefore they cannot refuſe to examine upon the tenor of it: but if indirect interrogators be proponed, to expiſcate the verity, parties are heard thereupon; and in caſe of difficulty, report is made thereanent, or upon the objections and inſtructions thereof.

XIV. Formerly the teſtimonies of witneſſes were taken, without the hearing of any but the judge and clerk. But now, by a late ſtatute, *P.* 1686, *c.* 18. teſtimonies are appointed to be publiſhed; and therefore parties and advocates are admitted

admitted to be preſent at the examination, but no other ought to be admitted. This was always allowed in criminals, and the reaſon is, becauſe, upon the anſwers of witneſſes, there ariſe emergent interrogators to expiſcate the truth, which the Lords did always follow, and now they have the concourſe of the parties.

XV. In the teſtimonies of witneſſes, the *ratio ſcientiæ* ſhould always be expreſſed, that it may appear they do not depone upon fancy or conjecture, or upon deduction of conſequences, but upon acts falling under ſenſe. And therefore teſtimonies *ex auditu* prove not, that is, where the witneſs gives for the reaſon of his knowledge, that he heard the matter by relation of others. But if the thing to be proved, do itſelf fall under hearing, the teſtimony of the witneſs that heard it is valid: and therefore, if witneſſes be adhibited to prove fame, the hearing of common report is ſufficient, though the deponent cannot condeſcend upon the reporters.

XVI. If parties give in interrogators, for examining who were preſent at theſe acts on which the witneſs depones, and where and when the ſame were done; the ſame ſhould not be refuſed, that thereby it may appear, whether there were witneſſes not cited, which were leſs ſuſpect, whom the Lords might ordain to be cited, that it might appear whether the witneſſes would vary as to the circumſtances of time and place, and ſo not be *conteſtes*.

XVII. By what hath been ſaid, it may appear what witneſſes are inhabile in any caſe; and what witneſſes are inhabile as to ſome particular perſons, and not to others; or as to ſome particular cauſes and not to others; and what witneſſes are rejected, only where more indifferent witneſſes are found, but otherwiſe may be received without them, or if one unſuſpect be found, may be received with the ſame: thence alſo it appears, what witneſſes are *omni exceptione majores*, as being neither inhabile nor ſuſpect.

XVIII. In examination of witneſſes, each witneſs ſhould be examined ſeverally, out of the preſence of the reſt. And the parties and advocates ought not to be permitted to remove, till all of them be examined. Neither ought the examined witneſſes go to the ſame room with thieſe not examined, to the effect the witneſſes to be examined may not be biaſſed, by repreſenting to them what the former witneſſes have deponed, which may very readily be unfaithfully related: for a witneſs that will not perjure himſelf in the favour or odium of a party, may yet relate his teſtimony otherwiſe than truly it was.

XIX. Witneſſes in improbation of writs, or reprobatures, are not excluded upon exceptions, but all are taken *cum nota*, which are not parties: and if their teſtimonies be contrary, they may be confronted, that by minding thoſe who differ, of circumſtances, they may be convinced to join: and in adviſing theſe teſtimonies, reſpect is not had only to the number, but chiefly to thoſe who are moſt free of exception.

TITLE XLIV.

Probation by Oaths of Parties.

PRobation by oaths of parties, hath a moral ground and a ſcriptural warrant, as well as probation by witneſſes. The moral ground is, that as men are obliged to perform all duties towards men, ſo they ought not to refuſe to acknowledge the ſame, ſo that the other party be obliged to acquieſce, and not further to ſtrive or controvert. The ſcriptural warrant is, "That an oath for confirma-"tion, is the end of all ſtrife." And therefore, as all men are obliged to remove the ground of ſtrife, ſo they are obliged to give their oaths, when theſe are neceſſary for removing it. Strife doth comprehend, not only contending by force, but contending by law. And there is convincing reaſon that oaths of parties ſhould

end all ſtrife: becauſe thereby God is called as witneſs of the truth, and is acknowledged as a juſt judge, who will puniſh the perjury. It is a ſtronger confirmation than the teſtimonies of witneſſes: becauſe party's oaths are commonly againſt themſelves, whereas witneſſes ſwear not againſt themſelves. Alſo theſe who aſſert or acknowledge by confeſſion or writ, do not call God to be witneſs and judge, nor are under the atrocious crime of perjury; and confeſſion is rather a yielding, than a poſitive aſſertion of the verity of what is confeſſed, as denial imports no more, but not confeſſing, and not a poſitive aſſertion of the falſhood of the thing denied.

II. Seeing oaths of parties for confirmation muſt end all ſtrife, and that the ſwearer runs therein the hazard of perjury, and infamy, if the contrary be proved; therefore, after ſuch oaths, there may be no other probation adduced; yea, parties ought not to be urged to ſwear, where the urger knows any other ſufficient probation; and therefore he that is required to ſwear for terminating a plea, is not obliged to ſwear, till the requirer not only renounce all other probation, but depone that he hath none. Eſpecially that he hath no probative writ; becauſe the malice of ſome, in ſmall matters, may be ſo great, as to be content to loſe the point referred, ſo that they might make the ſwearer infamous, by reſerving his writ to the contrary.

III. It is not every oath that can terminate pleas, and be the end of all ſtrife, but that oath only which the Scripture calls an oath for confirmation, and which is commonly called an oath of verity: becauſe it poſitively affirmeth, that what the ſwearer aſſerteth, is true. And therefore an oath of credulity is not ſuch an oath of verity: becauſe the ſwearer doth not aſſert the verity of the matter, but the verity of his belief of the matter; by which, is not underſtood, that which is proper belief, that is, perſuaſion upon the teſtimony of faithful witneſſes; but belief is the prevalent opinion or judgment of the ſwearer. And yet the oath of credulity ought to be true, that the ſwearer is ſo perſuaded; and it is ſo preſumed, but it terminates not the plea: for even thereafter, other probation by writ or by witneſſes above exception, may be uſed, where, by ſtatute or cuſtom, they are not forbidden; much more if the party depone, that, to the beſt of his memory, or beſt of his knowledge, what he aſſerteth is true. Such oaths do juſtly exclude him who ſo ſweareth, to inſiſt in theſe points contrary to his own belief or perſuaſion; and therefore in that caſe they may terminate the plea: but an oath of verity terminates the plea *ſimpliciter*: yet oaths of credulity, in ſupplement of other evidences, may fully terminate the plea, but not alone.

IV. Yea, oaths of credulity may terminate pleas in ſome caſes, even in favour of the ſwearer; as the oath *in litem*, in relation to the quantity or value of goods, which poſitive law for conveniency allows in many caſes, to prevent attrocious injuries; as in the caſe of ſpuilzie, if a ſpuilzie be proved, though the whole particulars libelled be not proved, the party injured is allowed to prove by his own oath, what other particulars were ſpuilzied: or in the caſe of things committed to cuſtody, by the edict *nautæ*, *caupones*, *ſtabularii*, if any thing be wanting, the party damnified may depone upon the goods contained in any coffer or clock-bag, or other incloſure, and the law preſumes, that thoſe who receive the ſame in cuſtody, do it with that hazard, and that it were uncivil to require thoſe who truſted the ſame, to ſhow not only to parties, but to witneſſes what were incloſed: and as to the value, an oath of credulity, or of eſtimation, is in theſe or the like caſes allowed to thoſe damnified, yet ſo as if the eſtimation be exorbitant, the judge only can modify.

V. An oath of verity cannot be urged, in that which might infer the hazard of life or fame of the party. And this is not by poſitive law only, but by the common law of nations: and it is the common intereſt of mankind, that they ſhould not be urged to ſwear againſt their life, limbs or fame; and even when they are preſſed to confeſs by torture, they are not compelled to ſwear, but it is ſufficient to deny, that is, not to confeſs; becauſe there lies upon them an ob-

ligation of ſelf-preſervation, whereby they may conceal their own crime, if it cannot otherwiſe be proved. Joſhua did not urge Achan to confeſs the ſtealing of the Babyloniſh garment, nor did he ſay that the confeſſion was to the glory of GOD, till by divine teſtimony the lot fell upon Achan, and then it did glorify GOD, to ſhow his omniſcience veracity and juſtice by the lot, and that not only by Achan's confeſſion, but by his digging up and ſhowing to the people the truth thereof. Therefore it is, that in improbations in caſes of forgery, or in theft and robbery, or in moſt caſes of fraud, parties are not urged to depone, nor are they urged to depone upon the ſecret thoughts of their mind, either as to their judgment, or as to their purpoſe and deſign: for ſo far has GOD left thoughts free, as to man's inquiry. Neither can an oath be urged to ſupply the want of a writ, when it is not only a mean of probation, but a ſolemnity requiſite for compleating a right, as a charter, ſeiſin, or intimation of an aſſignation.

VI. Oaths of verity do ſo far ſopite pleas, that after ſuch an oath is given, there is no more to be inquired than *ſi juratum ſit*; ſo that there can be no remedy, tho', by a criminal action, the ſwearer ſhould be found perjured: and that becauſe an oath, voluntarily referred or deferred by him who had power ſo to do, implies a contract to ſtand thereto, without any retractation, and hath the force of a tranſaction, and of a final and ultimate judgment; and therefore there is no appeal from ſentences proceeding upon voluntary oaths, where appeals are in uſe.

VII. An oath of verity hath the ſame effect, tho' it be extrajudicial, which both affordeth action and exception. And albeit by the Roman law, naked pactions without ſtipulation were ineffectual, yet even an extrajudicial oath doth afford both action and exception. And tho' extrajudicial confeſſions do not always prove, but may be upon other deſigns than to confirm the truth; yet an extrajudicial oath doth ever prove whether it be ultroneous, or upon tranſaction or reference of parties.

VIII. An oath of verity is ſo effectual and extenſive, and doth ſo fully end pleas, that it gives not only action or exception to the party who has ſworn, but to his heirs and ſucceſſors, yea, to his ſingular ſucceſſors. And the oath of one *correus debendi* liberates not only him and his heirs, but all the reſt and their heirs. And the oath of the principal liberates the cautioner, and his heirs, if the verity of the point be referred to his oath. Yea, tho' another action be intented by the ſame or other parties, if the plea or cauſe be the ſame, the exception of an oath of verity is ſufficient to elide it, if the matter be the ſame: but the matter comprehends the *medium concludendi*, whereunto if the oath relate, and not ſimply to the verity of the concluſion, it doth not exclude the probation of the concluſion by other *media*.

IX. There is another kind of oaths of verity, which is not referred nor deferred by a party, but by the judge; which therefore is not a voluntary but a neceſſary oath, in obedience. But it takes no place in plenary probation, in which the judge can neither command a party to ſwear, without conſent of the other party, nor can he hinder him to refer or defer an oath, where oaths are competent: for inſtance, where there is *ſemiplena probatio*, a judge may command a party to depone, even in his own favour, when he finds that would make up a ſufficient probation: ſuch alſo are the oaths *ex officio*, in extraordinary caſes. From theſe oaths there was competent an appeal, that it might be judged by the ſuperior judge, whether the inferior did rightly urge the oath: but therein there is no contract of parties; and therefore writs after found out, may reduce ſentences upon ſuch neceſſary oaths, but not upon oaths voluntarily referred or deferred by parties, implying an engagement finally to ſtand to the oath.

X. Formerly parties were examined upon oath alone, either upon the expreſs terms in the act, whereupon they deponed, or upon interrogators given in writ by the parties, but they or their advocates were not allowed to be preſent: but now,

now, ſince all teſtimonies are publiſhed, parties do not only give in written interrogators, but they and their advocates are preſent, and offer to the examinators verbal interrogators, from the anſwers made to the act or written interrogators.

XI. The examinators are judges of the relevancy and pertinency of the interrogators, and in caſe of difficulty, they report the debates concerning them. There is great ſkill and prudence in ordering the interrogators, that the particular interrogators or expiſcations be put firſt; for if the terms of the act, or more general interrogators be put firſt, the anſwers thereunto engage the deponent to anſwer the particulars accordingly, which they would not eaſily advert if the particulars were firſt propoſed.

XII. The examinator ought not to give up the interrogators to be ſeen by the parties that are to ſwear, who thereby are apt to contrive evaſive anſwers, and are aſſiſted therein by others: nor ſhould he ſuffer them to read their anſwers in writ, but to anſwer by word. And it is his truſt by new interrogators to clear all dubious anſwers. Yet in the caſe of qualified oaths, they are accuſtomed to relate the matter of fact in writ, and to ſubjoin that what they have before related is true. The main reaſon of allowing writ in this caſe, is, that the other party may be ready to debate againſt the competency of the quality; but the examinator and the other party may propone what interrogators they ſee juſt, notwithſtanding the written qualified oath. And there is a late act of Sederunt in July 1692, prohibiting the giving in of written oaths, except in the caſe of qualified oaths.

XIII. Oaths of verity referred to parties, are ſometimes by them deferred back to the referrer, wherein the queſtion oft-times ariſeth, which of the two ſhould depone, which the judge muſt determine: and he that offers to defer, ought to depone that he is not clear in the matter; and therefore, if there be probability that the other party hath more occaſion to be clear therein, he ſhould not refuſe to depone, but otherwiſe he ſhould not be urged, becauſe the deferrer may be clear to depone againſt himſelf, but would rather the referrer ſhould depone, againſt whom he hath the ground of reproach, that he hath gained his cauſe by his own oath.

XIV. Qualified oaths are theſe, wherein the deponent acknowledgeth, that what is referred to his oath is true, but that what is referred, doth not contain all the truth requiſite for determining the cauſe, which therefore he adds as qualities of his oath. This is neceſſary and warrantable in many caſes; eſpecially where in any affair, a party who refers to oath, pitches upon particulars ſufficient to infer the concluſion, by preſumption ariſing therefrom, which he is not otherwiſe obliged to prove: as if he alledge he made a bargain for ware at ſuch a price, and delivered the ſame: and therefore ought to have the price. The other party may depone, that the bargain was true, the ware delivered, and that was the price; but that there were other conditions beſides the price, or that the ware was not ſeen by the buyer, but taken on truſt, and found inſufficient, and upon the firſt diſcovery thereof was offered to be returned, and not being accepted, the goods being periſhable, were rouped, whereby the inſufficiency did appear. Or if a party ſhould purſue another, for intromitting with goods in his poſſeſſion, which preſumed his right, and therefore ought to be reſtored, the party might depone, that he intromitted with theſe goods by authority of a judge, or by the conſent or approbation of the party.

XV. There is another oath frequently uſed in proceſſes, called an oath of calumny, which may be uſed againſt purſuers as to their whole libel, or as to ſuch parts thereof wherein they inſiſt; or againſt the defender as to any defence proponed by him, or even as to his denying the verity of the purſuer's libel, and as to all replies, duplies, *&c.* wherein either party will be holden as confeſſed, if they refuſe to depone; except in the caſes where they are not obliged to depone or confeſs, which are the ſame as in the oath of verity.

XVI. There

XVI. There is much unclearneſs in the import of an oath of calumny, what the meaning of it is; and what the words ought to be, which depends mainly upon the ſignification of calumny, which doth always import a reflection or reproach upon the party who calumniates. And in proceſſes, it is either a reproach againſt the juſtice or truth of the party who calumiates, that is, that he urges points unjuſt, or which he believes not to be true: and by the ordinary terms of oaths of calumny, wherein parties are interrogated, "whether they have juſt rea-"ſon to affirm or deny ſuch points;" parties are in danger to ſwear falſely, or ignorantly; for thereby they may mean, that they have juſt reaſon to purſue or defend their own intereſt, or their meaning may be, that theſe points are not againſt law or reaſon, albeit they know nothing of the truth thereof. But the tenor and true meaning of the oath of calumny, is, that parties do not affirm or deny theſe things that may reproach their neighbour, but when they believe that what they aſſert is true: which is very well determined by our antient ſtatute, both as to parties and their advocates, or foreſpeakers: *Parl.* 1429, *cap.* 125. bearing, "That "advocates and foreſpeakers in temporal courts, ſhall ſwear, and alſo parties that "they plead for, if they be preſent in the beginning, before they be heard in the "cauſe, that the cauſe he trows is good and leill."

Illud juretur, quod lis ſibi juſta videtur.
Et ſi quæretur verum, non inficietur.

By this ſtatute it appears, that the oath of calumny, is an oath of credulity, that the cauſe is good, *i. e.* juſt, and leill *i. e.* true; and that the plea appears to the deponent to be juſt, and that he will not deny the truth that ſhall be aſked of him thereanent. In the plea, are comprehended both the alledgeances of purſuers and defenders; and therefore the terms of the oath of calumny ſhould be by either party, that "they believe or judge that the points they inſiſted in, are "both juſt and true." And it is not ſufficient to depone, that they think them juſt or equitable; or that they only believe they are true, but that they are both juſt and true.

XVII. The ſtatute alſo bears, that the oath of calumny upon the libel, ſhould be before any proceſs. And it uſed to be ſuſtained, if it were deponed, that they believed ſome part of the libel were juſt and true: but now oaths of calumny are not uſed but in the time of diſpute, and not until the points whereon they are craved, are found relevant, or at leaſt admitted to probation by an act before anſwer; but in formal acts of litiſconteſtation it is not reaſonable to crave the oath of calumny, as to the juſtice of points, ſeeing the Lords have found them relevant. But only as to the verity thereof, that they believe they are true, and not calumniouſly proponed to procure delay.

The Lords did lately, by an act of Sederunt, 13th January 1692, alter the terms of oaths of calumny, but that act hath not yet taken effect, and the terms of this ſtatute are much more clear and proper, than the terms of that act: and the oath may be fitly propoſed in theſe terms, "whether or no the deponent doth "believe, that there is more probability for the truth of the point propoſed, "than againſt the ſame:" for this is ſufficient to clear, that the alledgeance is not calumniouſly proponed.

XVIII. If parties be preſent at the diſputing of their cauſe, they muſt depone *de calumnia*, but if they be abſent, the advocates who propone the points, may be put to depone *de calumnia*, whether or no they were informed by their clients, or by ſuch as they intruſted to inform them, that the points they inſiſted in were true, which yet doth not hinder the parties to be cited to depone *de calumnia*, whether they did believe the truth of theſe points: for it is ſufficient for advocates, to believe upon the information of clients, but the clients muſt have a better ground of belief.

XIX. Oaths of calumny are always competent before probation, or even if the probation by writ or witneſſes prove nothing, when they are patent, the oath of calumny

calumny may be required; but not after the concluſion of the cauſe, and yet even then, the oath of verity may be required, if the party be preſent.

XX. By what hath been ſaid, the difference is evident between the oath of verity, and that of calumny; that the oath of calumny doth not fully determine the plea, but only excludes the deponent from inſiſting in theſe points, which he doth not believe to be true; and doth not hinder the other party to prove theſe points, which the deponent did deny by his oath of calumny, but doth not prove the points to be true, and ſo as to require no further probation, as the oath of verity doth. The Lords, by ſaid act of Sederunt, 13th January 1692, have declared, that they will not require the oath of calumny of parties, upon their own recent fact, for they cannot believe that to be true, but when it is true, and therefore there muſt not firſt be required an oath of calumny thereupon, and when they cannot prove by witneſſes or writ, they cannot then return to the oath of verity, upon the ſame point of proper recent fact: but in antient facts, where the actor may have forgot, the oath of calumny may be required, and afterwards the oath of verity, if no other probation can be had: for then the deponent muſt be poſitive of the truth of the point.

XXI. The moral duty to ſwear for ending of controverſies, gives the foundation of the probation by holding parties as confeſſed who do not depone, when they are required or cited to depone with expreſs certification to be holden as confeſſed, if they do not depone [d]. This is a juſt and a moſt expedient certification: for the law preſumeth they will not depone, becauſe they are conſcious they muſt confeſs what is referred to their oaths. And it takes place both in oaths of verity, and in oaths of calumny: for thoſe who refuſe to depone *de calumnia*, are held as refuſing, becauſe they are conſcious their alledgeance is calumnious, and that they themſelves do not believe the truth of it.

XXII. Albeit being holden as confeſſed, comes in place of the oath, acknowledging the point referred thereto; yet it is not ſo ſtrong a probation, as the oath itſelf: for none can be reponed againſt an oath, but they may be reponed againſt being holden as confeſſed, if the execution, by which they were cited under that certification, be improven; or ſuch impediment hindering their appearance at the term appointed, be inſtructed, that they neither could come, nor ſend to their advocates to petition for a commiſſion to depone; as if they ſuddenly fell into a diſeaſe affecting the brain, or were carried away and unlawfully impriſoned; yea if parties be holden as confeſſed upon exorbitant quantities, which cannot be ſuppoſed they would acknowledge, they will be reponed to their oaths; or if they defer to the party's oath who required the ſame.

XXIII. The preſumptive probation, by being holden as confeſt, may be elided, if recently done, by other contrary probation adduced by the party holden as confeſt; but not *ex intervallo*, becauſe the other probations which might have been had on the ſame point, whereupon the party was holden as confeſt, may be loſt; for if any crave to be reponed, the other party may confirm the decreet by witneſſes, which otherwiſe would not be receivable. And it cannot be known whether he might have found witneſſes to prove, if the repoſition be craved *ex intervallo*, ſeeing in the mean time perſons might have died, or removed, who might have known the truth: and likewiſe a decreet upon holding parties as confeſt, for whom a term hath been taken, is a decreet *in foro*, which is not quarrellable *ex intervallo*.

[d] See above, IV. 3. 30.

TITLE XLV.

Probation extraordinary.

HAVING explicated the three ordinary kinds of probation, *viz.* writ, witneſſes and oath, there remain yet other kinds and ways of probation, which are here called extraordinary; becauſe they are more rare and unaccuſtomed, and ſome of them are only competent to ſovereign courts *ex officio nobili*, when the ordinary ways of probation occur not.

II. Probation uſes to be diſtinguiſhed in that which is inartificial, and that which is artificial. The former three ways of probation are called inartificial; becauſe they prove points expreſsly, directly, and *in terminis*, and ſo require no art or ſkill to make parties underſtand, that the point found relevant is proved: as when a libel, exception or reply, is directly and expreſsly proved to be true, by the oath of the parties againſt whom the probation is adduced, ſwearing that theſe points are true, or that they know them to be true, or that they believe them to be true, or when they ſay the like by an authentick writ ſubſcribed by them, or for them, or when ſufficient witneſſes teſtify the ſame; for here can be no doubt or queſtion, that the very point propoſed is expreſsly proved. But when the probation is not direct and expreſs, but conſequential and indirect, where the point to be proved is inferred to be true by conſequence, it is not equally obvious to all capacities, whether that conſequence be valid or not: and therefore it is called an artificial probation, when it admits debate and reaſoning whether the conſequence be good or not; upon which the Lords muſt give interlocutor, not only when the conſequence is upon matters of fact acknowledged or notour, but even when the points of fact are offered to be proved, from which being proved, that point would be inferred by conſequence, which is proponed in the libel, exception, reply or duply. And yet the interlocutor is rather concerning the verity of theſe points, than concerning the juſtice thereof; but the interlocutor may well be, that ſuch matters of fact alledged are not relevant to infer the point propoſed in the proceſs: for the probation of the matter of fact to infer the point to be proved by conſequence, cannot help or relieve the party who alledges the ſame, becauſe the inference is not good.

III. But there are other extraordinary ways of probation, beſides this conſequential probation, inferring the truth of one point of fact, from another point of fact; ſuch as notoriety of the verity of the point of fact, and the confeſſion of the party, which are valid probations, and yet are neither by writ, witneſſes, or oath of party. Neither do all other probations beſide theſe three, come under the name or nature of preſumptions; but all the ways of probation beſides theſe three, are leſs ordinary than they; and therefore are all joined here, under the name of extraordinary kinds and ways of probation.

IV. Probation by notoriety of the verity of fact is, when the judge of proper knowledge knows, that the point to be proved is commonly known or acknowledged to be true, whether it be ſo known to a whole nation or to a whole vicinity. And it will not be elided, tho' ſome particular perſons be ignorant of it, if the generality know it. But the particular knowledge of the judge is not probative; for the judge muſt proceed *ſecundum allegata et probata*, and cannot be both judge and witneſs in the ſame cauſe upon particular knowledge; and yet his knowledge of the notoriety is ſufficient, but ſo that the notoriety may be redargued by a ſtronger poſitive probation, if it be in due time proponed and proved. But a decreet will not be found null for want of probation, when judges ſuſtain the point to be notour, eſpecially in a ſovereign court collegiate, where the major part of the judges

judges acknowledge the notoriety: thus all alledgeances for huſbands, wives, parents, children, proceed without probation of their being ſuch, unleſs pregnant evidence be alledged in the contrary, which will hardly be admitted to be proved by litiſconteſtation, but muſt be inſtantly verified, yet may be competent by way of reduction. There are many other ſuch caſes, as when lands are libelled to ly in ſuch a ſhire, ſuch juriſdictions or ſuch pariſhes, it is taken for granted, unleſs the contrary be inſtantly proved. In the ſerving of brieves of heirs, or of terces of relicts, "commonly holden and reputed" is ſufficient, tho' it be not univerſal, but in the vicinity, without proving the marriage of the father and mother, or of the huſband and wife: yet a contrary probation, that ſuch perſons could not be lawfully married, or that they were the time of the birth married to others, if inſtantly verified, would ſtop the ſervice, or make it null, or being proved in a reduction, would have the ſame effect.

Albeit judges cannot be both judges and witneſſes, not only in the ſame point, but even in the ſame cauſe, (which is introduced that the power of judges be not too much increaſed) yet it reaches not to notoriety, or to what is done in preſence of the judge in judgment, as what he ſees and hears; for theſe are counted as notour. But this holds not *ex intervallo*, upon the memory of judges, even of things they have ſeen or heard in judgment, neither in what they have heard or ſeen extrajudicially, but only ſuch as are ſo inſert in judicial acts.

V. The next extraordinary manner of probation is, by the confeſſion of the party, againſt whom any alledgeance is ſuſtained to be proved; yet it is an extraordinary probation, becauſe there are few ſo ingenuous as to confeſs what they know to be true, neither is there a law to compel them either to confeſs or deny, unleſs the matter be referred to their oath of verity or calumny. This confeſſion muſt be judicial, acknowledged by advocates at the bar, (or by their informations) being minuted by clerks, in ſo far as falls within the duty of advocates, who frequently acknowledge what they do not controvert, to ſhew their ingenuity, and to give the more favour to what they do controvert.

It has been much controverted, and ſometimes ſuſtained, that when parties propone defences, without denying the libel or quantities, they ſhould be ſuppoſed to acknowledge the ſame; but that hath not been univerſally ſuſtained. By the Roman law in many caſes, parties were put to acknowledge or deny the truth, without oath: and, in ſome caſes, their denial doubled the value of that which they did unjuſtly deny, and was proved; which our cuſtom doth not approve: and in other caſes upon denial, the expence of probation lay upon the denier, which were very juſt and ſuſtainable with us, having nothing penal in it; and therefore, if the alledger require the other party to confeſs or deny any point found relevant, if he refuſe to confeſs the verity of that point, and if it be proved, ſo that it may be preſumed he was not ignorant of the verity of it, he may juſtly be condemned in the expences, whatever be the event of the plea.

VI. But if the party be not preſent, when litiſconteſtation is made, the queſtion is, if his advocate may be ſo required? And how far the advocate's confeſſion will be ſufficient probation? As to the firſt, There is very good ground, that the advocate may be required to confeſs or deny the point to be proved: for he ſhould inſiſt in no point, but that which he hath aſked his client whether it be true or not? At leaſt, whether he doth believe it to be true?

And as to the laſt point, whatever is the proper truſt and duty of advocates, obliges their clients as to the verity of alledgeances; and therefore ingenuous advocates acknowledge how far they will controvert the verity of points propoſed, both in matter of law, and matter of fact: but in matter of law they have leſs warrant, for that is the judge's part, and therefore if they yield more than the judge ſees juſt, he ought to extend the law further than they yield; but, in matter of fact, the judge is not preſumed to know, nor doth his private knowledge import, but it is proper for advocates, who are procurators by their office, to acknowledge

knowledge or confeſs points of verity, which they will not controvert, which makes ſufficient probation, being minuted by a clerk of ſeſſion, or if it be contained in bills or informations given in by the advocate who returns the proceſs for that party, which being once ſo done, they ought not to be permitted to retract the ſame, upon pretence of want of warrant, inadvertency or miſtake.

VII. Homologation is a kind of confeſſion or acknowledgement of the right homologated. It hath been already conſidered, *lib.* 1. *tit.* 10. § 11. what acts have been found to import homologation, and what not.

VIII. Extrajudicial confeſſion is commonly held not to be probative, but to be done upon ſome other deſign, than to prove the verity of what is profeſt: yet when extrajudicial confeſſion is made upon accompt of the truth of the things confeſſed, it may import probation; but if it be only by emiſſion of words, it cannot be proved by witneſſes, but by oath of party, who, if he acknowledge ſuch a confeſſion, and adject not a rational qualification, it will prove againſt him. But extrajudicial confeſſion may not only be by word, but by writ, as by miſſive letters, wherein there are no obligements contained; ſo confeſſions before arbiters in tranſaction of affairs may be proved by the oath of party, or even by a decreet-arbitral, if there be no defect therein: and confeſſions before church-judicatures and congregations, though they be accounted extrajudicial, and in capital matters, are not ſuſtained as probation, becauſe to ſhun excommunication, men may be under temptation to acknowledge themſelves guilty of that they are not; yet if any matter civil be confeſt and acknowledged by writ, it is a much ſtronger probation than ſeveral poſitive preſumptions; or confeſſions made *ad levandum conſcientiam*, or for ſatisfying the deſire of parties, being ſo proved, are probative, becauſe ſuch expreſſions cannot be accounted *verba jactantia*. Yea, when the Lords *ex officio* allow all evidences to be adduced, for proving any point, they will examine witneſſes upon extrajudicial confeſſion, which makes not plenary probation, but doth concur with other evidences to make up probation, if the nature of the point in queſtion cannot be proved by an ordinary probation, and yet is not excluſive of extraordinary probation; as oft-times occurs in latent or antient rights, or where there is ſuſpicion of fraud.

IX. Preſumptions are the moſt important extraordinary probations. And they are of two kinds. The one is, when the points to be proved are preſumed to be true, without the probation of any other point of fact. The other is, when points of fact are alledged, and thence the point to be proved is inferred, as conſequent therefrom. This occurs two ways, for ſometimes a point is offered to be proved ſimply, and when the probation is adduced, the point is not expreſsly proved thereby, but ſo much is proved, as the point to be proved is thence preſumed to be true; and this occurs at the adviſing of probation, which formerly reſted alone upon the conſequences inferred by the Lords with cloſs doors, but now parties are to be heard, whether the conſequences be good, or the preſumption be probative. And ſometimes theſe conſequences are demonſtrative, or of neceſſary conſequence, in which caſe the probation is full and ſure: but theſe come ſcarce under the name of preſumptions, but theſe conſequences only that are ſufficient to induce perſuaſion in the judge, and that have an eminent probability of the conſequence. But every probability is not probative, nor deſerves the name of preſumption: and frequently many preſumptions do concur to make up probation; and there may be many oppoſite probabilities, from different conſequences and conſiderations; ſo that if the prevalence be not great, it will not infer againſt a poſſeſſor, the loſs of his poſſeſſion, much leſs againſt a proprietor, the loſs of his property, nor will it infer an obligation againſt a party, that is otherwiſe free. But if the queſtion be about attaining the poſſeſſion of that which neither party poſſeſſes, but craves to recover as their prior poſſeſſion, or if the point of right be dubious, the prevalence of the preſumptions though far leſs than in the former caſes, may infer ſufficient probation: for when parties do controvert and contend, it is eaſy to prove the right, where there is no other conteſt,

teſt, but whether it belong to the parties contending or be *nullius*; yet the *regalia* or theſe things that are *inter regalia*, or belong to ſovereign authority, are not accounted *nullius*, but may be declared to belong to the ſovereign authority, though they do not inſiſt: but, in other things, hardly can any thing be declared *nullius*.

X. It is a more ſure way of probation, when the points of fact which are deſigned to prove the point in queſtion, are expreſsly condeſcended upon in the libel or exception, *&c.* which uſes to be done, when the alledger ſays, that he offers to prove ſuch a point, in ſo far as he offers to prove other points of fact, from which the point to be proved is preſumed, as conſequent: for then before probation, there is place to debate the conſequence, and ſo the judge muſt determine whether the conſequence be good or not, *nam fruſtra probatur, quod probatum non relevat.*

XI. The other kind of probation is, when the very point in queſtion, is much more probable to be true than to be falſe, without adducing any other matter of fact to be proved; ſo that the diſpute is only whether the alledgeance be preſumed to be true, wherein every probability infers not a probative preſumption, but it muſt be eminent *ad convincendam conſcientiam judicis:* for if it be certain by evident reaſon, it is not preſumption but notoriety, which makes the probation.

XII. This is that kind of preſumption whereupon there are ſo large treatiſes of lawyers. And ſo preſumptions are divided in three ſorts, for they are either *præſumptio judicis*, *præſumptio juris*, or *præſumptio juris et de jure.*

Præſumptio judicis is when the judge finds the probability of a point wherein the ordinary probations are not competent, to be eminently probable to be true; unleſs the contrary be proved by a more poſitive probation.

XIII. *Præſumptio juris* is where law hath ſo preſumed, but hath not ſtatute, nor declared it for a rule: ſo frequently in the narrative of ſtatutes, preſumptions are expreſſed, as motives inducing the making of the ſtatute, but it is the ſtatutory words that makes it a law: yet the preſumption from which the ſtatute ariſes, is a preſumption in the law, and is ſtronger than the preſumption of a judge alone: of theſe preſumptions there are multitudes in the Roman law, which ſwell the treatiſes of preſumptions to a great meaſure. There are not wanting ſuch preſumptions in our law, though we have but few ſtatutes: yet even theſe preſumptions admit a contrary ſtronger probation; and though preſumptions be ſaid *transferre onus probandi*, rather than to prove, yet they prove unleſs the contrary be proved. Under the preſumptions of law, the preſumptions of cuſtom are to be comprehended, though they be not in written law; and ſo cuſtom hath fixed many preſumptions, about which there is no queſtion, but that they are probative.

XIV. *Præſumptio juris et de jure*, is, when the ſtatutory or declaratory part of the written law, does ſtatute or declare ſuch a point to be true, without further probation. This preſumption is not only a preſumption in the law, but a preſumption which becometh a law; and therefore it admits no contrary probation. Of theſe, there are many examples in our law: ſuch is the preſumption of ſimulation from retention of poſſeſſion, whereby baſe infeftments are poſtponed to poſterior publick infeftments *; or the retention of poſſeſſion of eſcheat-goods, which is declared to preſume that the gift is to the behoof of the rebel, who was ſuffered long to poſſeſs **; and the ſtatute againſt fraudulent alienations declares, That it ſhall be ſufficient to infer fraud in prejudice of creditors, if in the courſe of inchoate diligence, the debtor diſpone, or if he diſpone without cauſe onerous, when he becomes inſolvent.

XV. Fiction of law is no preſumption; for thereby the law-giver makes that which he knows not to be true, to be eſteemed and held as if it were true: ſo the heir is *eadem perſona cum defuncto.*

* This preſumption is not now of uſe ſince act 13. *P.* 1693.
** Eſcheat, and all its conſequences is taken away by act 20. Geo. II. *c.* 50.

XVI. Preſumptions of law with us, are chiefly when, by the deciſions of the Lords, ſuch preſumptions are ordinarily ſuſtained; of which there are many more than are in our written law.

XVII. Preſumptions are of two ſorts, ſome are general, occurring in many cauſes; and others are ſpecial to particular cauſes. The chief general preſumptions approved by our cuſtoms, are theſe; firſt, Liberty is preſumed in oppoſition to ſlavery. Of this preſumption we have but little uſe, ſlavery being aboliſhed; yet there remains ſome veſtiges of it in colliers and ſalters, who are aſtricted to theſe ſervices by law, though there were no paction or engagement, which is introduced upon the common intereſt, theſe ſervices being ſo neceſſary for this kingdom, where the feual of coal is in moſt parts neceſſary at home, and very profitable abroad; and ſeeing we have no ſalt of our own, but that which is made by the boiling of ſalt-water, ſalters are ſo alſo aſtricted: ſo that colliers and ſalters while they live, muſt continue in theſe ſervices, and the once having them in ſervice, is a ſufficient ground to detain or recover them; yet ſo, that if that poſſeſſion hath not been lawful, another who did poſſeſs, and from whom they did unwarrantably remove, *vi*, *clam*, *aut precario*, may recover them from the unlawful poſſeſſor.

Secondly, Freedom from all obligations by delinquence is preſumed. This preſumption is to the ſame effect with that common brocard, *nemo præſumitur malus*; which is to be underſtood of any particular delinquence or fault (albeit in general no man be free of faults, inducing obligations to reparation or puniſhment) even though he hath been proved to have been faulty in the ſame kind of fault. Yet he who is known to be habitually vitious in any particular vice, is preſumed ſo to continue: but this alone is not a probative preſumption, but an adminicle, concurring with other preſumptions or probation, whereby *ſemi-plena probatio* may be made full; ſo in improbations, it may be adduced as an article of the indirect manner, that the defender hath forged other writs, albeit the party concerned do not inſiſt, if the evidence of the forgery be clear.

Thirdly, Freedom from conventional obligations is preſumed, but not from natural obligations, or theſe which ariſe from the will of God, and man's obedience thereto. Obligations alſo by law are preſumed, and are effectual probations, and are preſumed to be known, in ſo far as they are evident and commonly known to people of all capacities; but with exceptions in ſome caſes, of ſoldiers, ruſticks, women, minors and perſons of weak capacity. Hence it is that in any action, wherein freedom from obligations by engagement, or obligations by the law of God, or law of man, are libelled relevantly, there needs no other probation but preſumption: and if what is alledged from the law of God, be clear and relevant to infer the concluſion craved, it is preſumed *præſumptione juris et de jure*, admitting no contrary probation: for it is rather a point of law, which requires no probation, than a point of fact. But the other preſumptions before mentioned, are but *præſumptiones juris*, which admit a contrary probation, and therefore are ſaid *transferre onus probandi*, that is, they prove unleſs the contrary be proved.

Fourthly, From the effect, the ordinary cauſe is preſumed. From this ground many of the contracts are preſumed: ſo he who payeth annualrent, is preſumed to owe the ſtock; he who payeth hire, is preſumed to be the conductor; he who holdeth accompt in a matter common, is preſumed to be in a ſociety, or in other caſes to be a factor or truſtee; he who goeth about another man's affair, is preſumed to be a mandatar, or a *negotiorum geſtor*, if the affair hath been begun by that other. Theſe contracts could hardly be otherwiſe proved but by writ, which is ſeldom uſed, or by oath of party, wherein the hazard of the parties faithfulneſs and ſincerity occurreth. Yet theſe preſumptions are but *juris*, and admit contrary probation, if the defender condeſcend on a more probable cauſe, which will prevail as a ſtronger probation; much more if he prove the contrary by oath

oath of party or writ; yea, even witneſſes are receivable to elide ſuch preſumptions.

Fifthly, Freedom is preſumed againſt any ſervitude or *nexus realis:* as the freedom from aſtrictions to mills, or any other real ſervitude of lands, or any hypothecation of moveables, or any arreſtment thereof; and therefore, if any purſue a declarator of freedom from theſe, he needs no further probation, but this preſumption, which transfers the burden of probation upon the defender, if he alledge ſuch real burdens.

Sixthly, All negative alledgeances are preſumed. And hence it is commonly ſaid, that negatives prove themſelves, and need no probation, other than this preſumption. And therefore in exculpation, there is no more needful, but to libel that the party is not culpable, actor, or acceſſory, whereupon decreet will follow without any probation, againſt the parties who are cited; and they cannot inſiſt in the contrary, while that decreet ſtands unreduced, though it be in abſence; yet they may be reponed upon payment of expences, if they be contumacious in not appearing; but if they appear and alledge any thing contrary to the libel, they muſt prove the ſame, and the purſuer needs prove nothing, unleſs it be by reply to elide the defence. This preſumption muſt be limited by what hath been ſaid, as to the former preſumptions, that it holds in negatives againſt obligations by engagement, but not in the negatives of natural obligations, or obligations of law: and it holds in ſervitudes or real burdens, except ſuch as are introduced by law; ſo the negatives of hypothecation of the fruits, or *invecta et illata* for rents, are not preſumed when propoſed by tenants.

Seventhly, All poſſeſſion is preſumed to be lawful. This is *præſumptio juris*; and therefore when poſſeſſion is craved either to be retained, recovered or quieted from moleſtation; there is no more to be libelled, but that the purſuer was in poſſeſſion, and did not relinquiſh the ſame, which will be preſumed; but that the purſuer was in poſſeſſion, muſt be proved. But it admits the contrary probation, that the poſſeſſion was *vi*, *clam*, *aut precario*, which the defender muſt prove, and the purſuer is not obliged to condeſcend upon, or inſtruct any right, but only poſſeſſion; unleſs it be by reply to elide the alledgeance of violent, clandeſtine or precarious poſſeſſion. This preſumption is introduced for the common intereſt of mankind, that none may diſturb the poſſeſſion of another, at his own hand, without order of law, and inſtructing a juſt cauſe for altering that poſſeſſion; and that no queſtion of right ſhall be meddled in, till the poſſeſſion be eſtabliſhed where it ought to be: and therefore poſſeſſion makes a right ſeveral from property. This is alſo the riſe of the diſtinction betwixt petitory and poſſeſſory judgments, whereby poſſeſſors defend themſelves in poſſeſſion, without diſputing their rights ſummarily, but by reduction or declarator only, and enjoy the fruits and profits *medio tempore*, till they be put *in mala fide* to poſſeſs, by inſtructing the right of another [a]. Theſe actions are alſo elided, by obligements to quit poſſeſſion, in favour of the defender, whether it be by direct obligation, or by diſpoſitions importing the ſame.

Eightly, Poſſeſſion of moveable goods preſumes the property thereof. This is the great ſecurity of commerce, which would be extremely prejudged, if men were obliged to prove the titles of their poſſeſſion of moveables, and ſo ſubject themſelves to the memories or faithfulneſs of witneſſes, or to the neceſſity of writ in bargains which ordinarily paſs currently in markets. Yet this is but *præſumptio juris*, admitting a contrary probation, even by ſtronger preſumptions: and therefore he who inſiſts for recovery of moveables, which he alledges to belong to himſelf in property, or wherein he was the lawful poſſeſſor, put out of poſſeſſion, *vi*, *clam*, *aut precario*, muſt condeſcend and prove, that he ſo ceaſed to poſſeſs, *as* that it could not be preſumed to be by commerce; as if he prove that the goods were ſtolen or ſtrayed from him, or were loſt by him, or that they belonged to him as ſucceeding to a defunct who died in poſſeſſion thereof, and the like;

[a] See above, II. 7. 22.

like; or if he prove that he was in poſſeſſion, and that the goods could not paſs from him by commerce to the defender, becauſe they were goods altogether unſuitable for him to have by commerce, as if the goods were precious moveables, which it could not be preſumed that the defender could acquire by traffick for his own uſe, or as a merchant, or as a perſon intruſted for others, to whom ſuch goods were preſumable to be acquired by commerce.

Ninthly, Long poſſeſſion preſumes property of real ſervitudes: and that albeit there be no more title but the general title of pertinent, in any infeftment.

Tenthly, Poſſeſſion of lands by him who is holden and reputed heritable poſſeſſor, wadſetter or liferenter, preſumeth ſufficient title to cognoſce the right, by an inqueſt of the moſt famous perſons in the neighbourhood, if it be proved that the purſuer's writs and evidents were burnt, deſtroyed, or loſt by any accident. This is a preſumption of law, mentioned in our acts of Parliament, and it differeth much from the probation of a tenor, which can be proved by two ſufficient witneſſes, yet requires adminicles; but here the whole writs may be loſt, ſo that there remains no adminicle in writ: but it can no otherwiſe be proved, but by an inqueſt of the moſt famous perſons in the neighbourhood, by a commiſſion to the ſheriff or other judge-ordinary in the place.

Eleventhly, There was a *præſumptio juris et de jure*, in favour of the King, in the caſe of forfeiture, whereby poſſeſſion for five years, was declared ſufficient to the King or his donatar, to give him right to the lands poſſeſſed by the perſon forfeited, being retoured by an inqueſt as heritable poſſeſſor thereof. *Parl.* 9. *Ja.* VI. 1584, *cap.* 2. Bearing, "That all lands, baronies, Lordſhips, annual-"rents, mills, multures, fiſhings, tenants, tenandries and ſervice of free tenants, "and other heritages whatſomever, which have been, or hereafter ſhall be "peaceably bruiked and poſſeſſed, be whatſomever perſons forfeited, or that "hereafter ſhall be forfeited for crimes of treaſon and leſe-majeſty, committed "or that hereafter ſhall be committed, againſt his Highneſs and his ſucceſſors, "or be them to whom our ſovereign Lord and his ſucceſſors ſhould ſucceed be "reaſon of the forfeiture of their neareſt heirs; as their heritage by labouring "the ſame with their own goods, ſetting the ſame to tenants, and uplifting the "mails and duties thereof, as their heritage, and ſo reputed holden and eſteem-"ed heritable poſſeſſors thereof, by the ſpace of five years, immediately pre-"ceeding the proceſs and ſentence of forfeiture; ſhall belong to the King, and "others deriving right from him, without ſhowing any other right and title "thereof. And alſo it is ſtatute, that tacks and poſſeſſions of lands or teinds by "the forfeited perſon, ſhall be put in poſſeſſion of the King or his donatar, and "they to remain therein for five years, that they may ſearch the rights thereof, "and ſhall enjoy the fruits thereof during that time." In this laſt point anent tacks, there is not required five years poſſeſſion by the forfeited perſon, but any lawful poſſeſſion ſufficeth. Theſe are evidently *præſumptiones juris et de jure*, which the law not only owneth, but ſtatutes to be a full probation. But the foreſaid ſtatute is much derogated, by *cap.* 33. *Parl.* 1690. Whereby, "it is declared, that all forfeited eſtates ſhall be ſubject to all real acti-"ons and claims againſt the ſame, though they be not raiſed nor inſiſted in "within the five years preceeding the forfeiture; excepting bygone feu-duties, "annualrents and other annual preſtations, for which there is no diligence with-"in the ſaid five years." Whereas formerly only ſuch actions within the five years, did interrupt the preſumption: yet the title of the forfeited perſon is ſtill preſumed, but may be excluded by a better right.

Twelfthly, It is an important general preſumption, that whoſoever is cited by a meſſenger, to compear and depone by an oath of calumny, verity or ſuppliment, if he do not depone, he is holden as confeſſed. This is not by ſtatute law, but by cuſtom, juſtly and fiftly introduced by the Lords, on this preſumption, that he doth not depone, becauſe he durſt not deny, which is *præſumptio juris*

juris et de jure, which admits not a contrary probation. Yet the Lords *ex nobile officio*, do repone parties to their oaths, when they inſtruct, that they were not contumacious in not compearing and deponing, or when they adduce evidences in the contrary, which is not admitted as a contrary probation, but is a ground to repone them to their oaths: for that for which they are holden as confeſſed may be true, though there were writs to prove the contrary. The probation by being holden as confeſſed, is a certification in ſummons referred to oath, and is already more fully treated with the probation by oath, *lib.* 4. *tit.* 44.

Thirteenthly, The certification in reductions and improbations, is alſo by cuſtom founded upon preſumption. For in reduction the certification is, that the purſuer ſhall be preferred and put in poſſeſſion, if the defender appear not and produce; which is upon this preſumption, that he dare not produce, knowing that the purſuer has a better right, whereby a decreet of preference *in foro* would be recovered. And the certification in improbation, is, that if the defender produce not the writs called for, they ſhall be holden and reputed as falſe and forged; and the preſumption whereon this certification is grounded, is, that the defender dare not produce the writs called for, becauſe he is conſcious they would be improved: this is *præſumptio juris et de jure*, which admits of no contrary probation, but the former is only *præſumptio juris*. The like preſumption in improbation, is, that he who uſes a writ, muſt abide by the truth thereof, with certification if he do not, it ſhall be holden as forged: the preſumption is, that he is conſcious of the forgery, and ſo acceſſory thereto, or otherwiſe he would abide by the writ.

Fourteenthly, It is a common preſumption, that no man by diſponing, or delivering of poſſeſſion, is preſumed to gift gratuitouſly; unleſs it be ſo expreſſed. And therefore he is rather preſumed to give in cuſtody, or in truſt, than to gift. Yea though it be expreſſed as a gift, or gratuitous diſpoſition, it may be found a truſt, not only by the oath of party, but by pregnant preſumptions.

Fifteenthly, It is a common preſumption, that *debitor non præſumitur donare*[b]. This is a ſpecies of the former, and ſtronger than other preſumptions of that kind: for the donor being debtor, it is ſtrongly preſumed, that he doth not diſpone or deliver to gift, but to pay; Yet it is not without limitation, for if the thing diſponed be not liquid of the ſame kind with the debt, it is not preſumed to be in payment; or if there be a ſtronger preſumption that it is a gift rather than payment, ſo mean things given to indigent perſons, are preſumed rather to be for charity, than in ſatisfaction of a debt; or what is diſponed by princes, is not preſumed to be in ſatisfaction of a former gift or promiſe; or what is diſponed or engaged to children, who are competently provided by former diſpoſitions or obligements, is not preſumed to be in ſatisfaction of the former, but as a new donation.

Sixteenthly, What is delivered by a bridegroom to a bride, is preſumed to be conditional, if marriage follow.

Seventeenthly, What is wittingly built or wrought on the ground of another, is preſumed to be a donation. This preſumption is introduced by law, that ſuch buildings be not demoliſhed.

Eighteenthly, Intertainment to a perſon that is major, without paction, is preſumed to be gifted, and nothing can be demanded upon that account.

Nineteenthly, Life is preſumed. This ſome do extend to an hundred years of age, but others only to fourſcore, which is confirmed by that of the Pſalmiſt, that the age of man is threeſcore ten, unleſs by the ſtrength of nature he come to fourſcore. Hence it is that heirs cannot be ſerved upon preſumption of the death of their predeceſſor, unleſs witneſſes or fame concur; and hence alſo women may not marry in their huſbands abſence till that age, which yet doth not hinder them to proceed by a proceſs of adherence, which doth not infer death, but deſertion.

Twentiethly, In matters of fact ignorance is preſumed, unleſs knowledge be proved. But this hath ſeveral limitations: as firſt, knowledge is preſumed of

[b] See above, I. 8. 2. *et* IV. 42. 21. 6.

thoſe things that fall under ſenſe, when the party was preſent, as to theſe things which moved him to be preſent; but not as to other things, that might have paſſed without his obſervation. Secondly, Ignorance is not preſumed of the moral law, or poſitive law or cuſtom, which is evident to common capacities. Neither in proper recent facts, except in thoſe who are involved in multiplicity of affairs: but it is preſumed in the acts of others, except where the party is obliged to inquire, and ſo to know the ſame. Hence comes the brocard, *Scire debes cum quo contrahis*, which doth not ſo much relate to the validity of rights, as to the qualification of the party with whom you contract.

Twentyfirſtly, In ſolemn acts all formalities are preſumed, whereby the act might ſubſiſt, unleſs theſe formalities be ſpecially required by law of paction.

Twentyſecondly, *Probatis extremis præſumuntur media.* This preſumption hath its effect in preſcriptions and poſſeſſory judgments: for in the long preſcription forty years poſſeſſion muſt be proved; and in poſſeſſory judgments ſeven years poſſeſſion muſt be proved, ſo that no other hath poſſeſſed ſeven years, ſince both theſe poſſeſſions muſt be continual without interruption. But it is not neceſſary to prove continual poſſeſſion every day, every month, or even every year; but poſſeſſion muſt be proved at leaſt every other year, or that there hath not intermitted three years in the long preſcription, or one in the ſhort preſcriptions or poſſeſſory judgment; but theſe are preſumed *probatis extremis* [c].

XVIII. The ſpecial præſumptions in particular cauſes, are mainly concerning lawful marriage, and lawful children, truſt, and concerning the ſatisfaction of old obligations, which hath been long without payment of annualrent, and concerning the retiring of writs and evidents, and returning the ſame back unto the perſons of the debtors. In all which the ordinary probations by writ, oath or witneſſes, do ſeldom occur: and therefore probation by preſumption is the more neceſſary. But in theſe, preſumptions are ſeldom direct and immediate, ariſing from the points of fact to be proved, as in the general preſumptions, wherein the certainty or pregnant probability of the truth of the matter of fact, makes it be preſumed to be true, without any probation by writ, oath or witneſſes: but the other kind of probation is, when ſome of theſe ordinary probations are adduced, from whence the point to be proved is deduced by conſequence. No judge will ſuſtain marriage becauſe it is alledged, or that which is properly truſt, or the ſatisfaction of evidents, becauſe they are aſſerted. But other facts muſt be proved, that theſe may thence be inferred as neceſſary or very probable.

XIX. To return to the particulars, marriage may be proved by witneſſes, which is a direct and immediate probation, but it ſeldom occurs except in reſent marriages which have been ſolemn. But in no caſe is it eaſy to be proved by writ, altho' the declarations or teſtificates of the perſon who officiated, of the married perſons themſelves, and even of the witneſſes, were produced; for theſe are but teſtificates, unleſs the oaths of the witneſſes be interpoſed, amongſt whom he that officiated is a pregnant witneſs, and others that were preſent, tho' not called nor required; much leſs will the oaths of both the married perſons prove the marriage in all caſes; for that may be by colluſion, to cover their fornication, or to prejudge the lawful ſucceſſion by ſolemn marriage. And yet marriage will be more eaſily proved indirectly by facts whence it is preſumed.

As firſt, marriage is proved by the *ſponſalia* preceeding, as by the contract of marriage, whereby the parties oblige themſelves to ſolemnize marriage, and by copulation following, or even by antecedent promiſe of marriage, whatever be the way that it is obtained or granted, if copulation follow without violence, altho' the promiſe were conditional, and that the condition is no otherwiſe purified but by copulation, the condition is thereby preſumed to be paſſed from, or the fraud or force in obtaining the promiſe. But if the copulation be not voluntary, whatever preceed it, does not infer the marriage.

Secondly,

[c] See above, IV. 40. 20.

Secondly, Contracts in impuberty are presumed not to be with the use of reason, nor are obligatory or valid, except contracts of marriage in impuberty of either or both parties, which, if copulation follow, are valid: for marriage being a divine coutract, cannot receive its measures and rules from human constitution; and therefore discretion or judgment is presumed from copulation, *præsumptione juris et de jure*; and (as the canon saith) in such cases, *malitia supplet ætatem.*

Thirdly, Cohabitation, and behaving as man and wife for a considerable time, presumeth marriage, tho' there be neither contract, promise, nor *sponsalia* preceeding, nor evidence of copulation by children. But the copulation in the former case must be proved by the tokens of virginity known to witnesses, or by present inspection of the wife's body. These are presumptions so strong, that the confession or oath of either, or both parties, will not elide the same, tho' they should acknowledge that they neither promised marriage *de futuro*, nor contracted the same *de præsenti*; yea, tho' they should acknowledge that they so cohabited to cover their fornication, that they might be free to marry others when they pleased: for all these and such things would be presumed as collusive, to dissolve the marriage upon dissonance of humors, or other designs, seeing marriage is indissolvable but by adultery or wilful desertion.

XX. Filiation is presumed from marriage, whereby the children are presumed to be the lawful children of those who are proved to be married in any of the former ways, which is yet more pregnant and favourable on the part of the children, to give them the right of aliment and succession, and is the probation of the marriage betwixt those who are presumed parents, which is so strong a presumption, that the mother acknowledging another father than he that is married to her, will not prejudge the children; much less will the assertion of the father, that the children are not his, albeit he condescend upon another to be the true father: yet if both the married persons do acknowledge that the child is not procreate betwixt them, but by another as father, who would also acknowledge the same, and own the child, it would elide the presumption. But if both married persons had first owned and treated the child as theirs, the concurring testimonies of all the three would not prejudge the child in its aliment, legitime and succession, as children of that marriage. But the impotency of the father, or his being far distant from the mother, while the child were presumable to be gotten, at least for the space of nine or ten months, is sufficient to prove the children not to be lawful children.

XXI. Trust may be proved by the confession, or oath of the trustee, or by his writ acknowledging the same. But it is much more frequent to prove the same indirectly, by matters of fact proved by writ, oath or witnesses, not directly proving the trust, but indirectly, being thence inferred by the judge. The stating a right in the name of a trustee, with a backbond or declaration of the trust, is properly no trust, more than any obligation in writ, which is called *creditum*, or a trust, in so far as the debtor will voluntarily pay his creditor, and not alienate his estate to exclude him, or put him to the trouble of suits at law: so trust with a backbond is only trust in so far as the trustee disponing for causes onerous, may betray his trust, because the backbond being personal, and not a recorded reversion, will not recover the thing intrusted. But trust properly is that which the law calleth *fidei commissum*, where there is no reversion, bond, or promise of reversion; yet the trustee knows *quid actum est*, that it was not a donation or gratuitous alienation; but that the granter did trust that the trustee would dispose of it as the truster would require: and therefore, if the trustee did not this voluntarily, it were to small purpose to refer it to his oath: for it is presumed that he who would steal, would swear; and it is the worst kind of stealth to betray trust: and therefore the law alloweth, that trust may be proved indirectly, by circumstances inferring the same *.

XXII. There

* Trust can now be proved only by writ or oath of party, P. 1696, c. 25.

XXII. There are many circumſtances from which truſt may be inferred; as firſt, if any perſon deliver money, and take a bond in the name of another, not being a child, or other near relation, and at the lending did not expreſs it to be the money of that other, and did retain the bond in his own hand, thence it would be preſumed that other's name were in truſt to the lender's behoof, and he might be compelled to acknowledge the ſame, and to aſſign. And if any perſon aſſign or diſpone a right to another, and if it be proved that he was in ſuch circumſtances, as it was not ſafe to keep it in his own name, and that the other being maſter of the right, made no mention of it in the inventary of his eſtate, or did not diſpoſe of the profits of it, it would thence be preſumed, that it were in truſt, to the behoof of his author, albeit it did bear a pure donation for love and favour, or to be for onerous cauſes and good conſiderations.

XXIII. The ſatisfaction of an old ſecurity, has been always ſuſtained, not only by direct probation, but by indirect, from circumſtances proved. As if the creditor had long taken no profit when he had opportunity, as if he had had intromiſſion with the debtor's eſtate, or was his tutor or curator, and did not retain the ſum in that ſecurity, nor mention it, or did not mention it in the inventary of his eſtate, or if he were indigent and claimed it not, and the debtor were opulent; or if a poſterior ſecurity were granted for a greater ſum, without mention or accumulation of the former, and without demanding any thing upon it, it would be preſumed to be comprehended in the greater ſecurity, if the profit thereof were taken and claimed, and not of the other.

XXIV. The returning ſecurities to the granter thereof, is much more frequently proved by preſumptions from circumſtances, than by direct probation; whereof this alone is *præſumptio juris*, *chirographum apud debitorem repertum præſumitur ſolutum*. (Yet it may be elided by a contrary probation, that the writ came into the debtor's hand by another way, than upon payment; as by finding it, or getting it up from another in whoſe hands it was, without the creditor's warrant) or that the ſecurity was in the author's hand with a blank aſſignation or diſpoſition, albeit it was not a right to be retired upon payment, or if it was in the hands of the author who could cancel it, ſo that the tenor of it could hardly be proved, albeit there were no blank aſſignation or diſpoſition of it: thus appriſings found in the debtor's charter-cheſt, after his death, the ſame being ſo proved, have been found extinct, before the law for regiſtration of the allowance of appriſing; and when the meſſenger was dead, and the executions not in the appriſer's hands; or if therewith there was a blank aſſignation or diſpoſition, which would extinguiſh the ſame; although a ſingular ſucceſſor's name were filled up even for onerous cauſes, becauſe he would be preſumed to be partaker of the fraud, or to be only a truſtee.

TITLE XLVI.

Decreets of Seſſion.

HItherto have been explained the ſeveral actions and proceſſes, competent before the Lords of Seſſion, and the moſt ordinary and important defences, exceptions, replies and duplies, common, or proper to be adhibited in theſe proceſſes, with the diligences for obtaining probation thereof, and the ſeveral ways of probation competent therein. There remain now to be conſidered, the decreets following upon the ſaids proceſſes, and the executorials and executive actions for making them effectual; which actions could not fitly be explicated before decreets, they being a part of the execution thereof, and preſuppoſing the ſame; as actions for making arreſted goods or ſums forthcoming, actions upon breach of

of arreſtment, contraventions upon lawborrows, and adjudications of ſeveral kinds; and laſtly, ſuſpenſions of decreets of Seſſion, or other ſummary charges.

II. It were a ſuperfluous and tedious repetition, to conſider the matter of decreets ſeverally, and the particular forms and tenors thereof. But it is ſufficient to know the general forms of final ſentences, the whole matter having been handled before. The judicial ſentences of judges, are of two ſorts. The one is intermediate between the dependence and termination of proceſſes, which are therefore called interlocutors, and are done by acts of proceſs. The other ſentences are definitive, which terminate and end proceſſes, as to the inſtance, action, or plea. Theſe we call decernitures or decreets: the Engliſh call them judgments, or decrees, which do more properly ſignify a reſolution upon choice in any free thing, than the determining the rights of parties.

III. Decreets are either abſolvitory, whereby the defender is freed or aſſoilzied from the concluſion of the libel or proceſs; or they are condemnatory, whereby the concluſion of the proceſs is found juſt and true, againſt the defender, in whole or in part; or they are mixed, whereby the defender is abſolved from ſome part of the concluſion of the proceſs, and is condemned in other parts thereof. In all the three, the decreet is either ſimple, when it is exactly conform to the concluſion of the proceſs, or it is qualified by the propoſal or conſent of parties, or by the authority of the judge *ex proprio motu*; which qualifications do not annul the decreet as diſconform to the libel, for either party may qualify their alledgeances, and though neither do it, the judge may do it.

IV. Sentence definitive of the inſtance, is, when upon any dilator, proceſs is refuſed: for thereby that inſtance is ended, theſe ſentences are only abſolvitors *ab inſtantia*, the terms whereof are ordinarily, "The Lords ſuſtain the dilator de-"fence, and find no proceſs upon this citation; or in this action;" which are not the ſame: for inſtance, if a ſpuilzie be purſued upon a citation having leſs time than fifteen days, there is no proceſs on that citation; but if the dilator be, that the proceſs is not intented within three years after committing the ſpuilzie, that dilator being ſuſtained, is an abſolvitor from any action of ſpuilzie; but it is not an abſolvitor *à lite et cauſa*, for the purſuer may inſiſt for wrongous intromiſſion. But if the cauſe be odious, the interlocutor uſes to be, "The Lords aſ-"ſoilzie *à libello ut libellatur*." Defenders uſe to neglect the extracting of ſuch ſentences, imprudently enough: for, upon ſupplication, the Lords may ordain the cauſe to be further heard, when perhaps the defender is gone, thinking himſelf *in tuto*; whereas, if the ſentence were extracted, he were *in tuto*.

Sentences finding libels not relevant, are of this kind. For the purſuer may inſiſt in the ſame cauſe, otherwiſe libelled, upon other *media*. Yea, he will ſeldom be hindered to alter his libel, to make it relevant, to be ſuſtained without a new citation; but if the ſentence be extracted, he cannot inſiſt on that citation.

Proteſtations for not producing ſuſpenſions, or for not inſiſting are abſolvitors from the inſtance. Theſe uſe to be extracted; for if they be not, the purſuer may inſiſt at any time within the year.

Proteſtations containing remits in advocations, are always extracted, and are final ſentences of the advocation, as to the reaſons therein contained, but hinder not advocations upon new reaſons, emergent after the former advocation; which ſhould not be paſt upon reaſons competent and omitted the time of the former advocation: for as reaſons of ſuſpenſion are excluded, becauſe competent and omitted, ſo ought reaſons of advocation.

V. All the former abſolvitors paſs under their ſeveral names, and are not ordinarily called decreets, though indeed they be. But decreets ſo commonly called, are alſo of different kinds. Some are without litiſconteſtation, when the points requiſite for obtaining ſentence are all inſtantly verified, by preſumption, writ, oath of parties, or being holden as confeſſed without taking a day to de-

pone: which ſort of decreets occur, when the purſuer's libel is ſo inſtantly inſtructed, and there is no defence or exceptions ſuſtained to be proved, or if exceptions be repelled in reſpect of replies inſtantly verified; or if the reply be repelled in reſpect of a duply inſtructed; or if all theſe be inſtructed, which do not import the verity of the alledgeance againſt which they are adduced. All ſuch decreets may be diſpatched by the ordinary, unleſs ſome point be taken to interlocutor, as to the relevancy or inſtruction, which makes no further ſtop than till the interlocutor be reported; unleſs the Lords appoint it to be heard in their own preſence, inſtantly, or to go to the roll. So ordinaries may adviſe all writs adduced for intereſt or probation, requiring no litiſconteſtation, and may take and adviſe the oaths of parties compearing, and inſtantly determine thereupon: albeit they are ſparing to determine upon qualified oaths, or theſe which are not ſo plain and ſhort as that they may be written and ſigned at the bar, in reſpect there is a remedy without neceſſity to go to the roll, becauſe the Lords hear the oaths of parties, (when the clerks offer them) if they determine the cauſe, and do inſtantly decern; but if there be any doubt of qualities adjected, the Lords either call the parties, or remit the cauſe to the roll. Yet if the writs produced be many, large, or intricate, the ordinary may make a great *aviſandum* to anſwer when the Lords call; and then the cauſe goes to the roll, according to the date of that *aviſandum*.

VI. The ſecond kind of decreets, is, when litiſconteſtation is made, and terms are aſſigned to prove. After the firſt term is paſt, the party againſt whom the point is to be proved, may call upon the act, and if the point to be proved be by oath, he may crave the term to be circumduced, and the party to be holden as confeſſed; or if the probation be by writ or witneſſes, he may crave the term to be circumduced for not proving: and if that point terminate the cauſe, decreet paſſes of courſe. But if the party produce an executed diligence againſt witneſſes, he will get a ſecond term againſt any of the witneſſes contained in the former diligence, againſt whom citations are produced by the charge of horning on the act, and therewith may have a caption for taking of the witneſſes; which being elapſed, if the witneſſes be not produced, ordinarily the term is circumduced, and decreet pronounced, if decreet follow upon that point. Yet by ſupplication for more witneſſes, in place of theſe that are dead, or out of the country, or for witneſſes new come to knowledge; the party deponing that they are come to knowledge ſince the former diligence, will get a diligence againſt theſe other witneſſes, and a term longer than ordinary, that he may uſe both horning, and, in caſe of diſobedience, caption before that term: ſo that there are ſtill but two terms. Yea at the ſecond term for witneſſes, if an execution againſt magiſtrates or meſſengers to take the witneſſes, be produced, or the latency of witneſſes be inſtructed, at leaſt by the party's oath; a further term may be granted by the Lords on ſupplication. But if no diligence be produced at the firſt term, or no witneſſes at the laſt term; decreet paſſeth of courſe, the terms whereof are, "the Lords circum-"duce the term and decern."

VII. In diligence for probation by writ, if neither writs be produced, nor horning againſt the havers; the term will be circumduced, and decreet pronounced. But if either writs or horning againſt the havers be produced, a ſecond term will be granted, and caption againſt the havers. But if he who is to prove, will take a reaſonable long term, by an incident diligence by way of action, for proving the having of other men's writs, if he depone *de calumnia*, that he believes that they are in the hands of ſuch perſons, againſt whom he hath intented the exhibition, ſhortly after the term was aſſigned; the Lords do readily allow the ſame; but not indefinitely without a certain term as formerly, when the uſer of the incident did induſtriouſly draw it in length, as far as he could, becauſe till the full effect thereof, the principal cauſe was ſuperſeded.

VIII. If writs be adduced *ad probandum* upon litiſconteſtation, the ordinary cannot adviſe the ſame: yet if ſuch writs be produced, as have no rational contin-

gency

gency with the point to be proved, he ought to reject the ſame, and circumduce the term. But if any writs to the purpoſe be produced, if no further term be craved (for the purſuer when he thinks he hath proved will readily renounce probation, yet the defender will not, till the laſt term be paſt, nor will declare the cauſe concluded) there the ordinary ought to declare the cauſe to be concluded, and according to the act concluding the cauſe, it is to be inrolled in the roll of concluded cauſes.

IX. In like manner when the probation is by witneſſes, if there be any depoſitions, the ordinary cannot adviſe the ſame, though they bear nothing more than that the witneſſes knew nothing of the cauſe. And if the cauſe depend upon a libel or reply to be proved by the purſuer, he will readily at the firſt term (if he thinks he has ſufficiently proved, or expects no more probation) renounce further probation, whereupon the ordinary will hold the cauſe as concluded. But if the defender be to prove an exception or duply, the cauſe cannot be concluded without his conſent, till the laſt term be elapſed; and then the ordinary declares the cauſe to be concluded, and according to the date of theſe concluſions of the cauſe, they are inrolled amongſt concluded cauſes.

X. If the defender compear not, or before proponing peremptors paſs from his compearance; the probation is only by the purſuer, and upon the libel: which if he inſtantly verify by preſumption, writ, or holding the defender as confeſſed, he being cited by a meſſenger at arms with that certification, and if the matter be competent to be proved by oath; the ordinary will preſently decern, or report in caſe of difficulty, and upon report will decern: yea if he find a defect in relevancy or probation, he ought to aſſoilze, which the defender though abſent may extract for his ſecurity; and the ordinary ought not to ſuffer the purſuer to take up his proceſs, after abſolvitor is pronounced.

XI. If probation be upon litiſconteſtation *reo abſente*, the purſuer may paſs from further probation, when he pleaſeth, and hold the cauſe as concluded: but the ordinary cannot adviſe the probation, whether it be by writ or witneſſes, but it muſt go to the roll of concluded cauſes. And if the defender be cited by a meſſenger, perſonally apprehended, with certification to be holden as confeſſed; the ordinary ought to hold him as confeſſed and decern, if he find the libel relevant, and the certification to prove the ſame, otherwiſe he ought to aſſoilzie.

XII. Theſe acts concluding cauſes are oft times neglected to be extracted, yet the Lords uſe to proceed to adviſe upon the minute of the act concluding the cauſe.

XIII. The adviſing and decerning in concluded cauſes proceed thus. The ordinary day for adviſing concluded cauſes is Saturday; yet if the Lords find that the teſtimonies or writs are many, which cannot be ended in a forenoon, they appoint an afternoon for adviſing; and in the beginning or ending of each ſeſſion, they uſe to proceed in concluded cauſes, upon other days, when that roll is far behind. For concluded cauſes once being inrolled, need not be wakened, though a year elapſe after their inrolment: and though they be delete out of the roll for not inſiſting, yet they may be inrolled of new; becauſe either party may inſiſt in concluded cauſes, though the other inſiſt not; and therefore when they are deleted becauſe none of the parties inſiſt, neither party can take advantage thereof, but that either party may inrol again.

XXII. When concluded cauſes are called to be adviſed, which is not till the proceſs be put in the hands of the clerk of the proceſs, that he may peruſe the ſame, then the clerk, in preſence of the advocates for one or more ſides, relates the caſe, and reads the words of the act of litiſconteſtation, bearing the points that are to be proved, and then declares what is adduced for proving thereof, that either advocate may hear that he omits nothing neceſſary to be mentioned, which he will not fail to do, becauſe it concerns both his truſt and reputation. If the probation be by a qualified oath, or by another oath which is long and perplexed, then the uſer of the oath pitches upon the words which he thinks

prove

prove the point to be proved, which are accordingly read: and if the other party alledge other words, to clear the meaning of theſe, theſe are alſo read: and if there be doubtfulneſs in the probation, the advocates are heard how far the oath proves, or if it be a qualified oath, they are heard whether the quality be intrinſick and competent or not. And if the probation be fully clear, the chancellor or preſident, without removing of the parties, decerns. But if there be any doubtfulneſs, parties and advocates remove, and the Lords adviſe and decern *.

XV. If the probation be partly by writ, and by witneſſes ſo far as is not proved by writ, the ſame courſe is followed. And if witneſſes have been uſed, who neither depone *affirmativè* nor *negativè*, but that they know nothing, or remember nothing of the points that are to be proved, when the party that is to prove ſeeth the event to be ſuch, he may upon ſupplication, obtain a citation againſt the defender to depone, with certification, providing it ſtop not the adviſing of the cauſe, and then the cauſe is adviſed upon the oath, or upon the certification to be holden as confeſt, which are competent when witneſſes neither affirm nor deny.

XVI. If the probation be only upon the teſtimonies of witneſſes, and if the party againſt whom they are adduced have inſiſted upon reprobatures againſt the hability of theſe witneſſes, if the ſummons of reprobature be concluded, the adducer of the witneſſes may pitch upon witneſſes which are not in the reprobature, and if theſe prove, there is no need to adviſe the reprobature; if not, the reprobature muſt be firſt adviſed. The teſtimonies of the reprobatures may not be *contra dicta teſtium*, wherein they are *conteſtes*, but only againſt their preliminary depoſitions, wherein they are alone, and wherein their oaths are not oaths of verity terminating the proceſs. all theſe points which concern hability of witneſſes are expreſſed, *lib.* 4. *tit.* 23. probation by witneſſes. After the diſcuſſing of the reprobature (which may be either as to the preliminaries, or as to the *ratio ſcientiæ*) the principal cauſe is adviſed.

XVII. Formerly parties were not allowed to be preſent at the adviſing of the teſtimonies of witneſſes, nor to ſee the teſtimonies: for when they were taken, none but every ſingular witneſs could be preſent, and when all had deponed, the ordinary was to ſeal the teſtimonies with his own ſeal; and when they were opened, which was only at the time they were to be adviſed, ſo ſoon as decreet was pronounced they were ſealed up again, never to be opened thereafter. The reaſon then given for this cuſtom was, that the witneſſes might not incur malice or prejudice by their teſtimonies, and thereby might the more freely depone; and becauſe all probation depends upon the faith and belief of the judges, which is their proper truſt: but if the teſtimonies were publiſhed, debates upon their teſtimonies would be drawn in much more length than the debates of relevancy, whereby one court could not overtake the cauſes of a nation. But by a late ſtatute, *Parl.* 1686, *cap.* 18. the teſtimonies of witneſſes are ordained to be publiſhed; wherein there is this advantage, that witneſſes cannot be ſo eaſily ſuborned, or depone for favour or fead, when their particular teſtimonies are known: and when they are examined, parties or advocates may more effectually follow them with emergent interrogators, minding them of circumſtances.

XVIII. However teſtimonies taken ſince that act are publiſhed, both at the taking and adviſing, and ſo are never ſealed. When they were ſealed, the Lords adviſed with cloſs doors; and when they called before adviſing, it was only to hear if any party had any thing to ſay, why they ſhould not be adviſed with cloſs doors. But now parties and procurators muſt be called. And to prevent delay and loſs of time, the advocates are appointed to prepare a condeſcendence upon the witneſſes, whereby they think the ſeveral points are proved: and therefore the witneſſes are marked by numeral figures; and if their teſtimonies be long th

* All cauſes are now adviſed with open doors, P. 1693, c. 26.

the particular words thereof pitched on are to be marked by a line on the margin, and a letter thereat: ſo that at every point to be proved, and at every teſtimony, if the probation be clear, that witneſs's depoſition is declared to prove: if it be doubtful, parties and procurators are removed, and the Lords adviſe. And ſo ſoon as they find concurring witneſſes to prove, they inquire no further: but if none of the marked teſtimonies prove, by two, or three witneſſes in more arduous caſes, then they aſſoilzie. But the Lords are not put as formerly, to read and compare all the teſtimonies, and to find out what is proved thereby; which of late, before the publication of teſtimonies, did ſo burden them, that they referred the ſame to the clerk of the proceſs, or to ſome of their number, which much weakened the decreet, depending but on the truſt of theſe: but when parties themſelves are allowed to pitch on their probation, they can no more complain of it, than when they produce large writs, and are obliged to mark the clauſes they inſiſt on: and ſo the burden of the Lords by the publication of teſtimonies, is by theſe means ſomewhat eaſed.

XIX. The greateſt difficulty of adviſing concluded cauſes is, by acts before anſwer, by which parties are not allowed to prove contrary points; but the nomination of the witneſſes is not wholly in the power of either party, but a certain number is determined, which either may adduce. And if the Lords by their preliminaries find, that there were other witneſſes preſent, called by neither party, they may *ex proprio motu* call theſe (if there be any doubtfulneſs) before they determine. Now, in adviſing theſe cauſes, oft-times the relevancy of the whole points to be proved is undetermined, and always the relevancy of ſome points. And tho' the debates upon relevancy take ſome time, yet not near ſo much as the debates on relevancy before litiſconteſtation: for there they do as anxiouſly debate upon the relevancy of theſe points, wherein nothing would be proved, as in others; but here the probation being firſt adviſed, what is proved, the debate will not be large whether theſe points be relevant or not.

XX. This difficulty doth alſo ariſe in adviſing probation, when teſtimonies are inconſiſtent, whether they be adduced by the ſame party, or by oppoſite parties. In this theſe rules are to be obſerved, 1. An affirmative witneſs is much ſtronger probation than a negative witneſs; becauſe inadvertence or forgetfulneſs may make the negative witneſs ſo depone innocently, but none can innocently depone upon more than what he remembers, and did not advert to. 2. There is much weight in the reaſon of the knowledge: ſo he who was near proves ſtronglier, either what he heard or ſaw, than he that depones that he heard or ſaw but at a diſtance; or he who depones that he was well acquainted with the perſon of whom he depones, than he who was not, but did only aſk who that perſon was, or did expreſs ſuch tokens of him. 3. If the points whereon the cauſe depends be done at different times, the more recent will be the more pregnant proof, as that wherein circumſtances will be leſs obliterate. 4. As to the value or quantity of things to be proved, two witneſſes above exception, who prove the greateſt quantity or value are ſufficient, tho' there be many more that prove leſſer quantities or values: yet if they all concur, and be of far greater fame than the fewer witneſſes that prove more, that quality may be ſuſtained. 5. Points that fall under the proper object of one ſenſe, are probable by leſs authority than other points that fall under more ſenſes; ſo quantity, motion, diſtance, require more ſkilful witneſſes than the exiſtence of theſe objects. 6. Inſtrumentary witneſſes being required to be witneſſes, and the particulars expreſſed, are far more pregnant than common witneſſes. 7. Witneſſes of ſeeing of facts, by which the verity is inferred, are more pregnant than theſe where the ſame is inferred by emiſſion of words; as in the queſtion whether a fact be ſpuilzie, wrongous intromiſſion, or warrantable intromiſſion; a witneſs deponing acts of force and violence, is more pregnant than another that depones delivery by conſent; becauſe the acts of violence make a deeper impreſſion in the memory. 8. When teſtimonies are contrary, *teſtimonia non ſunt numeranda*

ſed ponderanda. So fewer of more reputation for faithfulneſs will preponderate more of leſs reputation.

XXI. If the probation be by writ, if the writs diſagree, and (*ſome*) contain both the confeſſion or acknowledgement of the perſon againſt whom probation is led, or of his predeceſſors or authors, they are ſtronger than any other writ by clerks or nottars, albeit there be leſs queſtion of their ſubſcription or atteſtation: and likewiſe the atteſtation of a clerk is more pregnant than the atteſtation of other nottars. But when the acknowledgement of the original party is compared with the acknowledgement of his ſucceſſors, the former is more pregnant. But if there be different acknowledgements, or declarations by the ſame perſon, *poſteriora derogant prioribus*, which holds alſo in clauſes in the ſame writ; for the poſterior clauſes, if they agree not with the former, do always qualify, correct, alter, or even take off the former, if they do fully contradict the ſame, or be inconſiſtent therewith: for parties in forming of writs, which oft-times are very long, are unwilling to alter the whole frame, which takes long time and expences: and therefore do rather add poſterior clauſes not agreeing with the former.

XXII. Albeit either party be abſent at adviſing of concluded cauſes, yet that doth not make the decreet a decreet in abſence, nor gives ground to reduce it as not *in foro contradictorio:* becauſe there is much more intereſt in judges in the matter of probation, than in the relevancy; for albeit their believing of the truth of points proved, be not abſolute and arbitrary, for there muſt be two or three witneſſes: yet there is far more latitude in their perſuaſion of the point of fact, than in the point of law. And it were a great detriment to the ſecurity and quiet of the nation, if there were difference made between decreets by ordinaries, and theſe *in præſentia*, or by a leſſer and a greater *quorum*, or by adviſing when either of the parties advocates forbear to compear, having been in the cauſe, and attending the houſe, ſo that it is a wilful forbearance. Nor is there any reaſon to admit of bills, upon pretence that the witneſſes have proved more or leſs than the Lords have found proved, to put the Lords again to go over the teſtimonies, when the advocates might ſo diſtinctly be heard upon all the teſtimonies they reſted on. It is not the perſuaſion or truſt of intereſted parties or their procurators; but that of the Lords, that muſt terminate probation.

XXIII. By what hath been ſaid, the difference may appear between decreets in abſence, and theſe which are upon compearance, but paſt from before proponing peremptors, and theſe which are upon circumduction of terms, and theſe which are upon adviſing of probation. The laſt two ſorts are decreets *in foro contradictorio et contentioſo*, wherein allowance has been given to all that could be relevantly alledged. But decreets wherein only dilators were proponed, and compearance paſt from, are in the middle between decreets paſt in abſence, and decreets *in foro contradictorio:* for therein the defender choiceth rather to let a decreet take effect by performance, or poſſeſſion, than to found upon theſe defences which he knew not how to prove.

XXIV. There is a ſpecial kind of decreets called decreets of ſuſpenſion, which proceed upon the ſuſpenſion of former decreets or charges: and whether the decreets be abſolvitor or condemnator, they are called decreets of ſuſpenſion.

XXV. There is alſo a diſtinction between decreets of reduction and decreets reductive. The former is, when any prior decreet or charge is reduced: the latter when that decreet of reduction is reduced.

XXVI. The tenor of decreets is much the ſame, as to the form thereof: for they contain, 1. The deduction of the libel, ſuſpenſion or charge. 2. The compearance of parties, who were either in the cauſe *ab initio*, or were admitted for their intereſt. 3. They contain a ſummary of all the writs produced for any of the parties. But they do not mention the witneſſes adduced: yet now ſeeing teſtimonies are publiſhed, it were very fit that in the production, mention were made of how many teſtimonies were adduced, without any thing of their tenor, or the names

names of the witneſſes; for in decreets in abſence, or where parties are reponed againſt the ſame, it is neceſſary to know how many witneſſes were adduced. 4. The decernitory words are ſet down *verbatim* as they are in the ſigned ſentence. And laſtly, There is ſet down the Becauſe of the decreet, containing the alledgeances of the parties, and the interlocutors of the Lords thereupon, and even the final ſentence itſelf is repeated.

XXVII. It derogates much from the honour of the Seſſion, and from the eſtimation and ſecurity of their decreets, and hinders the diſpatch of juſtice, that all things (whether in matter of law or matter of fact) are congeſted in their decreets, which do contain the reiterated and various diſputes and interlocutors, and the frequently repeated bills and anſwers and interlocutors thereupon inſert *verbatim:* whereby decreets ariſe to ſuch a bulk, and are ſo nauſeous to the peruſers of them, that they will exceed ſometimes forty ſheets of paper and more; and take a long time and expenſive attendance, before ſuch decreets can be extracted. All which may be remedied by the Lords, ſeeing the order of the adminiſtration of juſtice is by their inſtitution committed to them. For all theſe things may be allowed to be inſert in the acts, wherupon decreets proceed: but there is no neceſſity to inſert more in the decreet, than the matter of fact, whereupon the decerniture ſtands and is ſupported; whether it be in the libel, or in the exceptions, replies or duplies, containing only different matters of fact, albeit very unſkilfully every defence is called an exception, and every anſwer thereto is called a reply, and the return thereto, a duply. So that there needed no objections be inſerted, or diſputes whether theſe points of fact are according to law; for when the Lords find any point of fact relevant, that imports, that it is according to law, and is ſufficient for the effect for which it is adduced; and more is unfit, unleſs the particular ſtatutes, cuſtoms, and reaſons from equity and juſtice behoved to be inſert, which is pretended by none. Neither needs this take from the clerks, the benefit that cuſtom hath allowed, according to the number of ſheets in decreets; but the ſame might be allowed according to the number of the ſheets in the acts, whereupon the decreets proceed, in which their pains do chiefly conſiſt: for what paſſes at the time of decreets is ſeldom large.

XXVIII. To ſhow that this propoſal is practicable, ſome inſtances may clear it. 1. When there is no exception proponed, but the defences are all objections againſt the titles, or on the intereſt of parties not cited, the order of citation, or the relevancy of the libel: in all theſe, there is no proper exception, nor in any dilator: therefore there needs no mention of theſe in decreets, but of the particular defence only, whereupon no proceſs is ſuſtained, which is the proper Becauſe of ſuch decreets. Yea, though the libel inſiſt on a particular ſtatute, and the defender defends upon deſuetude, or upon a poſterior ſtatute abrogating or derogating from the former ſtatute; it is but an objection, and makes the libel not relevant. 2. If there be alledgeances in fact proponed as exceptions, either proved by the writs produced, or offered to be proved in the proper way that ſuch are probable, and if none of theſe be found relevant, then there is no neceſſity to mention them in the decreet, but they will ſtill be held as proponed and repelled, or competent and omitted: and if in the ſecond inſtance by ſuſpenſion or reduction, the ſame matters of fact be repeated, not only does the ſaid preſumption make againſt them, but the acts of proceſs may clear the ſame, as well as the decreet, if the ſame be recently quarrelled; and there is no reaſon that grounds of debate ſhould be perpetually encouraged till preſcription, but that in the moſt ſolemn acts by final ſentences, *omnia præſumenda ſolenniter acta*, without neceſſity to produce theſe acts, which are ſeldom regiſtrate: ſo that the libel being found relevant, and terms aſſigned to prove, the decreet needs bear no more, but that the term was circumduced, for adducing no probation, or that the probation being adviſed, did or did not prove. 3. If exceptions in fact one or more be found relevant, and inſtantly verified, they muſt be inſert in the decreet: but if they be to be proved, there needs no more be inſert, but that ſuch exceptions being

being found relevant, and terms aſſigned for proving thereof, either the terms were circumduced, for not adducing any probation in the manner found competent, and therefore decreet was given; or that the exception was found proved or not proved, and decreet accordingly pronounced. 4. Replies being properly matters of fact, inſtructed or offered to be proved, if they be not found relevant, they need not be expreſſed in the decreet; and if they be found relevant, whether they preſuppoſe the verity of the exception or not, the tenor of the decreet will be in the ſame way, as hath been expreſſed of libels and exceptions, and ſo of duplies, or any further plies in fact. By this method, there will not be continued to poſterity, ſuch long relations of matter of fact, neither inſtructed nor offered to be proved, nor ſuch impertinencies and reflections as now are in decreets, with great eaſe to the Lords, who, in the ſecond inſtance, may, at a ſhort view, ſee he whole grounds of a decreet, and with much eaſe and no damage to the clerks, nor to the clients by neceſſitating their long attendance to extract decreets. This method is not the ſame with that, which ſometime hath been urged, *viz.* That decreets of Seſſion ſhould have no ſpecial reaſon or Because, but only in general, "That all the alledgeances and evidences of the parties being conſidered "*hinc inde*, the Lords decerned, *&c.*" But here all the grounds of the decreet are to be ſpecially expreſſed; ſo that all other grounds behoved either not to be proponed, or being proponed to have been repelled; as now alledgeances, which are paſt over by the Lords without interlocutors ſpecially relating thereto, are underſtood to be proponed and repelled.

TITLE XLVII.

Letters executorial upon Decreets.

DECREETS would be of no effect, but as bees without ſtings, if the law did not fix the kinds and form of the executions thereof: which do follow the decreets themſelves of courſe, without the neceſſity of any ſpecial warrant in the decreet. The execution of the decreets of inferior courts are called precepts, ſuch as precepts for paying or performing what was decerned, or for poinding; and upon decreets of removing follow precepts to remove, and precepts to eject the perſons decerned to remove, and to poſſeſs the obtainer of the decreet of removing. Inferior courts have no other executions; except burghs-royal who have a privilege to grant acts of warding, and the admiral's privilege. See § 23. *h. t.*

II. The decreets of the Lords of Seſſion for attaining their effects, have letters in the King's name, commanding the parties decerned to pay and perform as is decerned. Theſe of old, were by letters of four forms, as they were called: the firſt was a charge to pay or perform, without any certification; the ſecond was a charge to the ſame effect, but with certification that horning would be direct; the third was horning; the fourth was caption *. But theſe being tedious and expenſive, every form being to be returned to Edinburgh, before the next were granted; the firſt two were laid aſide, and only horning and caption retained. But the cuſtom run to the other extreme, and letters of poinding were granted without the neceſſity of a preceeding horning.

III. But both then and now, no execution can paſs within fifteen days after the dates of the decreets of inferior courts, which therefore are called the days of law; and now horning muſt precede poinding or poſſeſſion, which are not to be granted till the days of the charge be expired, which are fifteen days in decreets upon proceſſes, and ſuch days as parties agree on by the clauſe of regiſtration in regiſtrable writs, and by the decreets of regiſtration thereupon, whether ſummarily, both debtor and creditor (or his aſſigny having intimated in the creditor's life)

* Craig, III. 2. 4. gives a different account of this diligence.

life) being alive, or in caſe of either of their deceaſes, upon decreets of regiſtration *. But if the party to be charged be out of the country, the charge muſt be upon ſixty days, at the market-croſs of Edinburgh and pier of Leith. Or if he be latent, or in a place to which there is not ſafe acceſs, the letters may bear warrant, to charge him at the market-croſs of the head burgh of the ſhire, wherein he dwells, or haunts. Or if he have no certain dwelling or abode, the charge at the market-croſs of Edinburgh, as *communis patria*, will be appointed by the letters. And if the party be not found perſonally, the charge may be at his dwelling-houſe, if he have any, in the ſame order and with the ſame ſolemnities as is required in the execution of ſummons, of which formerly. *Lib.* 4. *tit.* 38. § 13. preliminaries of proceſs.

IV. The ſame executorials are granted of courſe, upon any part of the King's revenue, or upon the benefices or ſtipends of miniſters, having obtained decreets for letters conform, or having decreets of locality; and that not only in favour of the obtainers of theſe decreets, but alſo of their ſucceſſors, upon production of the decreets of their predeceſſors, with their own act of admiſſion: act of Sederunt 22. June 1687. Which letters were effectual, not only againſt the perſons decerned in the decreets, but againſt their heirs or ſingular ſucceſſors poſſeſſing the lands burdened by the ſaid decreets. And in like manner horning is ſummarily granted, upon all the acts of Parliament, bearing expreſsly a warrant for horning. Letters of horning were alſo competent for the charges of commiſſioners to Parliaments and conventions of eſtates; and for the contribution-money due to the Lords of Seſſion, out of the benefices. All theſe hornings were called general letters, becauſe all the particular perſons were not named in them, but were contained under general heads [d].

V. But by *cap.* 13. *Seſſ.* 2. *Parl.* 1. *K. W.* and *Q. M.* "All general letters of "horning were prohibited in the future, and declared null, if they were uſed, ex- "cept for the King's revenue, and miniſter's localities, without prejudice of the "decreets for poinding of the ground, which are to have the ſame execution as "formerly." This is, that they may proceed not only againſt the perſons that then were heritors and poſſeſſors, but alſo againſt their ſucceſſors, ſo long as the obtainer of the decreet and letters of poinding lives; but after his death the ſame muſt be transferred in the perſon of his heir or aſſigney *activè* and in the perſons of the then heritors and poſſeſſors *paſſivè*.

VI. Yet this act will not hinder ſummary charges, if the parties names be particularly mentioned in the letters: as in the hornings for the commiſſioner's charges, if the names of the heritors be therein expreſſed, who are repreſented by their commiſſioners, albeit the *quota* be not expreſſed, but only the total of the charges, according to the clerk-regiſter's teſtificate of their attendance; without neceſſity of a decreet calling all the ſaids heritors, but only containing a charge to the free-holders to meet and ſtent themſelves, for the ſaids commiſſioner's charges, according to the valuation of their lands holden of the King. And likewiſe letters direct at the inſtance of the ſeveral Lords of Seſſion, for their ſhares of the contribution-money, againſt thoſe who were in uſe to pay the ſame, being expreſſed by name, are ſufficient, without neceſſity of a decreet. See *lib.* 4. *tit.* 3. § 25.

VII. Summary letters of horning are alſo granted on bills of exchange, by *cap.* 20. *Parl.* 1681. Bearing, "that any foreign bills of exchange, from or to "this realm, being duly proteſted for not acceptance or for not payment, and the "ſaid proteſt having the bill of exchange prefixed, ſhall be regiſtrable within "ſix months after the date of the ſaid bill, in caſe of non-acceptance, or after "falling due in caſe of non-payment, at the inſtance of the perſon to whom "the ſame is made payable, or his order, that letters of horning upon a ſingle "charge of ſix days, may paſs thereon: without prejudice to purſue for ex- "change,

* By act 39. *P.* 1696. all writs regiſtrable may be ſummarly regiſtrate notwithſtanding the granter's death.
[d] See above, III. 3. 13.

" change, re-exchange, damage or intereſt, by way of action or ſpecial charge." But after the ſix months, there is no place for ſummary regiſtration or ſummary charge upon bills of exchange, but only by way of action. Alſo by this act they bear annualrent, in caſe of non-acceptance, from their date, and in caſe of acceptance, and non-payment, from the day of falling due.

VIII. Letters of horning do firſt narrate the ground whereupon they proceed, whether it be a decreet either ſolemn or ſummary (by regiſtrations of bonds, or other regiſtrable writs, or bills of exchange) or a ſtatute by which horning is appointed. Alſo they paſs by cuſtom in the caſes aforeſaid; and alſo upon the decreets of inferior courts, preſented to the Lords: *Parl.* 1606. *cap.* 10. *&c.* Next follows the will or command, which contains two parts, both being directed to meſſengers. The one is, to command the party to pay or perform. And (in caſe of diſobedience, the days of the charge being paſt) the other part, is, a command to the meſſenger to paſs to the market-croſs of the head burgh of the juriſdiction, wherein the party charged dwells, whether it be a ſhire, ſtewartry, bailiary of royalty or of regality, and there publickly to read the letters of horning, and becauſe of diſobedience of the party charged, to denounce him rebel: and to the effect the ſamine may be known to all concerned, the meſſenger muſt give three blaſts with a horn, which is the reaſon why theſe letters are called horning: and likewiſe for the further publication, he muſt affix a copy of the letters upon the croſs, immediately after the blaſts of the horn. All which muſt be done in preſence of witneſſes, required to that effect, who with the meſſenger ought without delay to ſign the executions of the horning, (theſe being ordinarily taken along with the meſſenger, that they may be witneſſes both at the charge and denunciation, ſince the late ſtatute, *Parl.* 1681. *cap.* 5.) For it is not reaſonable, that the execution ſhould depend upon the memory of the meſſenger and witneſſes; and the letters of horning are not accounted executed, till the executions thereof be both done, written and ſigned as aforeſaid. But as to hornings preceeding that act, the expreſſing of the witneſſes their names and deſignations, both as to the charge and denunciation, and there being required to be witneſſes to theſe acts, with the ſubſcription and ſeal or ſtamp of the meſſenger, was ſufficient: but now the ſubſcription of the meſſenger and witneſſes ſupplies the ſtamp, and in antient executions any veſtige of the ſtamp is ſufficient.

IX. The effects of horning ſo executed, whereby decreets and others abovementioned, attain their end, are different in ſeveral caſes. For tho' the horning be not regiſtrated, yet upon the return thereof duly executed, letters of caption ſometimes paſs of courſe, whereby the party denounced may be immediately taken and incarcerated. But if the decreet be to remove, there is, upon ſight thereof, letters of poſſeſſion granted for diſpoſſeſſing the party decerned to remove, and for entering of the party, obtainer of the letters, to the natural poſſeſſion. And if the horning and executions be regiſtrate within the time appointed by the act of Parliament for regiſtration of hornings, the moveables of the party denounced, which he had the time of the denunciation, or which he ſhall ſucceed to, or acquire thereafter, become eſcheat and confiſcated to the King, or to the Lord or bailie of regality, according to their infeftments, whereby the moveables of parties living within the regality, and denounced and regiſtrate there, are gifted and diſponed by the King to them, their heirs and ſucceſſors, as pertinents of their office and juriſdiction. But hornings againſt witneſſes, or havers of writs to be produced *ad probandum*, or any denunciation not being at the market-croſs where the party denounced dwells, do not infer ſingle or liferent eſcheat, but only caption. Yet denunciation againſt perſons fugitive, or other denunciations by order of the Privy Council or Juſtices, being at the market-croſs of the place where they ſit at the time, do infer eſcheat ſingle and liferent, tho' the party denounced dwell not there: but this is by a ſpecial ſtatute. And likewiſe the party denounced and regiſtrate at the horn is declared rebel, becauſe of his diſobedience

dience to the King's command; yet it is not a rebellion importing treaſon or any crime, becauſe it is not preſumed, that the party's not obeying was out of contempt of the King's authority and command; but becauſe they are either not able to perform, or ſupinely negligent and ignorant of the denunciation and regiſtration.

It is alſo a further effect of the horning duly executed and regiſtrate, that if the party denounced be inſolvent, he can thereafter do no deed (if he was not ſpecially obliged to do it before the denunciation) that will be effectual againſt the creditor at whoſe inſtance the denunciation was.

X. If the party denounced be relaxed within year and day after the denunciation, it reaches no further than his moveables that he had before the relaxation. But if he continue unrelaxed for the ſpace of year and day, the rent and profit of all his heritable rights fall to his ſeveral ſuperiors, not upon account of tranſgreſſion againſt them, but becauſe by the denunciation he is an out-law, and as *civiliter mortuus*, whereby his fees are opened to his ſeveral ſuperiors: yea, tho' he be relaxed, only thoſe moveables he acquired after his relaxation continue to him: but his liferent continues in the hands of his ſuperiors [a].

XI. Horning duly executed and regiſtrate hath this further effect, that the party denounced as a rebel or out-law, hath no perſon to ſtand in judgment until he be relaxed. Yet when he is cited by parties, with certification, that if he compear not, he ſhall be holden as confeſt, or that his evidents ſhall be reduced, or improved, as reputed falſe and forged, the Lords will not ſuffer that party to debar the party denounced with horning, by which they ſhould both urge him to compear, and hinder him to compear. The Lords do likewiſe relax parties who are incarcerated, and not able to find caution, to give them *perſonam ſtandi in judicio*, to the effect that their cauſe may be diſcuſſed while they are in priſon.

XII. Horning having ſo ſevere effects, the Lords do reduce the ſame upon the leaſt nullity, by omiſſion of any thing requiſite in the execution and regiſtration thereof; as is largely treated, *lib.* 3. *tit.* 3. § 1. *et ſeq.* But they will not ſuſtain any nullity by way of exception; becauſe the King's intereſt ariſing thereupon by the eſcheat, requires that the Officers of State ſhould be called, eſpecially when the horning is craved to be reduced, that the eſcheat may fall in conſequence, unleſs a donatar be called or appear. But if the horning be otherwiſe made uſe of, as to debar any party from compearance, the nullities therein will be received, intimation only being made to the Officers of State: or if the horning be craved to be reduced, that the liferent-eſcheat may fall in conſequence, the ſuperior or his donatar muſt be called, whoſoever the ſuperior be; for in that the King *utitur jure communi*.

XIII. The ſecond executorial on decreets, is, by letters of caption. Theſe letters paſs of courſe upon production of the executions of the horning, both as to the charge and denunciation. The narrative thereof bears, that the party to be taken was orderly denounced rebel and put to the horn, for the cauſes expreſſed in the horning; and therefore the will of the letters bears warrant to command all magiſtrates and meſſengers, to take and apprehend the perſon denounced, wherever he may be found within their ſeveral juriſdictions. Yet any meſſenger employed by the party to whom the horning belongs, may himſelf, without a charge to any other, apprehend the perſon denounced wherever he finds him; and the having of the horning is a ſufficient inſtruction of his warrant: yea, if he think another meſſenger may be more able to execute the caption, or be leſs ſuſpect to be intruſted with the letters, he may cauſe that meſſenger execute the ſame; and if he be not willing, he may charge him by the warrant of the letters to do the ſame.

XIV. All meſſengers ſhould have a blazon, and a rod or wand [b]. The blazon is a piece of braſs or ſilver, having the impreſſion of the King's arms upon it, which

[a] See above, II. 4. 64. *et* III. 3. 14.

[b] See below, IV. 49. 7.

which is fixed upon the meſſenger's breaſt, ſo as the impreſſion of the arms may be ſeen, that thereby while he charges, his authority and warrant may appear: for if any affront be done to him, when he charges without his blazon, it will not import a deforcement, unleſs the actor knew him to be a meſſenger then. From the impreſſion of the King's arms on this blazon, meſſengers are called meſſengers at arms: for they are not military officers, but civil. The rod or wand hath a particular ſhape and impreſſion, by which it may be diſtinguiſhed from any other. The uſe thereof, is to evidence his authority and warrant to execute captions or other executorials: for in the execution of captions, the meſſenger ought to touch the party to be taken with that rod, and then read to him the letters of caption: yet if he have witneſſes and aſſiſtance ſufficient to make him go to priſon if he were unwilling, the not reading of the letters, or the not giving a copy thereof ſigned by the meſſenger would not annul the caption: but if the party taken ſhould eſcape, the reading of the letters, or giving a copy thereof, would not have the ſame effect, as if the blazon were ſeen, or the party were touched with the rod; theſe being the evidences of the meſſenger's authority, by which the party cannot deny, but that he knew him to be a meſſenger at arms, and thereby might not only be liable to the penalty of deforcement, but to other penalties for his contempt and violence.

XV. The caption being ſo far executed, the meſſenger or magiſtrate charged to execute the caption, muſt take the perſon apprehended to a lawful priſon, and muſt deliver him to the keeper of the priſon, or to ſome magiſtrate having power over him, requiring him to put him and detain him in priſon: and if they refuſe, or do not perform the ſame immediately, he may charge them by the warrant of the letters for that effect.

XVI. The meſſenger may incarcerate the party in whatever lawful priſon he pleaſes, and is preſumed to have warrant from his employer ſo to do: which power cuſtom hath allowed, that debtors may the more effectually be induced to pay, but it wants not its inconvenience, putting all the burghs to the trouble of incarceration at the option, or it may be upon the picque or prejudice of the creditor or meſſenger. And therefore it might fitly be amended by an act of Parliament, or of Sederunt, requiring meſſengers in executing of captions, to take the party to the next lawful priſon, having a ſecure priſon-houſe; for albeit every burgh-royal, or burgh of regality, be obliged to have a ſufficient priſon; yet many have not, and creditors ought not to hazard the eſcape of their debtors by an unſufficient priſon; and albeit thereby the magiſtrates will be liable for the debt, yet they are not always ſolvent: but there is no reaſon they ſhould paſs by a ſufficient priſon.

XVII. Meſſengers ought not to detain priſoners unneceſſarily in their hands, but ought to put them in priſon ſo ſoon as they can; leſt they prejudge their employers by heightening their expences, upon pretences of componing with their parties, or ſuffer them to procure ſuſpenſion before they be actually impriſoned.

XVIII. As meſſengers may execute captions, by themſelves immediately; ſo they may at diſcretion charge other meſſengers or magiſtrates, to execute the ſame; but they muſt attend them, and furniſh them with the letters of caption, without which they can ſhow no warrant for the incarceration: and therefore magiſtrates uſe to offer to go with the meſſengers foot for foot, if he can ſhow where the perſon to be taken is, of which he doth ſhow any probable evidence; but otherwiſe it were unreaſonable, that a ſheriff or his depute, ſhould follow a meſſenger, at uncertainty, to any place of his ſhire. Magiſtrates of burghs are liable to more diligence, for executing captions, becauſe the bounds of their town or juriſdiction is narrow: and therefore ordinarily, the meſſengers do of conſent take their officers and other aſſiſtance, to ſearch for and apprehend the party.

XIX. By magiſtrates, are only underſtood ſheriffs of ſhires, ſtewarts of ſtewartries, bailies of regality, bailies of burghs-royal, or of burghs of regality: but though

though all theſe be obliged to have ſufficient priſon-houſes, and may be puniſhed for want of them: yet they are not bound to receive priſoners whereby they would be liable for the debt in the caption, if they have no ſufficient priſon.

XX. The executions of letters of caption ought to bear the whole diligence of the meſſenger uſer thereof, in the ſeveral caſes before expreſſed, and eſpecially the place where he apprehended the party, and the time thereof: that it may appear how long he was in his hands. And if he charged any magiſtrate or other meſſenger, who failed in giving due concurrence, he ought to expreſs the ſame, albeit thereafter the party was taken otherwiſe: for thoſe who fail in due courſe, are liable for the debt in the caption, although there were many ſuch, as well as thoſe who ſuffered the priſoner to eſcape; likeas all of them become *correi debendi* to the creditor; and if the party eſcape by violence, or otherwiſe, the manner of eſcape ought to be expreſſed in the execution, and the names of thoſe who were concurring in the eſcape: the witneſſes alſo in theſe executions ought to be required and deſigned, and ought to ſubſcribe with the meſſenger *de recenti*.

XXI. There is an acceſſory action or diligence againſt thoſe who fail in their duty, in executing of captions, for which the Lords may grant letters of horning ſummarily to charge them, in the ſame way as they do againſt depoſitars of ſums conſigned, upon ſight of the inſtrument of depoſitation: for there is no reaſon that creditors uſing executorials ſhould be put to new ordinary actions; nor can ſuch hornings be counted general letters, becauſe the names of the parties are expreſſed, and their failing in their concourſe appears from the executions, whether it be in the not concurring to the taking and incarcerating, or in ſuffering the priſoner to eſcape.

XXII. It will not be a relevant defence or reaſon of ſuſpenſion, for magiſtrates ſuffering priſoners to eſcape, that they will yet take the party, albeit he be in as good condition as when he eſcaped; or that, upon teſtificates of phyſicians, they ſuffered the priſoner for his health to go out to take the air, or to go to a private houſe, albeit in either caſe there were two to guard him; for the Lords, by act of Sederunt, June 14. 1671, prohibited the magiſtrates of Edinburgh, to ſuffer priſoners to go out, without particular warrant; or the magiſtrates of other burghs not far diſtant, except in the imminency of death. And where ſuch warrant is granted, the magiſtrates ought to chuſe the place of the priſoners abode, that the ſame be ſecure, and the guards attending. Likeas, they do declare, that if magiſtrates let priſoners go out, upon any other pretence, although they reſtore them to priſon, they ſhall be liable for the debt: for *ſqualor carceris* is an intereſt of the creditor, to cauſe the debtor to ſatisfy, or to diſcover his means, which magiſtrates ought not to prejudge them in. Yea, the eſcape of priſoners liberates not the magiſtrates, except in the caſe that provident diligence could not prevent or hinder: and therefore it is not relevant to liberate them, that the priſoner got in files, and therewith did ſhear off the locks or catbands of the doors of the priſon; becauſe there ought to have been more doors and catbands on either ſide, whereby the priſoner could not reach the outer-catbands: neither yet that the priſoner cut the ſtanchers with files, or *aquafortis*; becauſe the keepers of the priſon ought to viſit the ſame frequently, and to ſearch for ſuch inſtruments: for if ſuch pretences be ſuſtained, it will be eaſy for the keepers, by colluſion, to ſuffer priſoners to eſcape. In like manner, the eſcape from meſſengers, doth only liberate the meſſenger, when he uſeth all provident means to prevent or hinder the party to eſcape.

XXIII. Captions do ordinarily proceed upon the ſight of regiſtrate hornings. But regiſtration is not requiſite againſt witneſſes, or havers of writs, charged by diligence, to produce writs as means of probation. Captions are alſo granted without a preceeding charge, by the Lords, upon ſpecial occaſion, as if parties be ſuſpect to leave the country, and have no viſible eſtate in it; or when the warrant is upon contempt, or diſorder in proceſs. Any judge-ordinary, or even parties, may ſeize upon perſons for publick crimes, or for their own debts in

their eſcape out of the kingdom, or in clear evidences of their preſent going about the ſame. There is alſo a ſpecial privilege of ſummary arreſting or ſeiſing perſons by the admiral: becauſe his juriſdiction is moſt converſant about ſtrangers, and on that occaſion, and for diſpatch of ſtrangers, he is authorized, ſummarily to ſeize perſons, till they find caution *judicio ſiſti*, or *judicatum ſolvi*, or both.

XXIV. The third executorial is by letters of poinding, which of old was called the brief of diſtreſs, paſſing out of the chancellary of courſe; by which the goods not only of debtors, but of their tenants and poſſeſſors of their lands, were poinded for their debts, much like the execution of the ſubjects of one ſtate againſt another, by letters of mart. But this was juſtly redreſſed, by *Parl.* 1469, *cap.* 36. intitled, "That the poor tenants ſhall pay no further, than their term's "mail for their Lord's debt, by the brief of diſtreſs." And cuſtom hath further interpreted, that this diſtreſs of tenants, even for a term's mail for their Lord's debt, is not for his perſonal debt, but for theſe debts which are *debita fundi*, and that upon letters for poinding of the ground, paſſed upon decreets for poinding of the ground, which can extend to no further, than the ground affected with the real burden contained in the letters, and the goods thereupon, in ſo far as they do belong to the debtor, or to the tenants, in ſo far as may be extended to their term's mail or rent [d]. This kind of poinding requires no prior charge of horning, becauſe no perſon is decerned to pay, and ſo cannot be charged, but only the ground is decerned to be diſtreſſed; and the moveables thereon to be poinded; and failing theſe, the ground-right and property of the lands to be appriſed by the foreſaid act. Yet it cannot proceed till fifteen days after the decreet of poinding of the ground, which are the days of law, within which parties may ſatisfy, or procure ſuſpenſion. This way of poinding is more fully explained, *lib.* 4. *tit.* 23. So that there needs no further to be here repeated.

XXV. Appriſing is the executorial for making effectual decreets for poinding of the ground, which paſſeth of courſe as other executorials: for letters of appriſing are ſummarily obtained thereupon by ſupplication; and the ſame order is uſed therein, as in appriſings upon perſonal debts. There is no need to ſay any further of appriſing here, it being largely handled, *lib.* 2. *tit.* Infeftments, § 29. as a ſpecies thereof; and likewiſe *lib.* 3. *tit.* Diſpoſitions, § 13. *et ſeq.* as appriſing is a tranſmiſſion and legal vendition of lands and annualrents. See alſo *lib.* 4. *tit.* 35.

XXVI. Hence there ariſes a diviſion of poinding, in real and perſonal. The real poinding proceeds upon a real right affecting the ground. The perſonal poinding proceeds upon a perſonal debt, decerned to be paid by perſons debtors, principals and cautioners, or other acceſſory debtors; whereupon letters of poinding paſs of courſe, for poinding the readieſt goods of the debtor, wherever they can be found, to the avail of the debt. And becauſe the right of moveables is preſumed by poſſeſſion, all the moveables which are in the poſſeſſion of the debtor, may be ſo poinded for his debt; and neither his aſſertion, nor his oath that they belong not to him, but to others, will ſtop the poinding: but the oath of others being offered, before the poinding be compleat, will ſtop the ſame, without prejudice to the creditor, to prove theſe ſtopped goods to have then belonged to his debtor; and ſo he may recover the ſame, if he be not otherwiſe ſatisfied. The meſſenger hath authority to take this oath, and is a kind of judge in the execution: and therefore he ſhould not reſt on the oath of parties in general, that the goods belonged to them, and not to the debtor; but he ought to cauſe them condeſcend upon their particular right, and ought to ſet the ſame down in his execution of poinding, that if there was any thing wanting to pay the debt, the creditor may return upon theſe goods, and that he may know that the meſſenger has done his duty without colluſion: for the meſſenger may reject the oath, if he do not find a reaſonable account of the title, and perſons will not ſo particularly depone falſly, as in general, or upon their conſtruction of the point of right,

[d] See above, II. 5. 9.

right, ſeeing they may know that ſuch oaths in their own behalf, are but as oaths of credulity, or oaths of calumny, which terminate not the point of right, ſo that by a future proceſs ſuch oaths may be eaſily redargued, and they appear to be perjured. Theſe oaths to ſtop poindings, uſe to be admitted, to be given not only by the owner of the goods, but in caſe of his abſence, without ſuſpicion of colluſion, by his wife, or children in his family. See *lib.* 4. *tit.* 30. § 6.

XXVII. By the 34th act, *Parl.* 1469, "poinding for mails and annualrents "upon holy days, is forbidden, and deferred till the third day after Whitſunday or "Martinmaſs," which was for the rent payable at theſe terms, while theſe were accounted holy days. But theſe not being ſo accounted now, that part of the act is in deſuetude: yet ſtill poindings on the LORD's day, or on ſolemn days appointed by church or ſtate, for humiliation or thankſgiving, are void and puniſhable.

XXVIII. Letters of poinding are not only granted upon the Lords decreets, ſolemn or ſummary, or upon the other ſummary letters of horning, but alſo upon the decreets of ſheriffs, commiſſaries, or other inferior judges, the ſame being preſented to the Lords. For tho' theſe judges may give precepts of poinding on their own decreets, yet theſe can have no effect without their own juriſdiction; but the letters of poinding granted by the Lords, are as extenſive as if they were upon their own decreets, *Parl.* 1661, *cap.* 29.

XXIX. But no perſonal poinding can lawfully be put to execution until a charge of horning be given, and the days of the charge expired, by *cap.* 4. *Parl.* 1669, bearing, "That it ſhall not be lawful to poind moveables upon regiſtrate "bonds, or decreets for perſonal debts, till the parties be firſt charged, and the "days of the charge expired; with certification, that poinding otherwiſe uſed, "ſhall be null, and the poinders ſhall be puniſhed, and proceeded againſt as "ſpuilziers: but prejudice always of any decreets recovered at the inſtance of "heritors againſt their tenants in their own courts; whereupon it ſhall be "lawful to them to uſe poinding as formerly: and but prejudice to ſuperiors, "to uſe poinding againſt their vaſſals for their feu-duties, as they might law-"fully have done of before." Theſe exceptions leave it uncertain what was the rule for the perſons accepted before, wherein the cuſtom of the ſeveral places muſt be conſidered, at leaſt to ſhun ſpuilzie: but tho' there be no neceſſity for a precept to pay, as in the caſe of other creditors, who muſt uſe ſuch precepts, or letters of horning, before they can lawfully poind; yet ſtill the days of law after the decreet ought to be free, that parties decerned may ſatisfy or ſuſpend.

XXX. The order of maſters poinding their tenants is not determined by ſtatute, but by cuſtom, which is thus: maſters do at their own gates, or other places accuſtomed, poind their tenants for their rents, and poinding upon any decreets of their baron-courts are ſo executed; becauſe there is no warrant for letters of horning or poinding upon their decreets, neither can they exerciſe their juriſdiction without their own territories.

XXXI. Poinding upon decreets of all judges ordinary muſt be thus: if the poinding proceed upon the precept of an inferior judge, his officers, with ſuch aſſiſtance as they think ſufficient, go to the place where the goods of the debtor are, within the juriſdiction. And if they be goods that can be driven, or brought together without hurt, they gather the ſame, and then they read the precept of poinding; and if there be ordinary prizers within the bounds, and the debtor offer to prize goods by them to the value of the debt, that no more need be carried to the croſs than what is ſufficient, the officers may not drive or carry more away, than about that quantity they eſtimate: or if ſuch prizers be not offered, the officers may deſign prizers for that effect, and they have the choice of the goods that may be ſufficient. But that appriſing is not the rule of eſtimation, but the goods muſt be carried to the croſs, or to the ordinary place of poinding, within

within the juriſdiction where they are found, and there again the letters of poinding muſt be read; and if there be ordinary ſworn prizers, authorized by the judge-ordinary of the place, theſe ſhould appriſe the goods to the value of the debt, with the twentieth penny more for the ſheriff-fee; but if ſuch be not found, the officers may chuſe other prizers, againſt whom the debtor can inſtruct no juſt exception, eſpecially indifferent perſons, who are not concurring in the poinding, if they can be had.

XXXII. The goods being ſo appriſed, the officers muſt make publick intimation thereof by oyeſſes, to convocate the people, and declare the price of the goods, they being ſet apart and under view; and then muſt require the debtor to make payment, with certification, that if he do not, he will deliver the goods appriſed to the creditor, or any having his warrant, (which is ſufficiently inſtructed by having the precept of poinding) to be uſed by the creditor, as his own goods, at his pleaſure. If the debtor, or any to his behoof, appear and offer payment, ſuch time muſt be allowed before the goods be delivered, as the money may be told, and being told, the ſame muſt be delivered to the creditor, or the perſon intruſted for him, upon his interchanging of a diſcharge of the debt, and of the decreet, and letters for the ſame; and there muſt alſo be time to draw the diſcharge by ſight of the officers, or judge-ordinary of the place: and in caſe ſuch diſcharge be not granted, the officer muſt not deliver the goods to the creditor, if the debtor conſign the ſum in the hands of the judge-ordinary of the place, or his clerk, to remain in their hands, to be given up to the creditor upon delivery of the diſcharge as aforeſaid; which being contained in the execution of the poinding, will be a ſufficient ground to charge the depoſitar to deliver the money upon delivery of a diſcharge, which the ordinary on the bills for the time will find ſufficient, comparing it with the decreet: or if there be a nottary preſent, it is more convenient, that the inſtrument of a nottary be taken upon the executions than by the officers, who are oft-times ignorant. This conſignation being made, the goods ſhould be left to the debtor, owner thereof, to be diſpoſed of as his own goods: and there may be no further execution upon that precept of poinding.

This way of conſignation is the ſecureſt and moſt convenient; yet if the meſſenger, or other executor, being a perſon of credit, receive the money, he may keep it as conſignatar, if a diſcharge be not offered; and tho' the executor ſhould deliver the ſame to the creditor, he would be in no hazard, if he offered the ſubſcribed double of the letters of poinding and executions to the debtor, and delivered the ſame, if he would accept it.

XXXIII. But if no offer and conſignation of the ſums as aforeſaid be made, the officers, executors of the poinding, muſt deliver the goods appriſed to the creditor, as his own goods, in ſatisfaction of the debt contained in the precept of poinding, in whole or in part: and he ought to offer to the debtor, a copy of the letters of poinding, and the executions ſigned by him and the witneſſes required thereto, if he can write, or by a nottary, by whoſe inſtrument the executions are formed; either of which, will be a ſufficient inſtruction of the payment of the debt. The execution upon letters of poinding by the Lords, is in the ſame manner: but with this difference, that the execution muſt be done by meſſengers at arms.

XXXIV. There is an exception againſt poinding of moveables by *cap.* 98. *Parl.* 1503. in theſe terms, "It is ſtatute and ordained, that in time to come, no "manner of ſheriff nor officer, poind nor diſtrenzie, the oxen, horſe, nor o-"ther goods pertaining to the plough, and that labours the ground, the time of "the labouring of the ſamen, where any other goods or land are to be appriſed or "poinded, according to the common law." By this ſtatute it appeareth, that plough-goods cannot be poinded, upon decreets for poinding of the ground, albeit

beit there be no other goods ſufficient upon the ground, to ſatisfy the real burden contained in the decreet: becauſe the act bears, that plough-goods ſhall only be poinded, when there is neither other moveables nor lands to be poinded; ſo that ſeeing the land is always capable to be poinded, therefore the plough-goods cannot at all be ſo poinded: but it is not ſo in perſonal poinding; yet in either caſe, the exemption of plough-goods, is only in plough-time, which is not to be underſtood of the time they are actually plowing, but of the ordinary time that ploughs uſe to go, in the ſeveral places of the country: and that whether it be for the maſter's debts, or for thoſe of the tenants or other poſſeſſors. The reaſon of the ſtatute, is, the publick good, that the plowing of the ground be not hindered. By "other ſufficient goods on the ground," are not to be underſtood the houſhold pleniſhing, which came not commonly under the name of goods on the ground [e].

XXXV. The fourth executorial, is, by letters of poſſeſſion, which take place not only upon decreets of removing, but upon all other decreets, whereby parties are decerned to be put in poſſeſſion; as decreets following upon actions of ejection, intruſion, ſucceeding in the vice of perſons removed, or decerned to remove or cede the poſſeſſion, as when the ſervants or ſucceſſors of liferenters, are ſummarily charged to remove, or when any party is obliged by contract or obligation, to enter another in poſſeſſion. And tho' in all other caſes, the days of law muſt firſt paſs, and the days of the charge of horning muſt expire, before caption or poinding on perſonal debts can proceed; yet there is no reaſon to extend that privilege, againſt decreets for poſſeſſion and letters of poſſeſſion thereon: for if the poſſeſſion be by contract, that delay is competent, according to the clauſe of regiſtration, becauſe it is ſo agreed, and therefore after expiring of the charge on the obligement, letters of poſſeſſion are competent, to make the obligement effectual, ſo ſoon as the days of the charge are expired; and if the decreet be againſt unlawful poſſeſſors, they can plead no privilege: But even in ordinary removings, there ſhould no delay be pretended upon days of law, or preceeding charge: becauſe removings being at peremptory terms, the maſter of the ground could not ſafely agree with new tenants, if he could not remove the former poſſeſſors preciſely at the term. And therefore the common intereſt requires, that decreets of removing may be obtained before the term, to take only effect at the term; that letters of poſſeſſion may immediately paſs upon theſe decreets, to take effect at the term: albeit in other caſes, parties ought not to be troubled by proceſs, before the term.

XXXVI. The tenor of letters of poſſeſſion, relate the decreet whereupon they proceed, and the will contains warrant to diſpoſſeſs the parties decerned, their "wives, bairns, cottars, ſervants, and their goods and gear, forth and from the "lands or houſes in the decreet; and to enter the obtainer of the letters in the "natural poſſeſſion, by himſelf or others by his warrant, which the having of "the letters does ſufficiently inſtruct;" and the form of the execution, is, if it be a houſe or garden that hath a door, the former poſſeſſor or any of his, being incloſed by the door, the ſame is opened, and they are thruſt out, and the obtainer of the letters, or his order, are entered in. And if there be goods therein, the ſame may be all turned out of doors; and at leaſt three particulars, or bribes (as they are called) muſt be turned out by the executer of the letters, and the obtainer himſelf may lay out the reſt, when he pleaſes. And for the poſſeſſion of ground, the whole goods may be turned off the ground, or at leaſt three bribes thereof, and the obtainer of the letters, or his order, may turn off the reſt thereafter, at his pleaſure: but corns or other moveables, that cannot ſo be removed, do not retain any pretence of poſſeſſion to the party diſpoſſeſſed. All theſe things muſt be expreſſed in the executions of the letters of poſſeſſion by meſſengers, who only can execute the decreets of the Lords, and by the officers

[e] See above, I. 9. 22.

of inferior courts executing decreets thereof, and ſigning the executions, with the witneſſes required, or by notars framing the executions by way of inſtrument, and ſubſcribing the ſame before witneſſes; in all theſe caſes, a copy of the letters of poſſeſſion, and executions thereof, ought to be ſigned and delivered, or at leaſt offered to the party decerned if he be unwilling to take it, that thereby he may inſtruct that obedience is given to the letters, leaſt he be diſtreſſed of new, upon pretence of being ſtill liable as poſſeſſor, for the rents.

XXXVII. The fifth kind of executorials, is by precepts out of the chancellary, upon retours; which are the decreets of the judges, to whom brieves were directed to ſerve heirs. Upon theſe retours precepts requiring ſuperiors to infeft the apparent heirs of their vaſſals, being ſpecially retoured in lands or annualrents, conform to the retour, are the executorials of the retour. The order and tenor of theſe retours are explained, *lib.* 3. *tit. heirs.* And the order and tenor of the precepts againſt ſuperiors, is explained, *ibid.* § 46. *et ſeq.* which therefore need not to be here repeated. But it is thereby clear, that theſe precepts againſt ſuperiors, are executorials of the retours, whereby the ſuperior is obliged to receive the vaſſal's heir, or otherwiſe to loſe the benefit of the non-entry by the ſuperiority, during that vaſſal's life; and the ſuperior's ſuperior ſupplies his place, and ſo from ſuperior to ſuperior, till it come to the King, who refuſeth to enter no lawful heir, upon ſhowing the refuſal or non-obedience of that ſuperior, who is the King's immediate vaſſal: for there can be no charge againſt the King, or Lords of exchequer, for paſſing ſuch infeftments; but they do immediately grant warrant, for precepts out of the chancellary, commanding the judge-ordinary of the place where the fee lies, to give ſeiſin to the perſon retoured; which precepts contain a clauſe *capiendo ſecuritatem*, for ſuch things as are due to the King as ſuperior, or his donatar: and if the judge-ordinary do not grant ſeiſin accordingly, the Lords on ſupplication, and production of the inſtruments of diſobedience, will grant warrant to the director of the chancellary, to iſſue precepts to another perſon, as ſheriff in that part, ſpecially conſtitute.

XXXVIII. If the fee be holden immediately of the King, precepts paſs of courſe out of the chancellary, commanding the judge-ordinary of the place, to give ſeiſin *capiendo ſecuritatem*, as in the former caſe. The tinſel of ſuperiority upon non-obedience of theſe precepts, is more fully handled, *lib.* 4. *tit.* 7.

XXXIX. The other brieves of the chancellary, are explained, *lib.* 4. *tit.* 3. They need no executorials different from the ſerving of the brieves: for the ſerving of the brieve of idiotry, is a declaratory decreet, finding the perſon to be incapable of managing his affairs, and therefore decerning and declaring his neareſt agnate of twenty five years compleat, to be his tutor, during the incapacity. The ſerving of the brieve for tutors of law, is alſo a declaratory decreet. The brieves of diviſion, perambulation, or lining, being executed, do put the party in poſſeſſion, and need no other execution. The brieve of terce gives alſo a declaratory decreet, that the purſuer was holden and reputed wife of the defunct, and therefore kenns her to a terce of lands, and others liable to a terce, by actual diviſion of the terce from the reſt of the fee, either by aiker-deal, or by allocating rooms according to the rent; whereby ſhe is put in poſſeſſion, and needs no further execution.

XL. The ſixth kind of executorials, is by letters for making patent doors, when parties keep themſelves or their goods within locked doors, and do not give acceſs thereto, for executing of caption or poinding; but make ſuch reſiſtance as the executor cannot overcome. Theſe paſs upon execution of theſe executorials, when the meſſenger gets not acceſs, but returns the execution thereupon; for then letters are granted for making patent doors, by force. The law of England ſecures every man's perſon and goods, to be ſafe and quiet, within his own doors, ſo that no man can enter the ſame, whom he doth not warrant or permit, which is a common intereſt of great importance; every man's houſe is his

his ſanctuary: but our letters of caption paſſing of courſe, bear warrant to open doors, and to make the king's keys; ſo that new letters are only needful in reſiſting, or offering to reſiſt; which reſiſtence is a contempt, and a kind of deforcement, and is ſufficiently inſtructed by the execution of the meſſenger, ſigned by him and the witneſſes, required to be witneſſes not only to the keeping of the doors cloſs, and refuſing entry when there is audible knocks, by the meſſenger, having on his blazon (which ought ſo to be expreſſed in the execution) but alſo bearing them to be witneſſes to the reſiſtance, or offer of reſiſtence as aforeſaid.

XLI. There are other extraordinary executorials, but they are not accuſtomed to be given by the Lords, but by the Privy Council; ſuch as letters for charging of parties to enter their perſons in priſon, in ſuch priſons as are appointed by the letters; wherein not only denunciation may paſs, upon which eſcheat and liferent fall, but likewiſe in ſome caſes, the certification of theſe letters is under the pain of treaſon, in caſes where it is ſo appointed by ſtatute or cuſtom. And likewiſe letters of fire and ſword, in caſe of deforcement or reſiſtance of the ordinary executions, by continued open force in arms; eſpecially for making letters of poſſeſſion effectual. But the charges againſt ſuch perſons, to enter their perſons in ſuch priſons, under the pain of treaſon are competent for making captions effectual, and ſhould be firſt uſed, before letters of fire and ſword, which are the laſt legal executions, warranting all manner of force of arms, that is competent in war; wherein, deforcement imports not only the ordinary penalty of moveables, but the pains of treaſon.

TITLE XLVIII.

Law-burrows, and the Actions on Contravention thereof.

THERE is a general executorial by letters of law-burrows, which paſs without citation, yet not of courſe, but upon the oath of the uſer thereof, or other ſufficient proof or evidence of a cuſtom or deſign of any party, to encroach upon another, by troubling them otherwiſe than by the courſe of law [a]. Theſe letters muſt be uſed upon evidence of the inclination of the party complained on, to injure the other, and the will containeth a warrant, to charge the party to find caution to keep the party plaintiff ſecure of any illegal violence. But it reached at firſt only to the complainer's life, *Parl.* 1429. *cap.* 129.

II. Formerly men were accuſtomed to take aſſurance of others, againſt their violence: but it was declared, *Parl.* 1449, *cap.* 12. "That no man needs take "aſſurance from others, but the King's peace to be aſſurance to all men, that if "any perſon dreads another, that he paſs to the ſheriff, or to the officers that *it* "effeirs to, and make that knawn, or ſwear that he dreads him, and they ſhall "take burrows of peace." Burrows or burgh, by our antient ſtile ſignifies caution; ſo that burrows of peace, ſignifies caution to do no act contrary to the publick peace, in prejudice of the complainer ſwearing that he dreaded him, or giving other evidence of his ill inclination towards him, which was ſufficient, although he did not ſwear that he was afraid of him, which might be interpreted as diſhonourable. But law-burrows hath been the term continued, as more extenſive, importing caution to be found againſt any trouble to be done to the complainer, otherwiſe than by the courſe of law. And therefore the letters did bear, "That the complainer ſhould be harmleſs and ſkaithleſs, in his perſon and "goods, otherwiſe than law will." And the penalty of law-burrows, was at firſt, at the diſcretion of the Chancellor or Preſident, *Parl.* 1491, *cap.* 27. But thereafter the tenor thereof was further extended, and explained thus, "To find ſick-

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[a] See above, I. 9. 30.

" er ſurety and law-burrows, that the complainers, their wives, bairns, tenants " and ſervants, ſhall be harmleſs and ſkaithleſs, in their bodies, lands, tacks and " poſſeſſions, goods and gear, and no ways to be troubled and moleſted there- " in, by the perſons complained upon, nor no others of their cauſing, ſending, " hounding out, recepting, command, aſſiſtance or ratihabition, whom they may " hinder or let, directly or indirectly; otherwiſe than by the order of law and " juſtice." *Parl.* 1581, *cap.* 117. And the penalties were to be equally divided between the King and party injured, *Parl.* 1579, *cap.* 77. The penalty of law-burrows was thereafter determined for every Lord *L.* 2000, for every great baron *L.* 1000, for every freeholder 1000 *m.* for every feuar 500 *m.* for every zeaman 100 *m.* for every unlanded gentleman 200 *m.* *Parl.* 1593, *cap.* 170. Yet in extraordinary caſes the penalty is ſometimes increaſed, when the evidences are clear, as if great violence had been already done, by men of violent tempers: and ſometimes it is abated, when the party cannot be able to find caution for ſuch a ſum.

III. Albeit law-burrows do not proceed upon decreets or dependences, as the other executorials do; yet they are truly executorials for preſerving men's rights, and do proceed upon moſt reaſonable conſiderations: for it were a great inconvenience, if violent men had no more to fear, than the making up the damage, that a party ſuſtains by their injuries, which many times would not be worth the purſuing for.

IV. For further ſecurity, there is another ſtatute, declaring, " That albeit par- " ties charged to find law-burrows, paſs to the horn and find not caution; yet " they ſhall be liable to the pains of law-burrows, contained in the letters," *Parl.* 1597, *cap.* 273.

V. The action founded on the breach of law-burrows, is called contravention. The title in this, is, either on the charge upon the letters of law-burrows, when no caution is found; or upon the bond granted for obedience thereof, when caution is found. The former can only be againſt the party contraveener: the lettar may be againſt both the contraveener and cautioner, and may be by way of charge upon the bond of caution, the particular fact being given with the charge, as the ſpecial charge, in caſe the charge be ſuſpended; eſpecially now ſince the inrolments of actions takes a long time before they be diſcuſſed. But the warrant for horning ſhould not paſs of courſe, but upon ſome evidence, that the contravention is attrocious, at leaſt upon the oath of calumny of the charger, which charge is not excluded by the act againſt general letters, but it hath all the effects of other hornings: for upon the denunciation thereof, the eſcheat falls. Yet the ſpecial charge muſt be proved, and any defences againſt it are ſuſtainable, though not inſtantly verified.

VI. When caution is not found, contravention can only be by way of ordinary action. But the penalty is much more to be extended in that caſe, both becauſe of the damage by the delay and expences in diſcuſſing the ordinary action, and the want of ſecurity by caution.

VII. Albeit the tenor of the letters be that the complainer ſhall be harmleſs and ſkaithleſs; yet the penalty is not incurred upon every damage, but *ex damno injuria dato*, when the damage is done wittingly and wilfully; for inſtance, the paſturing of cattle upon a march, when it is not wilfully done, may infer damage but not contravention, although the march be clear and uncontraverted, much leſs if the paſturage be upon ground contraverted before the charge of law-burrows, in which caſe the action or charge for contravention, uſeth to be turned into a moleſtation or perambulation, which is not a regular way ſo to alter ſummons, from one kind of action to another: but it is more regular and rational, when the contraveener alledges, that he hath done no wrong but did only continue his poſſeſſion, as it was before the charge; in this caſe, if the parties alledgeances be contrary, the Lords before anſwer, may allow witneſſes *hinc inde*, to clear the former poſſeſſion, which, if it prove to be violent, momentary, or clandeſtine,

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it ſhould not defend the contraveener; but when the ſummons is turned into a moleſtation, the defender is indirectly aſſoilzied from the contravention. Alſo the not payment of a debt, though thereby ſkaith ariſe to the creditor, doth not infer contravention, becauſe it is not properly an injury.

VIII. Albeit the fore-mentioned ſtatute bearing that perſons charged by letters of lawburrows, are liable for contravention, when they are denounced for not finding caution, ſeems to import that the charge is not ſufficient without the denunciation; yet it is the contempt of the charge, which makes it effectual without caution: and therefore, though the charger proceed not to denunciation, it is a favour to the contraveener, who is not only liable for deeds done after the denunciation, but after the charge: ſometimes alſo the charge is ſuſpended, not upon obedience, but upon other reaſons; as that the penalty is not ſuitable to the quality and ability of the party charged, according to the act of Parliament, and then there is no caution found, for keeping the charger ſkaithleſs; and yet it were without ground to pretend, that until that ſuſpenſion were diſcuſſed, and the party denounced, there ſhould be no contravention: but, on the contrary, if the reaſon of ſuſpenſion be not ſuſtained and inſtructed, the charger ought not to be put to a new action of contravention, but may inſiſt upon the charge, and give in the deeds of contravention by a ſpecial charge.

IX. Contravention may concur with other penal actions, as ſpuilzie, ejection, intruſion, or ſucceeding in the vice. But the Lords are not accuſtomed to ſuſtain both penalties (albeit, neither of the ſtatutes bear derogation to the other) but allow the party injured to choice, which of the actions he pleaſes to inſiſt in. Yet if the deed be attrocious againſt the publick peace, both penalties may be ſuſtained; and the officers of ſtate may inſiſt, though the party injured do not. But where the injury is not a breach of the publick peace, but ariſes from the ſkaith done by private parties, the officers of ſtate have not intereſt in the contravention, without concourſe of the private party, albeit the penalty be diviſible between the King and the party; as the concourſe of private parties is required in many other crimes.

X. Albeit the tenor of the letters of law-burrows bear, that parties ſhall be harmleſs and ſkaithleſs not only as to injuries againſt themſelves, but againſt their wives, bairns, tenants and ſervants, in their bodies, lands, tacks and poſſeſſions, goods and gear; yet theſe other perſons have no title for contravention, upon the law-burrows, albeit the ſame be indirectly in their favour, unleſs the charge be alſo at their inſtance, but the penalty doth wholly belong to the King, and to the raiſer of the letters, who is injured in and by the injury done to theſe other parties. And therefore the contravention will not extend to deeds done againſt the lands, tacks and poſſeſſions, goods and gear of theſe other perſons, whence no detriment ariſeth unto the charger, but only where he is damnified in and by their damage: for if they have other lands, tacks and poſſeſſions, not from him, encroachments thereupon will not infer contravention by their maſter's charge, but only what is done in theſe they have from him. But injuries againſt their perſons, whereby they are diſabled or diſcouraged in their duty to the charger, do infer contravention. And even other attrocious injuries againſt wives and bairns, in their fame, as well as in their perſons, do infer contravention, upon the charge of the huſband or parent: and albeit under the name of bairns and children, are comprehended grand-children, *&c.* yet if a nearer parent be alive, of the male-line, and capable of managing his affairs, it were hard to extend the contravention, except upon the father's charge.

XI. Contravention doth not only ariſe upon deeds done by the principal parties complained on, but likewiſe upon the deeds of others, of their cauſing, ſending, hounding out, *&c.* And here the queſtion may ariſe, how theſe points ſhall be proved? For ordinarily warrant or command is only probable *ſcripto*, or *juramento* in civil matters, which doth not hold in criminals; and therefore, if the injury be properly criminal, witneſſes are receivable, for proving the facts or deeds

importing the warrant, command or ratihabition: as if the witneſſes heard the principal party expreſs words, clearly importing theſe acceſſions, and agreeing upon the words; or if they ſaw the party charged calling to him a tenant or a ſervant, who immediately did the deed of contravention, without being ſtopped or reproved in the doing. But if it be a leſſer damage, tho' injurious, and not upon deeds immediately done, *or* upon the circumſtances inferring the command, oath or writ is requiſite; for what was ſaid at one time might be countermanded at another time, and is not preſumed to be a conſtant warrant.

XII. There alſo ariſes difficulty upon the words, "whom they may ſtop or "let," which are adjected to the warrant, command, or ratihabition, and ſo might be interpreted, as if contravention were not inferred, by command or ratihabition to any other than perſons in the contraveener's power, which were too narrow an interpretation: they might alſo be interpreted ſo as to extend to the deeds of all that the party complained on might command, and ſo infer contravention by the deeds of children in the family, or ſervants, tho' without warrant, command or ratihabition, which were too large an extenſion, unleſs the command or ratihabition were proved by the oath of the party charged, or by other facts inferring the ſame: as if a ſon in the family, or a domeſtick ſervant, ſhould commit an atrocious deed againſt the charger, without any occaſion or provocation relating to themſelves, it might thence be inferred, that they did the ſame by warrant, or for aſſiſting of the party charged, in avenging his quarrel.

XIII. The words in the tenor of law-burrows, bearing, "that the complain-"ers, their wives, bairns tenants and ſervants, ſhall be harmleſs and ſkaithleſs, "in their bodies, lands, tacks, poſſeſſions, goods and gear, and noways to be "moleſted or troubled therein by the perſons complained upon, *&c.*" may ſeem to reſtrict the effect of law-burrows to ſkaith in the complainers bodies, goods and lands; and ſo contravention takes no place on other injuries, ſuch as menacing, reproaching, reviling, defamation; neither upon attempts againſt the body, as by ſtrokes paried off, or eſcaped: which injuries are more atrocious than injuries in goods and gear. But the laſt words, "no way to moleſt or trouble," import, that law-burrows are even to be extended to ſuch caſes of trouble or moleſtation, tho' no other actual ſkaith follow.

XIV. The Engliſh have two ſorts of law-burrows. By the one, parties are bound to the peace, not to do any deed to the party complaining againſt the peace. By the other, parties are bound to the good behaviour, whereby they incur the penalty in their bonds, in caſe they commit any thing contrary to good behaviour againſt the party complaining, or againſt any other; which is extended not only to words, but to frowns, or to any ſign of contempt: but this proceeds only upon ſufficient evidence, that the party is habitually of ill behaviour, in which caſe it is both juſt and fit. And tho' we have not theſe terms of diſtinction, there is no doubt but ſovereign judges, upon ſuch evidence, may give law-burrows even to that extent, that the party complained on do no injury to the complainer any manner of way, or may take ſuch engagements, altho' there be no complainer, as they may and uſe to do, in taking ordinary law-burrows upon evidence of inclination to violate the peace, tho' no party complain, as upon atrocious words, threats, or challenges to duels.

XV. When law-burrows are granted, and put to execution, the ſame are upon the oath of the party complaining, which uſes to be conceived in theſe terms, that he ſwears "he dreads the party complained on bodily harm, *&c.*" This hath continued ſince the firſt inſtitution of law-burrows, which was then only extended to bodily harm: but now the oath ſhould be ſufficient, that he ſwears he dreads him wilful harm, in the perſons or goods of himſelf, his wife, his bairns, tenants, or ſervants: for the ſwearing a fear of bodily harm may be looked upon as reproachful and baſe, as if the complainer were ſo afraid that he durſt not defend himſelf. But if the complainer evidence reaſon to ſuſpect ſuch injuries, as if he produce decreets of contravention of former law-burrows, or teſtificates o

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perſons above exception, of former injuries, menaces or challenges, law-burrows ought to be granted without any oath. But then they ſhould not paſs of courſe, but upon the judges peruſal of the evidence, and finding the ſame ſufficient, which ſhould be ſo expreſſed in the bill for law-burrows.

TITLE XLIX.

Actions upon Deforcement.

THE legal remedies for making decreets effectual, are of two ſorts. The one paſſeth ſummarily of courſe, without citation of parties to the granting thereof, by letters executorial; of which in the former title. The other proceeds by way of action, wherein parties, if they appear, muſt be heard, and the procedure therein differs only from other actions, that theſe other do precede the decreets in the principal cauſe, whereas the executive actions muſt follow theſe decreets, for the execution whereof they are intented; and therefore, in the diviſion of actions by our cuſtoms, (*lib.* 4. *tit.* 3.) actions were divided in diſcuſſive and executive: the one diſcuſſeth and determineth the point of right, the other puts the ſame ſo determined to execution; ſo that there are two kinds of executorials, to wit, letters executorial, and actions executorial.

II. The executorial actions are theſe; the action upon deforcement, or unwarrantably impeding letters executorial, the action upon inhibition as to land-rights, and the action upon arreſtment, for making arreſted goods or ſums forthcoming, the action for breach of arreſtment, and againſt cautioners in looſing of arreſtment, and the actions of adjudication, which are of diverſe ſorts. We have already ſpoken of magiſtrates, and meſſengers being liable for the debts of rebels, when ſuffered to eſcape unwarrantably, as the ſame may be obtained by way of ſummary charge, which may, and oft-times uſes to be purſued by way of action. There is alſo a general executorial by law-burrows and contravention thereof; of which we have alſo ſpoken.

III. The action upon deforcement is partly civil, and partly criminal, and may be purſued either way [b]. For the deforcing of meſſengers, and other executors of the King's letters, albeit it be without armed force, is a crime, and may be purſued criminally for puniſhment; but nothing would thence ariſe to the party injured: and if there were not a civil remedy in favour of the party injured, to be purſued before the Lords, who are judges in the principal cauſe, it would be of exceeding great inconvenience, if they were neceſſitated to addreſs to another judicature, to make the executorials on the Lords ſentence effectual.

IV. There are three ſtatutes in relation to deforcement. The firſt is, *cap.* 85. *Parl.* 1587, bearing, "That all deforcers of officers, in execution of their offi-"ces, be ſummoned upon fifteen days warning, civily or criminally, at the opti-"on of the party purſuer, and their lives and goods to be in the King's will "therefore." The other two ſtatutes, are as to the civil actions upon deforcement: the one is, *cap.* 118. *Parl.* 1581. Whereby, "all deforcers of the exe-"cution of ſentences, are to be declared to have eſcheated their whole move-"ables to the King, beſide the puniſhment of their perſons at his will; and that "the party injured, ſhall have execution, upon the firſt and readieſt of the de-"forcer's goods for his debt and expences, &c. and that the action ſhall be with-"out tabling the ſame, or continuation thereof." This gives ſufficient ground for the Lords, to take in theſe actions ſummarily, without putting them to the roll: becauſe the roll comes in place of the table of actions which was before; yea,

[b] See above, I. 9. 29.

yea, as the Lords do ſummarily charge parties (when they contemn their authority) by letters of horning; there is no leſs reaſon to charge deforcers, who ſhow contempt againſt the letters in the King's name, whereas the letters upon contempt of the Lord's authority, is upon contemptuous violation of acts in their own name. The other ſtatute is, *cap.* 150. *Parl.* 1592, which extends the action upon deforcement. not only to deforcement of the execution of decreets, but ſtatutes and ordains, "That in caſe any officer of arms, or ſheriff in that part, "or other perſon whatſomever, the time of the execution of any ſummons, let-"ters or precepts, direct by his Highneſs, or other judges, within this realm, "or in putting of decreets to due execution, be deforced in doing of the ſame; "The deforcers ſhall forfeit, amit and tyne, all and whatſoever their goods and "gear moveable." This ſtatute does alſo enlarge the intereſt of the party at whoſe inſtance the execution was: for whereas formerly they had only preference for the ſums contained in the decreet, and their expences to be modified by the Lords; yet by this act they have the one half of the eſcheat goods. And either of theſe may be inſiſted on, at the option of the party injured; ſo that, if the half of the eſcheat goods be more than their intereſt, they may inſiſt for the ſame; but if it be leſs, they may inſiſt for their intereſt out of the whole head. And by the laſt ſtatute, it is alſo declared, that the execution ſhall be holden to be as lawful and orderly, as if there had been no hinderance by the deforcement; this can only relate to moveables, for it would make a great uncertainty in land-rights, if every deforcement ſhould make an inchoate execution, as good as a compleat. The ſtatute bears, that the deforcement is firſt to be verified and proved, which hath given occaſion to inſiſt upon deforcement, only by way of action, for proving the deforcement; yet the executions bearing deforcement, are ſufficient proof, for a ſummary charge, albeit further proof muſt be for eſcheating the moveables, if the charge be ſuſpended.

V. The proper defences againſt this action, ariſe from the nullities of the executions of the ſeveral executorials, which are all competent by way of defence, becauſe the action is penal, and the penalty very great: as if the meſſenger have not on his blazon, in the execution of hornings or captions; or in the execution of letters of poſſeſſion; or if he do not read either of theſe letters, and ſhow the Signet to the party, unleſs he hinder him, or if the party fly away from the meſſenger, in the execution of caption, before he touch or attach him with his wand of peace. But it is not neceſſary nor convenient, that he ſhould have on his blazon at the execution of caption, leaſt thereby he may ſcar the party to ſuffer him to touch him: but if he hinder him to touch him, with any weapon or ſtaff, his offering to touch him, and ſhowing his wand of peace is ſufficient to infer deforcement: but if he be attached, he commits deforcement, if he do not go along with the meſſenger, who is not obliged to carry him by force, though he may, but without beating or wounding him, in the execution of a civil caption; albeit more may be done in the execution of a criminal caption, as he may detain him under caption where he is.

VI. It is a relevant defence, that the party attached by caption was ſo ſick, that he was not able to go or ride.

VII. In the execution of letters of poinding, it is a ſufficient defence, that the meſſenger had not his blazon on [c]. And albeit it were proved by reply, that the party knew the perſon executor to be a meſſenger, it will not be relevant, unleſs it be ſo proponed, that he knew he was in the preſent exerciſe of that office: for he might be exauctorated; neither will the duply of holden and reputed be ſufficient in that caſe, becauſe the law hath determined the way, how the meſſenger ſhould be known, viz. by his blazon, or his wand of peace. But if he make uſe of theſe when he hath not authority, the oath of the party that he knew he was not a meſſenger then in office, will be relevant, becauſe perſons may uſe theſe tokens of authority, who have it not; yet if the party depone he was ſo holden and

[c] See above, IV. 47. 14.

and reputed, and that he knew nothing to the contrary, the execution will be valid, and any hinderance will be reputed a deforcement.

In this execution, the meſſenger is judge, when parties offer to depone, that the goods offered to be poinded are not the debtor's, but their own property: wherein he may ſpecially interrogate, to find out the truth, and if he find that the oath does not inſtruct, the hinderance of the execution will infer deforcement: and it will not be ſufficient to prove the goods to be his own, in the action of deforcement. The reaſon is, becauſe ſo much muſt be yielded to publick authority, albeit when the poinding is executed, the goods may be reſtored by way of action.

VIII. In all deforcements, not only the act of the party directly concerned, infer this action, but the acts of all that he may ſtop or let. But he is not liable for the actions of others, who officiouſly without his warrant, do ſtop any execution: yet ſo that if he be preſent, and do not require them to forbear, in that caſe he will be liable for their acts; *qui tacet conſentire videtur*.

TITLE L.

Inhibition and Arreſtment, and the Actions thereon.

THE actions upon inhibition and arreſtment, are amongſt the prime executive actions. And they may well be reckoned amongſt executorials, albeit they do but hinder debtors to diſpoſe of their eſtates heritable or moveable, till the creditors who take the benefit of arreſtment or inhibition be ſatisfied. And the actions thereupon are properly executorial actions.

II. Inhibition extends only to ground-rights by infeftment, or other equivalent rights, as liferents by terce, courteſy, or reſervation in the infeftments of others: but reacheth not bonds or obligements, though they bear clauſe of infeftment. But they reach the ſuperior or donatar's caſualities of ſuperiority.

III. The riſe of inhibitions, is, from debtors dilapidating their eſtates in prejudice of their creditors. And they are much more antient and extenſive than the remedy by reduction *ex fraude creditorum*, which is determined by that excellent ſtatute of Seſſion, ratified in Parliament, *anno* 1621.

IV. Inhibitions did proceed upon ſupplication to the Lords of Seſſion, by creditors, relating and producing their decreets, or proceſſes againſt the debtors, or the evidences whereupon ſuch decreets might follow; and ſubſuming that their debtors were like to dilapidate their eſtates to their prejudice: and therefore deſiring that the Lords would give order for letters in the King's name, inhibiting or prohibiting theſe debtors to dilapidate their eſtates, and the lieges to accept rights from them, till theſe creditors were ſatisfied. Which the Lords upon probable evidence, did grant, without citation of the debtors. The tenor of which letters were thus: " William and Mary, *&c.* Foraſmuch as it is humbly " meant and ſhown to us by our lovit *A*, That where *B*, by his bond, *&c.* " (then follows a deduction of the writs whereupon inhibition is craved) And " the ſaid *B*, the debtor knowing that the complainer will ſuit execution againſt " him, his lands and eſtate, for ſatisfying of his ſaid obligation, action or decreet, " does therefore intend, in defraud and prejudice of the complainer (as he is " informed) to ſell, annailzie, wadſet, diſpone, reſign, burden or otherwiſe di- " lapidate, all and ſundry his lands, heritages, tiends, tenements, annualrents, " liferents, reverſions, tacks, ſteadings, rooms, poſſeſſions, corns, cattle, goods " and gear, *&c.* Our will is herefore, *&c.* That ye inhibite and diſcharge the " ſaid *B* perſonally, or at his dwelling-place, and if he be forth of the kingdom, " at the market-croſs of Edinburgh, and pier and ſhore of Lieth: that he on

" no ways make any private or publick alienation of his lands, heritages, tiends, " tenements, annualrents, liferents, reverſions, tacks, ſteadings, rooms, poſſeſſi- " ons, corns, cattle, goods and gear, or any part thereof, nor contract, or do " any other deed directly or indirectly, whereby any of the ſaids lands, heritages, " teinds, tenements, annualrents, liferents, or reverſions, may be appriſed, ad- " judged, or any ways evicted from him, in prejudice of the complainer, anent " the fulfilling to him of the ſaids obligations, decreets, or proceſſes. And ſic- " like, that you in our ſaid name and authority foreſaid, inhibite and diſcharge " all our lieges of this realm, and all others whom it effeirs, by open proclama- " tion at the market-croſs of the ſhire, bailiary or regality where the ſaid *B* " dwells, and the lands lie, that they, nor none of them preſume or take upon " hand, to block, buy, take or accept any right from him, of his lands, heri- " tages, teinds, tenements, annualrents, liferents, reverſions, tacks, ſteadings, " rooms, poſſeſſions, corns, cattle, goods and gear; or accept from him any " bonds, obligations, or contracts, whereby any part of the ſame may be ap- " priſed, adjudged, or any ways evicted from the ſaid *B*, *&c.* According to ju- " ſtice. Becauſe the Lords of our Council and Seſſion have ſeen the foreſaid " bond, obligation, decreet or proceſs." As ye will anſwer, *&c.*

V. By this tenor, it doth appear, that inhibitions were not granted by the Lords of courſe, without conſideration both of the debt and ground thereof, and ſome probability that the complainer's diligence might be prevented, before they could affect the debtor's eſtate: and therefore then inhibition reached the debtor's moveables. But this great inconvenience ariſing, that the free commerce of moveables (which ordinarily is without writ) ſhould not paſs current; therefore the Lords reſtricted the effect of inhibitions, that it ſhould not extend to moveable goods, but only to the rights of lands and others above written: and yet the Lords have never changed the ſtile of inhibition, as aforeſaid; but as to moveables they grant letters of arreſtment, for arreſting all ſums of money not ſecured by infeftment, and all moveable goods and gear, to remain under ſure fence and ſafe arreſtment, until ſufficient caution be found for payment of the ground of the arreſtment if it ſhall be found due.

VI. Inhibitions are only perſonal, and do not ſtrike againſt any right made by the heirs of the perſon inhibited.

VII. Inhibitions were long in uſe, before the ſtatutes ordaining them to be regiſtrate: and therefore the lieges could not be put *in mala fide* to buy from, or bargain with the perſon inhibited, unleſs the inhibition were publiſhed at the market-croſs of the juriſdiction where he lived; and at the market-croſſes of the ſeveral juriſdictions where his lands lay. But theſe publications eaſily paſſing obſervation and remembrance, great inconvenience aroſe to creditors and purchaſers. For remedy whereof, ' it was ſtatute, *Parl.* 1581, *cap.* 119. That all " inhibitions and interdictions to be raiſed thereafter, for whatſomever cauſe, " with the executions and indorſations thereof, be regiſtrate where the perſon " inhibited or interdicted dwells, or makes his reſidence: and if the ſaid perſon " have his lands and heritage, or the moſt part thereof, lying in another ſheriff- " dom than where he dwells; that the ſame be regiſtrate in that ſhire. The " extract of which ſhall be probative in all caſes, except in the caſe of impro- " bation. And if it ſhall not be ſo regiſtrate, it is declared null." This nullity is only to be underſtood, as to lands not lying in the ſhires, where it is regiſtrate. This act was defective, inſinuating that a regiſtration where the moſt part of the lands lay, ſhould be ſufficient for the whole: for it could have effect as to no part of the lands in any other ſhire, the lieges whereof could not be put *in mala fide*.

VIII. But this ſtatute being prejudicial to other juriſdictions than the ſheriffs, the ſame was altered by *cap.* 268. *Parl.* 1597, " Ordaining that inhibitions, in- " terdictions, and publications thereof, that ſhould happen thereafter to be exe- " cuted againſt perſons dwelling within bailiaries or ſtewartries, as well of roy- " alty

" alty as regality ; ſhould be executed at the market-croſs of the head-burgh " of the ſaid bailiaries and ſtewartries, within the whilk the ſaids perſons dwell, " and regiſtrate there. Whilk regiſtration is declared as valid, as if it had been " in the ſheriff's books." By this act there was no neceſſity to publiſh or regiſtrate in the ſheriff's books, againſt perſons within the ſaids ſtewartries or bailiaries, as is clear by its tenor ; yet it appears by the regiſters, that meſſengers did frequently publiſh and regiſtrate at both.

IX. By *cap.* 269. *Parl.* 1597, " inhibitions are appointed to be regiſtrate judi- " cially, before a nottary and four famous witneſſes, by and attour the ordinary " clerk. And in caſe the ordinary clerk refuſe to regiſtrate the ſame, inſtru- " ments being taken thereupon, the ſame may be regiſtrate by the next ſheriff, ſtew- " art or bailie, or by the clerk-regiſter and his deputes, in the books of council : " whilk regiſtration ſhall be as ſufficient as if the ſame letters were regiſtrate " in the ſheriff, ſtewart, or bailie's books, where the ſaids perſons dwell." By this act it appears, that the inferior courts, and their clerks, had power to regiſtrate inhibitions, without deputation from the clerk of regiſter. And albeit they were only to be preſented to the clerk of regiſter, in caſe of refuſal of the ordinary clerks, yet by the ambiguity of theſe words, " or to the clerk-regiſter " and his deputes," there hath been always ſince regiſters of inhibitions in every juriſdiction, and keepers thereof by deputation from the clerk-regiſter, and likewiſe a general regiſter of inhibitions and interdictions at Edinburgh, that all parties might at their option regiſtrate there (which was ſufficient for inhibiting the lieges of the whole kingdom) whereby the lieges were at greater pains in ſearching both the general and ſpecial regiſters, and there is great advantage of regiſtrating at the general regiſter : for thereby no lands of the debtor could eſcape ; whereas, by regiſtrating in the ſpecial regiſters, the inhibition extended no further than the lands in that juriſdiction where it were regiſtrate.

But that clauſe of regiſtrating judicially, *&c.* was thereafter reſcinded, as unneceſſary, *cap.* 13. *Parl.* 1600, whereby the general regiſter at Edinburgh is eſtabliſhed. And now of a long time the clerk-regiſter has deputes not only at Edinburgh, but alſo at the ſeveral ſhires and other juriſdictions.

X. In all theſe ſtatutes there is no mention of executing or publiſhing inhibitions at any place, but where the perſon inhibited dwells. Yet oft-times inhibitions are executed both in bailiaries and ſtewartries, where the lands lie, and at the market-croſs of the ſhire in which the bailiaries lie : which hath ariſen much from the advantage of meſſengers, to have the more work and the larger allowance. And ſometimes they publiſh the ſame at all the croſſes where the lands lie, not only when they muſt be regiſtrate there, but when they are regiſtrate in the general regiſter [cc]. Hence theſe queſtions ariſe, 1. Whether ſuch a cuſtom be general, ſince the acts for regiſtration of inhibitions ? 2. Whether ſuch cuſtom doth annul the inhibitions not ſo publiſhed ? By inſpection of the general regiſter of inhibitions, it appears, that inhibitions have been publiſhed, ſometimes not only in the juriſdiction where the perſon inhibited dwells, but alſo in other juriſdictions, and ſpecially they are publiſhed and regiſtrate both in ſtewartries and bailiaries, and likewiſe in the ſhires in which theſe juriſdictions lie, contrary to *cap.* 269. *Parl.* 1597, bearing, " That all letters of horning, relaxations, in- " hibitions, interdictions, and publications thereof, that ſhould be raiſed at any " time thereafter, and executed againſt whatſomever perſons dwelling within baili- " aries and ſtewartries, ſhall be executed at the market-croſs of the head-burgh, " or town of the ſaids bailiaries and ſtewartries, and regiſtrate there : which ſhall " be as lawful as if the ſame had been regiſtrate in the ſheriff-books :" whereby it appears, that inhibitions againſt perſons dwelling within ſtewartries or bailiaries of royalty or regality, muſt be executed and regiſtrate there, and not at the head-burgh of the ſhire, without reſervation, in caſe the perſon inhibited have lands within

[cc] See above, IV. 35. 21.

in the ſhire, and without theſe ſtewartries or bailiaries. And it follows *à contrario ſenſu*, that if the inhibited perſon dwells not within ſtewartries and bailiaries, the inhibition needs not be publiſhed there, albeit they had lands within theſe ſtewartries and bailiaries. But generally the publication of inhibitions is only at one head-burgh, albeit it cannot be doubted, but many of theſe perſons had lands in more juriſdictions than one: and eſpecially when inhibitions are regiſtrate in the general regiſter, which ſerves for the whole kingdom, and without inſpection whereof no provident man will acquire: it were very ſuperfluous to publiſh at other croſſes than where the party dwells, and wherein regiſtration is requiſite in that caſe.

The main argument for the neceſſity of publication at all the market-croſſes, where any of the inhibited perſon's lands lie, is, That the ſtatutes for regiſtration of inhibitions, do not derogate from the former cuſtom of publiſhing at all the market-croſſes where the lands lie; but, on the contrary, require regiſtration of inhibitions, and the publication thereof. But the contrary appears by the tenor of the firſt ſtatute, whereby it is only requiſite to publiſh where the perſon inhibited dwells, and where the moſt part of his lands lie; and therefore there is no neceſſity to publiſhat the market-croſſes where his other lands lie: yet it is certain, that it will not be effectual againſt any lands, but where it is either regiſtrate in the particular regiſters of the juriſdictions where theſe lands lie, or in the general regiſter, which ſupplies all theſe regiſters: whence it is evident, that inhibitions may be effectual where they are regiſtrate, tho' they be not there publiſhed. 2. The ſecond act for regiſtration of inhibitions doth yet more derogate from publiſhing inhibitions every where, where the debtor's lands lie; becauſe it requires not publiſhing at the market-croſſes of bailiaries or regalities, unleſs the perſon inhibited dwell there, without exception whether he have land there or not. And ſo an inhibition was found null, ſimply becauſe it was not executed in the regality where the perſon inhibited dwelt, in reſpect of the act of Parliament, which declares ſuch inhibitions null, without reſtriction or words taxative, but indefinitely. 3. There is nothing more dubious than "where the "greateſt part of the inhibited perſon's lands lie," whether it muſt be greater than all the reſt of his lands, or greater than any of the reſt. 4. Inhibitions muſt be regiſtrate within forty days after the publication thereof, which can only be reckoned after the firſt publication where the party inhibited dwells, otherwiſe it might be effectually regiſtrate within forty days after every publication where the ſeveral lands lie.

The next reaſon for the publication at all the croſſes where the inhibited perſon's lands lie, is, That it hath been a general cuſtom ſo to do, and ſo commonly holden and believed, which is ſufficient to infer a law, not only when it adds, but when it derogates from the ſtatute law: for inhibitions are found null even in the publication, if there be not three oyeſſes, and yet no ſtatute requires the ſame. But there is leſs moment in this reaſon: for, 1. It cannot be proved to be an univerſal cuſtom. 2. Whatſoever the avarice of meſſengers, or ignorance of parties, might make them to do, *propter majorem cautelam*, is only *voluntatis*, but not *neceſſitatis*, unleſs they were by a ſentence of the Lords ordained, or obliged ſo to do. 3. Such a cuſtom not authoriſed cannot derogate from the foreſaid expreſs ſtatutes; and yet the cuſtom is moſt frequent to publiſh both at the market-croſs of the ſhire, and at the market-croſſes of the regalities of the ſaid ſhire, which is diametrically oppoſite to the ſaid ſtatute. But the common notion of a general publication hath never been adhibited to this cuſtom, to publiſh both at ſhire, and at bailiary and regality within the ſame, but only to the general publication at all juriſdictions where the inhibited perſon's lands lie. 4. The ſtatutes require only publication where the moſt part of the lands lie; and yet the inhibition reaches annualrents and liferents, which will hardly be brought under the name of lands: and yet the inhibition will not affect, unleſs it be regiſtrate where the lands lie, out of which the annualrents or liferents are due.

And

And it is a dangerous thing to render inhibitions null, which the Lords cannot know how far it may go: but if they be ſuſtained, it is eaſy for the Lords, by a ſtatute of Seſſion, to declare for the future what muſt be done to make inhibitions effectual. 5. As to the oyeſſes requiſite in publication of inhibitions, this doth not infer, that theſe were ſuper-added to what was before requiſite for publication of inhibitions: for theſe oyeſſes were introduced as neceſſary to all publick executions, ſeeing, without oyeſſes to call the people, or blaſts of a horn to let them know a publick execution affixt, no execution could be accounted publick by the reading thereof, which might be done without advertance of the people of what was a-doing, and oft-times the copy affixt was pulled away, either by thoſe unconcerned, or more frequently by thoſe who do it upon account of the publiſher, that the execution may not come to notice.

XI. As to the effect of inhibitions, they extend only againſt voluntary facts and deeds of the party inhibited, after the firſt publication thereof at the market-croſs where the inhibited perſon dwells, and not from the regiſtration. Yet as an inchoate diligence, if it appear that the debtor did endeavour to prevent the perfecting thereof, *it* is a ground of reduction [d]; ſo that it is not reſtricted only to affect the lands of the regality: whereas, in other caſes where it is not regiſtrate in the general or ſpecial regiſter, it is invalid againſt the lands lying in theſe juriſdictions, where it is not regiſtrate ſpecially or generally.

XII. There is this inconveniency to purchaſers and creditors, that they cannot ſecurely cloſe bargains finally, till forty days run after the firſt publication. And by the late cuſtom of the keepers of the regiſters, whereby they kept inhibitions uninſerted very long, purchaſers became altogether unſecure, even tho' they had an atteſt of the (*not*) regiſtration; which by a late deciſion and a ſubſequent law, *P.* 1686, *c.* 19. was declared only to affect the keeper, and thoſe repreſenting him; whereby theſe excellent ſtatutes were in effect evacuated *; which the Lords in a great part have helped by a ſtatute of Seſſion, (*July* 15. 1692,) appointing the keepers of the regiſters to have minute-books, wherein all things to be regiſtrate behoved preſently to be received, and a minute made of it ſigned by the preſenter; whereby there could be no debate concerning the time of preſenting, nor durſt the keeper adventure to neglect the regiſtration within the days, having ſo ready a probation againſt him **.

XIII. It is a nullity if the executions bear not a copy given, or offered to the party inhibited, perſonally, or at his dwelling-place, or at the croſs of Edinburgh, and pier and ſhore of Leith: and the inhibiting both of the party inhibited, and the lieges at the croſs, was not found ſufficient, *Hope*, Inhibitions, *Syme contra Coldingknows*.

XIV. It is alſo a nullity if the executions bear not, that a copy was delivered to the party inhibited, and affixt upon the croſs: for the giving or offering of that copy, or affixing thereof, is moſt properly the act inhibiting. It was ſo found, *July* 28. 1671, *Keith*, albeit the executions did bear a copy affixt upon the croſs, and that the meſſenger mended the execution on the margent, bearing a copy given, but was not ſo regiſtrate; nor was it found probable by witneſſes, not being ſo marked.

XV. Inhibition was found null, becauſe the letters did only bear warrant to charge the perſon at the market-croſs, *&c.* as out of the country, and the execution was againſt him perſonally, *Jan.* 24. 1627, *Arſkin*.

XVI. Inhibition was found null, becauſe it bore not three oyeſſes, and publick reading at the market-croſs, which was not admitted to be ſupplied by witneſſes, *July* 11. 1676, *Stevinſon*. Yet thereafter the Lords ſuſtained an inhibition, where the execution did bear only, that the meſſenger made lawful publication and reading of the letters; becauſe they found that ſtile frequent in the regiſter, and

* This ſtatute repeated by act 18. P. 1696.

** This act of Sederunt was confirmed by act 14. P. 1693.

[d] See above, I. 9. 15. 10.

that the inhibiter offered voluntarily to prove the oyeſſes given, *June* 21. 1681, *Luncie*. So far were they from annulling inhibitions.

XVII. Inhibitions do not only ſtrike againſt lands acquired, where the ſame is regiſtrate, but againſt lands thereafter acquired in the ſame juriſdiction, *Dec.* 15. 1665, and *Feb.* 27. 1667, Mr. *John Elleis*; which was not extended to lands acquired in other juriſdictions, where the inhibition was not regiſtrate, *July* 18. 1662, *Swinton*

XVIII. But inhibitions do not reduce rights which the perſon inhibited was obliged to grant, before the publication of the inhibition, if the obligement were ſpecial, or if there were a diſpoſition anterior, importing that obligement. But infeftments to corroborate anterior perſonal obligements, not bearing an obligement to infeft, are reducible thereupon.

XIX. Infeftments after inhibition, by legal diligences, for a debt prior, are not reducible thereupon, but only if the debt be poſterior.

XX. Inhibition did not extend to wadſets or redeemable annualrents; becauſe the creditor might always have compelled the debtor to pay, (as was found, *July* 16. 1667, Mr. *John Elleis)* till the Lords, by act of Sederunt, *Feb.* 19. 1680, did declare, "That creditors uſing inhibition againſt the debtors infeft in wadſet or annual-"rent, if they ſhall make intimation, by inſtrument of a nottary, to the perſons "who have right to the reverſions of the ſaid wadſets or annualrents, that the "wadſetter or annualrenter ſtands inhibited at their inſtance, and ſhall produce, "in preſence of the party and nottary, the inhibition duly regiſtrate, that they "will not ſuſtain renunciations or grants of redemption, altho' upon true pay-"ment, not being made *bona fide*, but after intimation, as aforeſaid, unleſs the re-"demption proceed by proceſs, whereunto the uſer of the inhibition muſt be "called, *&c.*"

XXI. Inhibitions paſs ordinarily of courſe without advertence: yet if any party repreſent, that an inhibition may not paſs till it be conſidered, and ſhow a reaſonable cauſe for it, the Lords have been in uſe to conſider, and in ſeveral caſes to refuſe inhibitions. So it was refuſed to a wife upon her contract of marriage with her huſband, *Jan.* 11. 1625, *Hamilton* ſupplicant, where *Dury* doth alſo mention a deciſion, *Jan.* 9. 1623, *Marſhal*, by which inhibition was granted at the wife's inſtance againſt the huſband, *ſtante matrimonio*, upon her contract of marriage; as to which ſhe needed not to be authoriſed in that caſe. The diverſity of the caſe lies in this, that, upon the contracts of merchants and trading people, whereby the huſband becomes obliged to employ ſuch ſums on land or annualrent for the wife, inhibition uſed to be refuſed, unleſs the huſband had an opulent fortune beſide to trade with; otherwiſe the ſo employing of his ſtock would ruin his trade and family. Inhibition was alſo refuſed upon the warrandice of a diſcharge from the charger's fact and deed only, unleſs the ſupplicant had ſhown a particular hazard of diſtreſs: for warrandice is but a conditional obligation, and hath no effect till the condition exiſt.

XXII. The actions upon inhibition are only reſciſſory, and are ſpoken to *lib.* 4. (*tit. reductions*) and they have only effect againſt voluntary deeds, poſterior to the executing of the inhibition. But if there was an anterior obligement, whereby the party inhibited might have been legally compelled to diſpone, the diſpoſition is not voluntary nor reducible.

XXIII. Inhibition is a very uſeful remedy for ſecuring of creditors againſt the dilapidation of their debtor's eſtate, by which their ſatisfaction becomes to be in hazard. But every ſale by a debtor is not to be accounted dilapidation. And if malicious or too ſuſpicious creditors, ſhall obtain inhibitions of courſe; it were worthy of an act of Parliament, or act of Sederunt to be ratified in Parliament, whereby the keepers of regiſters of inhibition ſhould be prohibited to inſert any inhibition in the regiſter, within thirty days after the execution againſt the debtor, there being ſtill ten days remaining of the forty days required for regiſtration of inhibitions: for the inhibition will ſtill be received, and put in the minute-book when

when offered. The benefit of ſuch an act would be, that the debtor may ſhun the affront of ſuſpicion, ariſing from inhibition, by offering performance; and in caſe of refuſal, by application to the Lords, that upon conſignation of the ground of the inhibition, it may be refuſed; or upon production of clear diſcharges of the ground of the inhibition; or in caſe the term of payment be not come, by giving ſufficient caution for performance at the term: for beſides the prejudice to the debtor, ſuch unwarrantable inhibition will remain in record againſt him and his heirs, till purged by preſcription. And that regiſter hath no allowance for inſerting diſcharges of the inhibition, or the grounds thereof, or of any decreet of reduction thereof; ſo that all purchaſers muſt keep and preſerve theſe diſcharges, or ſentences during the preſcription. And even other creditors are not ſecure; for if theſe diſcharges or ſentences be not found, the debts contracted after may be reduced.

XXIV. As inhibition hath been introduced for ſecuring creditors againſt dilapidation of land-rights; ſo arreſtment hath been introduced for the benefit of creditors, that they might reach their debtor's moveable goods or ſums. All ſums are accounted moveable as to this effect, whereon actual infeftment has not paſſed, or is not ſtanding.

XXV. Arreſtment, and the actions ariſing therefrom, are more properly executorial than inhibitions: for inhibition doth only remove impediments hindering execution; but arreſtment doth not only hinder the debtor, in whoſe hands it is made, to pay, but gives an action, whereby the right of the ſums, or goods arreſted, is adjudged to the creditor arreſting; and thereby the former creditor is denuded, and the arreſter becomes creditor.

XXVI. There are two executive actions ariſing from arreſtment. The one is the action for making arreſted goods or ſums forthcoming, which reacheth no further than the ſatisfaction of the ſum for which the arreſtment was laid on; And the title of it were much more ſuitable to be adjudication upon arreſtment: for for it is as properly an adjudication of a moveable intereſt, as the adjudications of land-rights. And the title it has is tediouſly long, when it is fully expreſſed, and very unbecoming when it is called a forthcoming. Neither is it the making of the goods or ſums forthcoming, that is the proper effect of this action; but the adjudging of them to the arreſter: for if goods be arreſted, the haver is liberated by producing the goods, whereby they are made forthcoming; but they become not the arreſters, until they be rouped and ſold, and the price delivered to the arreſter. There is no neceſſity here to inſiſt further upon arreſtment, and the action thereupon tranſmitting the right to the arreſter, the ſame being largely treated, *lib.* 3. (*tit.* Aſſignations) as being a legal aſſignation, in the ſame way that adjudications of rights of the ground are legal diſpoſitions; and both have their effects by the ſentence of the judge adjudging the ſame to the ſeveral purſuers, in the different manners and orders preſcribed by law.

XXVII. Under arreſtment is comprehended ſequeſtration, whereby, not only the ſubject is arreſted, to remain *in ſtatu quo*, without the acceſs of either party contending, till their titles be diſcuſſed; but likewiſe the cuſtody of the thing controverted is intruſted, by an act and commiſſion of the Lords, to perſons nominated by them, either for the cuſtody, or for the management thereof, and profits of the ſame, to be made forthcoming to the parties that ſhall be found to have beſt right. Theſe are ordinarily called "factors conſtitute by the Lords," and by their commiſſion, they have power to uplift the rents and profits, and to ſet and raiſe lands, which is ordinarily by roup, that the factors may not be in a capacity by colluſion to take an under-rate. For theſe factors, ſallaries are appointed by the Lords, either before their intromiſſion, or are reſerved to be modified by the Lords, after their diligence ſhall appear. And when the titles of parties are determined, they have immediately acceſs againſt theſe factors; and albeit their decreets do not bear the ſame expreſsly, yet they do imply it.

XXVIII. Such

XXVIII. Such factors are conſtitute upon very many occaſions. As, 1. When the claims of Parties reach the whole right *in ſolidum*, but require a long time, before by the courſe of the roll, the cauſe can be determined, not only by diſcuſſing the relevancy, but by concluding and adviſing the probation, wherein different terms uſe to be aſſigned, for witneſſes and diligences both ordinary and incident for production of other men's writs *ad modum probationis:* for then, ſeeing the ſubject in queſtion would become unprofitable, or damnified *medio tempore*; therefore, upon the application of parties, the Lords appoint factors to manage in the mean time. 2. When the parties contraverting do not pretend *to* the whole right, but a part thereof, and a preference therein; the Lords appoint factors to manage, till the intereſts of the ſeveral pretenders be ranked and determined. 3. When apparent heirs are doubtful whether to enter heirs to their predeceſſors, then, upon the application of creditors or relicts having liferents, the Lords will appoint factors to manage in the mean time. 4. If any party ſucceed to an eſtate, and be out of the country to continue for a conſiderable time, and is perhaps ignorant of his intereſt; then, upon application of their relations, the Lords will appoint factors to manage, until the party concerned conſtitute other factors. 6. If any arreſtment be made upon things on the ground of lands, ſuch as woods, corns, peats, turffs, planting, trees, *&c.* If the Lords find ground of ſuſpicion of the irregularity of either party, they will give commiſſion to take the ſame in cuſtody: much more, if the controverſy be about any moveable goods, as jewels, plate, heirſhip, *&c.* the Lords will put the ſame in the cuſtody of indifferent perſons, till the rights of parties be determined.

XXIX. The actions againſt theſe factors or keepers, are chiefly founded upon the rights of parties being determined; and is properly an action of reſtitution, and may be more fitly called an action for making forthcoming, than the action upon arreſtment, whereby the ſums or goods are adjudged to creditors arreſting for their ſatisfaction, and thereby the right and property changed.

XXX. The other action upon arreſtment ariſes properly from the breach of arreſtment, whereby the arreſter hath action, either for his debt, or for the half of the moveables of the breaker of arreſtment, by virtue of the acts of Parliament made thereupon. But there is no neceſſity to inſiſt further in this action here; becauſe the breach of arreſtment is a delinquence civily cognoſcible before the Lords, and therefore is explained, *lib.* 1. *tit.* Reparation, § 29.

TITLE LI.

Adjudications.

ADjudications are now the great executorials, by which all rights of the ground are conveyed from debtors to their creditors, by decreet of the Lords; whereby they diſpone as effectually, as the perſons decerned themſelves could do: with this difference, that, in voluntary diſpoſitions, there are always expreſſed clauſes of warrandice, which are not in judicial diſpoſitions.

II. Appriſings were formerly the chief executorials, whereby all rights of the ground were conveyed, and adjudications were only extraordinary remedies, where appriſing could not take place. But not only do theſe adjudications yet ſtand, as legal and ordinary by long cuſtom, and are by ſeveral ſtatutes authoriſed and extended, as by *cap.* 7. *Parl.* 1621. *cap.* 18. *Parl.* 1669, but further, by act 19. *Parl.* 1672, appriſings are laid aſide, and adjudications are introduced in their place, except in the caſe where there hath been prior appriſings of the ſame ſubject: ſo that now no ground-right is appriſable, except only upon the action for

for poinding of the ground, where the decreet decerns letters of appriſing to be direct: whereupon appriſings muſt proceed with all the formalities as formerly, whereby theſe actions, which ought to have the moſt ſummary execution, are very tedious and expenſive: and therefore there is no doubt but parties may raiſe adjudications upon all *debita fundi*, and if they inſiſt only for the bygone annualrents, and not for the ſtock (as frequently they do) they may inſert a clauſe in the ſummons, bearing, "a power to appriſe the moveables on the ground, "belonging to the debtor, or to his tenants, not exceeding a term's mail; and "an adjudication of the ground-right and property for what remains unpaid, by "the ſaid moveables:" which no doubt the Lords would ſuſtain. See *lib.* 4. *tit.* 35. § 27.

III. Adjudication doth not only convey the rights of the ground, but alſo the moveable ſums of debtors and their moveable goods which are not in their own hands, by the actions for making forthcoming, which are adjudications upon arreſtment. So that poinding is only of the goods of the debtor, which are in his own poſſeſſion, which is alſo an adjudication of theſe moveables from the debtor to the creditor.

IV. Beſide all theſe adjudications, there is a new adjudication taking its riſe from the 17th act, *Parl.* 1681, concerning the ſale of bankrupts lands: "where-"by the Lords are authoriſed and impowered (upon a proceſs at the inſtance "of any creditor having a real right) to cognoſce and try the value of eſtates, "where the heritor is notoriouſly bankrupt, and the creditors are in poſſeſſion "thereof; and to commiſſionate perſons to ſell the lands, or any part thereof, at "the rates of the country where they lie, with conſent of the debtor where there "is a legal reverſion, or without the ſame where there is none: and the ſale is to "be by publick roup, after publick intimation at the head burgh of the ſhire, bai-"liary, ſtewartry or regality where the lands lie, and at the pariſh-kirk where "the lands lie, and at ſix other adjacent pariſh-kirks (to be named by the Lords "of Seſſion) at the diſſolution of the congregation, on a Sunday after the fore-"noon's ſermon, by letters of intimation under the Signet, upon the Lords de-"liverance: which letters are ſpecially to expreſs the time and place of the roup. "And the creditors having real rights, and in poſſeſſion, are to be ſpecially cited "upon twenty-one days, and all others concerned within or without the king-"dom, at the market-croſſes of theſe head burghs; and at the market-croſs "of Edinburgh, and pier and ſhore of Leith: and the price is to be diſtributed "to the creditors, conform to their rights."

V. But there are ſome alterations made in this, by *cap.* 20. *Parl.* 1690, "Whereby it is ſtatute and declared, that the buyers of bankrupts eſtates ſhall "have right thereto by decreets of ſale, to be pronounced by the Lords, adjudg-"ing the lands ſold to the buyer, for the price decerned, whether they be under "reverſion or not: and that if no buyer be found at the rate determined by the "Lords, it ſhall be leiſom for the Lords to divide the lands and other rights a-"mongſt the creditors, according to their ſeveral rights and diligences. And "becauſe the ſale may be obſtructed by donatars of liferent-eſcheat, the Lords "are impowered to determine the price and value of the ſaid liferent-eſcheats, "and to ſell land for the price thereof, according as the ſaids rights ſhall be "found to have preference." By this ſtatute the general inconvenience that did ariſe to debtors, by bringing in appriſings or general adjudications within the year, *pari paſſu* (whereby a great part of the eſtates of the kingdom came to be broken) is retrieved.

VI. Albeit theſe ſtatutes mention the "lands of bankrupts who are notoriouſ-"ly inſolvent, and that the creditors are in poſſeſſion;" yet that is not be under-ſtood, as if the debtor's debts muſt exceed the value of his eſtate: but it is ſufficient, that his eſtate be ſo affected, as prudent perſons will not buy from him, at a competent rate, with the hazard of the diligence of his creditors. And therefore it is not neceſſary to prove in this proceſs, that the burden of his eſtate

and his debts exceed the value of the eſtate: becauſe the debtor hath a competent time allowed him by the ſaid ſtatutes to purge the debts; for, 1. There muſt be proved the rental and rate of his eſtate and caſualities thereof, according to the ordinary rate of the country. And, 2. After that probation is adviſed by the Lords, there muſt not only be an intimation at all the pariſh-kirks where the lands lie, and ſix other kirks neareſt adjacent; but the creditors in poſſeſſion muſt be cited upon twenty-one days. And, 3. After all, the roup muſt proceed *. So that if, in the mean time, he can ſell his eſtate, and pay all his debt, the roup falls. Neither is it neceſſary, that all the eſtate muſt be poſſeſſed by creditors; but it is ſufficient that a part thereof be poſſeſſed by wadſets, or annualrents, or by adjudications. And there is a great benefit not only to the creditors, but alſo to the debtor, that he gets a better price, than he could obtain by voluntary diſpoſition: and if there be any ſuperplus of the price, he has it free to himſelf.

VII. This adjudication by roup, being deſigned as a general remedy, both for debtors and creditors; the Lords do not ſuſtain the ſame, unleſs the debtor's whole eſtate be contained in the proceſs, if either the debtor or any creditor do, before the term be aſſigned for proving the rental, condeſcend and inſtruct, that a part of the debtor's eſtate is omitted in the proceſs: as was found in the proceſs, at the inſtance of Sir *Francis Kinloch* againſt *Scot* of *Bonningtoun*,——1692 **. In which caſe alſo, it being found that one of the kirks named by the Lords, was not a pariſh-kirk, the intimation was ordained to be renewed, both as to the lands omitted, and as to a ſixth pariſh-kirk of the lands libelled: becauſe the Lords could not name *ex certa ſcientia*, but upon the ſuggeſtion of the purſuer.

VIII. Theſe adjudications of bankrupts eſtates, whether by way of ſale or diviſion, proceed ſummarily, as other Adjudications, and are called amongſt the acts, without abiding the roll: yet the alledgeances and objections of debtors and co-creditors are competent to be proponed, when theſe adjudications are ſo called; and there cannot be here an adjudication repelling defences, and reſerving them *contra executionem*, as in other adjudications, where one is already paſſed.

IX. By addition of theſe adjudications of broken eſtates, there are many kinds of adjudications now in uſe. As, firſt, An adjudication for perfecting diſpoſitions of rights of the ground which require infeftment, whether in fee or liferent, and whether in property or annualrent, when the diſponer is either expreſsly or implicitly bound to infeft the acquirer, and oft-times to infeft himſelf for that effect, yet hath not performed the ſame; juſtice requiring ſome legal remedy to make ſuch diſpoſitions and obligements effectual: which would have been very tedious and expenſive, if the acquirer had no other remedy, but firſt to uſe perſonal diligence againſt him to liquidate the damage, and then to appriſe thereupon, whereby the acquirer having a real right if not compleat, might eaſily be prevented by any creditor, who had only a perſonal debt. Therefore the Lords, who, by their inſtitution and authority, are impowered to make rules for diſpatch of juſtice (whoſe power is thereby like that of the Roman *Prætor*, *ubi lex deeſt*, *Prætor ſupplet*) did ſuſtain proceſs at the acquirer's inſtance, againſt the diſponer to fulfil, and againſt his ſuperior to ſupply his place, and to receive the acquirer, in the ſame way as he might have done upon his vaſſal's charter of confirmation or procuratory of reſignation: and if all the ſuperiors till the King were called, they might be ſo decerned in order, and at laſt precepts might be direct for expeding charters from the King, who is ſupreme ſuperior.

But this being at firſt *remedium extraordinarium*, the Lords did not ſuſtain it, ſo long as there was an ordinary remedy by horning and caption againſt the diſponer, to perfect the diſpoſition or obligement to infeft.

But now adjudications becoming ſo ordinary remedies, not only in this, but in many other caſes, and being all executive actions; there is no ground to delay the acquirer

* See the preſent form of carrying on rankings and ſales, acts of Sederunt, 23d Nov. 1711. and 17th Jan. 1756.

** This deciſion not found.

quirer till he obtain a decreet, and uſe all perſonal diligence, whereby he may be readily prevented by the adjudications of perſonal creditors: eſpecially conſidering, that if the diſponer be dead, there behoved to be an action againſt his heir, for fulfilling the diſpoſition, and thereupon a decreet and all perſonal execution, before he could have a judicial diſpoſition to ſupply the voluntary diſpoſition promiſed: and therefore, in either caſe, this adjudication ſhould proceed, unleſs the acquirer of his own choice ſhould pleaſe to inſiſt in the perſonal execution.

There is very convincing reaſon, that, upon theſe adjudications, if they be irredeemable, the ſuperior ſhould have a full year's rent: becauſe he muſt accept a ſtranger vaſſal; or a modification, if the diſpoſition be redeemable, or but a liferent-right; and if it be an annualrent, he ſhould have a year's annualrent: for, though the Lords (*before the act* 18. *P.* 1669,) demurred to give a year's rent in adjudications for perſonal debts, becauſe the year's rent was expreſſed in the act anent appriſings, and omitted in the act anent adjudications; yet that reaſon holds not in this kind of adjudications.

X. The ſecond kind of adjudications is, when apparent heirs are purſued to fulfil their predeceſſors obligements, but cannot be reached, unleſs they did repreſent the debtor; therefore, by *cap.* 106. *Parl.* 1540, it is provided, That the apparent heirs of debtors may be charged to enter heir to any of their predeceſſors who were debtors, within forty days, with certification, that if they enter not, all action and execution will be competent againſt them, as if they were actually entered heirs. Whereupon the Lords do ſummarily, by ſupplication, without citation, grant letters to charge ſuch apparent heirs to enter. But becauſe the law gives the apparent heir a year to deliberate, whether he will enter heir or not; therefore the forty days within which they are charged to enter, ſhould not terminate, till the *annus deliberandi* terminate. There is no further execution upon this charge, but it is a ground of an action whereby the apparent heir is purſued as lawfully charged to enter heir; and thereupon a decreet follows eſtabliſhing the debt againſt him, as if he were originally debtor, whereon all perſonal execution, and alſo all real execution againſt any eſtate that the apparent heir hath, may proceed. But becauſe he hath not that eſtate to which he might be heir, and hath not been entered therein; therefore ſuch an eſtate could not be appriſed from him, though he did not renounce to be heir, until there were a new ſpecial charge to enter heir in ſuch particular lands, or other heritable rights, with certification, that appriſing thereof ſhould be as effectual, as if he were actually entered: and then appriſing did proceed.

But if the apparent heir did renounce to be heir upon the general charge, then there was no place for a ſpecial charge, or for an appriſing thereon; which the Lords ſupply by an action of adjudication, narrating the premiſes. And albeit the foreſaid act of *Parl.* 1540, *cap.* 106. bear only, that the charge to enter heir proceed againſt parties being of perfect age, and for their predeceſſors debts; yet by act 27. *Parl.* 1621, the ſame is extended to debts due by any perſon himſelf, as well as theſe which were addebted by his predeceſſors: and our cuſtom hath promiſcuouſly ſuſtained charges againſt minors as well as againſt perſons of perfect age. And tho' the foreſaid act bear, "That if the apparent heir charged "enter not, letters ſhall be directed to the ſheriff of the ſhire and his deputes, "to appriſe the ſaid lands to the ſaids creditors, for the ſaid debts, if they be li-"quid; the which proceſs of appriſing ſhall have as great ſtrength, force and "effect, as if the ſaid heirs were entered thereto;" yet the Lords found that method could not be effectual: and therefore ſupplied the ſame by a ſpecial charge, raiſed upon the decreet following on the general charge, for charging the heir to enter to ſuch lands, and other heritable rights, ſpecially; with certification, that if he enter not, they ſhould be appriſed from him, as if he were entered: which ſpecial charge paſſed upon bill, and was the immediate warrant for the appriſing.

But

But now appriſings being laid aſide, adjudication proceeds upon the general charge, whether the apparent heir renounce or not; but with this difference, that if the apparent heir do not renounce, he is perſonally liable in all his eſtate, heritable and moveable: but if he renounce, his perſon and other eſtate is free, but the lands of his predeceſſor, who was debtor, and to whom he was apparent heir, is only adjudged. And whether the debt be liquid or not, the creditor may proceed in an action of adjudication, which hath been ſuſtained not only for liquid but illiquid obligations, and even for obligations in fact. And by *cap.* 27. *Parl.* 1621, the apparent heir may be charged to enter, to the effect the lands to which he might have entered, might be appriſed for his own debt, as well as for his predeceſſor's debt.

XI. The third kind of adjudications is, that which comes in place of appriſing, upon infeftments of annualrents, or other *debita fundi*, and is in place of appriſings which proceed upon actions for poinding the ground, wherein the decreet is only for granting letters of appriſing for poinding the moveables on the ground in the firſt place, and the ground-right and property, and all other right in the next place: for ſeeing now, by *cap.* 19. *Parl.* 1672, it is ſtatute, that in place of appriſings, the Lords of Seſſion, upon proceſs raiſed before them, at the inſtance of any creditor, ſhall adjudge the debtor's lands, *&c.* there is here no exception, whether the adjudication proceed upon a perſonal obligement, or upon a real burden upon the land: but adjudications on real burdens ſhould bear the ſame clauſe as in appriſings, that the moveables on the ground ſhould be firſt diſtreſſed, and then the ground-right, unleſs the creditor proceed upon the perſonal obligation for the ſtock, or for the annualrent thereof: for then there is no warrant to poind the moveables, but the creditor has the addition of a fifth part in place of penalty or expences; which may be always modified, whether the ſame be expreſſed or not, if the defender appear litigious. But if the adjudication be for bygone annualrents by infeftment, there uſes no penalty of expences to be granted for theſe; and therefore that fifth part ought not to be extended thereto: for the reaſon of the ſtatute is, that the creditor is neceſſitate to take land for his debt. But in infeftments of annualrent the very deſign is to affect the land and not the debtor, and he hath acceſs to the moveables, which perſonal creditors have not; neither can any land be adjudged or appriſed, but that which the *debitum reale* affecteth, and whereof every part is affected: and therefore there ought to be no ſpecial adjudication of a part of the lands equivalent to the bygone annualrents, but the whole lands affected muſt be adjudged under reverſion of ten years [a].

XII. The fourth kind of adjudication is founded upon the foreſaid ſtatute, putting adjudications in place of appriſings; whereby it is ſtatute, "That if "the debtor appear and produce his rights, and be willing to put the creditor in "poſſeſſion, and to ratify the adjudication; in that caſe the Lords ſhall only ad-"judge ſo much of the debtor's lands, as is ſufficient to pay the debt, and a fifth "part more in place of all penalty and expences, redeemable only within five years "from the date of the adjudication." And the Lords are impowered to pitch upon the lands ſo as may be ſufficient for the creditor, and leaſt hurtful for the debtor: the price whereof is to be rated conform to the rates of the country where the lands lie, and according to the tenor of the holding thereof, and the caſualities of the ſame, either affecting other lands, as multures and other ſervitudes, or increaſing the value, tho' giving no preſent rent, as wood, coal, *&c.* And it is declared, that the creditor ſhall be liable to no accompt in caſe of redemption; but, on the contrary, that the debtor ſhall be obliged to pay the annualrents of that part of the eſtate adjudged, to the rents whereof the creditor could not have acceſs for payment of his annualrent.

This kind of adjudication hath been much neglected both by debtors and creditors [b], whereby general adjudications have generally taken place, and coming in

[a] See above, § 2. *h. t.* IV. 23. 8. IV. 35. 27. 2.

[b] See above, IV. 23. 3. *fin.*

in *pari paſſu*, have rendered moſt debtors bankrupts, and have brought in the neceſſity of adjudication by ſale. And albeit the Lords were impowered to decern ſecurities for warrandice of the ſpecial adjudication, to affect the other lands, yet creditors like better to adjudge all, and ſo brought themſelves to a moſt tedious accompt, upon intromiſſion, compenſation, or the like exceptions competent againſt general adjudications, being proponed within the legal, which the leaſt pretence of proceſs doth prorogate. Debtors could have no advantage by general adjudications, except bankrupts whoſe whole eſtate would be exhauſted by ſpecial adjudications. And others had no detriment, but only the penalty of a fifth part more, to which the ordinary penalty and ſheriff-fee was equivalent, which uſed not to be modified unleſs it were exorbitant, or that there were ſome defect in the formalities of the appriſing.

XIII. The fifth kind of adjudications are the general adjudications of all the debtor's lands and heritable rights at random, without giving any evidence that the debtor had any right to them; [and which is effectual tho' he was not actually infeft, but apparent heir; for there is no charge to enter heir required as to theſe adjudications.] * And it is a great inconvenience, that creditors may adjudge what they pleaſe to inſert, and thereby lay the foundation of a plea againſt parties not concerned. But if parties appear and produce the evidences whereby theſe debtors are denuded, the Lords will not adjudge the ground-right and property, but will adjudge any other right of reverſion or truſt, which may be pretended competent to the debtor: or as they did in the caſe of *Alexander Livingſton* againſt the Lo. *Forreſter*, *Nov.* 23. 1664, where they adjudged lands wherein the debtor was infeft in the property, but with the burden of a back-bond, bearing that the infeftment was only for relieving the acquirer of the diſponer's debts.

This kind of adjudication is liable to all the exceptions to which appriſings were liable, which need not be further inſiſted in here, being ſo largely conſidered, *lib.* 3. (*tit. Diſpoſitions*) upon appriſing and adjudication, as judicial diſpoſitions.

XIV. The laſt kind of Adjudication is upon the ſale or diviſion of broken eſtates, wherein the eſtate is ſold by roup, albeit the debts and burdens be not ranked before the adjudication **: but the price decerned upon the roup bears annual-rent from the date of the roup, and the buyer is obliged to find caution for the price, if there be any ſuſpicion of hazard.

It was alſo declared, that there ſhould be an inventary of the evidents of all the creditors, their debts and real burdens, which ſhould be ſigned by the Ordinary upon the roup, and the creditors, and delivered to the buyer, and copies thereof given to the creditors, in like manner ſubſcribed by him and the buyer, as the other was by him and the creditors, that, in caſe of any diſtreſs againſt the buyer, upon production by the buyer of that inventary, and the writs therein, each party ſhould be liable to warrant, in ſo far as concerns the ſum he received. As was found in the proceſs of ſale, at the inſtance of *Dundaſs* of *Harvieſtoun*, *July* 1692. ***

* No adjudication can proceed againſt an apparent heir without a charge.
** By regulations 1695, the ranking of the bankrupts creditors muſt precede the roup.
*** This deciſion not found.

TITLE LII.

Suſpenſions, where, of Siſts of Execution, Relaxation, and Charges to ſet at Liberty, either upon Juſtice, or upon Mercy *ſuper ceſſione bonorum.*

THIS title is reſerved to the laſt place, becauſe all executions by horning, poinding, caption and incarceration, are ſtopped, till the ſuſpenſions thereof be diſcuſſed; and therefore ſuſpenſions could not be diſtinctly underſtood, until theſe executions, which might be ſuſpended, were premiſed: and ſo the diſcuſſing of ſuſpenſions falls in properly here to be treated.

II. Suſpenſion, as the name inſinuates, ſignifieth a ſtopping of execution; and that either for a time, till ſuch and ſuch things occur and be done, as ſhall be decerned by decreet of ſuſpenſion, or by ſtopping the execution for ever.

III. The laſt hath the like effect as a reduction; but with this difference, that decreets on ſuſpenſions cannot be again ſuſpended or reduced upon grounds proponed and repelled, or competent and omitted, when the firſt decreet on the ſuſpenſion was obtained, which does not ſo hold in reductions of other rights: for tho' a reduction upon one ground be not effectual, ſo that the defender is aſſoilzied, yet a new reduction may be raiſed upon other grounds, on different facts, but not upon other grounds *in jure*; which hath a great inconvenience to multiply and protract pleas: and it were worthy of a ſtatute, that whoſoever raiſes reduction of any right, ſhould not be heard upon any reaſons that were then competent and omitted [a]: For otherwiſe the litigious and rich might weary out the innocent, and thoſe who are leſs powerful to maintain pleas.

IV. Suſpenſions do alſo differ from reductions in this, that ſuſpenſions are not effectual, unleſs the grounds thereof be inſtantly verified; becauſe there having been decreets, or that which is equivalent thereto, the effect thereof by poſſeſſion or otherwiſe, ſhould not be delayed upon alledgeances to be proved, albeit they were not competent in the decreet or charge ſuſpended, but ſhould only be reſerved by way of reduction: ſo that in the mean time, till the obtainer of the decreet or charge be put *in mala fide*, to continue his poſſeſſion, he is to enjoy and ſpend the profits as his own. But he is not put *in mala fide* by raiſing a reduction, but by the production of ſuch a right, as doth evidently elide his right, and not by a dubious production, until the Lords find it to be a better right.

V. But there are ſome exceptions from this rule, as if a cautioner, or any interpoſed perſon do ſuſpend, who is not ſuppoſed to have the principal debtor's writs to defend him, he will get terms both by horning and caption againſt the principal debtor, or others havers of theſe writs: or if the reaſon of ſuſpenſion be ſuch as the ſuſpender is not obliged to inſtruct by writ, if he refer the ſame to the charger's oath, in that caſe the advocate for the charger will always take a term to produce him to depone, albeit the ſuſpender hath not by the ſuſpenſion referred the reaſon to his oath, and will take the ſhorteſt term, that the cauſe may be the ſooner diſcuſſed: but if the reaſon of ſuſpenſion be probable by witneſſes, the ſuſpender will get diligences againſt the witneſſes.

VI. Suſpenders uſe to raiſe reductions with their ſuſpenſions; and if in diſcuſſing thereof they ſatisfy the production, or hold it as ſatisfied, they will get a term to prove even by their own writs, if they depone that they are not in their power at the time, if there be any probability of verity in the reaſons.

VII. There is no neceſſity to conſider here the reduction of decreets: for what is general in reductions is handled *lib.* 4. *tit.* 20. Reduction and improbation:

[a] See above, IV. 40. 16. *fin.*

tion: and what is ſpecial in the reduction of decreets of the Lords of Seſſion, may be gathered from *lib.* 4. *tit.* 46. Decreets of Seſſion. Of theſe ſpecialities, this is the prime, that decreets of Seſſion *in foro contradictorio*, cannot be reduced upon what was proponed and repelled, or competent and omitted; which doth not extend to emergent reaſons, or ſuch as are known to be new come to knowledge: but in this caſe, or when the decreet is either in abſence ſimply, or by the defender's paſſing from his compearance before peremptors proponed; ſubſequent reductions will be ſuſtained, upon diſtinct reaſons, as in other rights: yet, more ſuch ſuſpenſions cannot be ſuſtained; for after diſcuſſing of the firſt ſuſpenſion, what was then competent, is not receivable by a poſterior ſuſpenſion.

VIII. A ſuſpenſion is an action, at the inſtance of the ſuſpender, againſt any party that hath obtained decreet, or hath obtained letters for charging the ſuſpender to pay or perform any thing for which he is charged, and whereupon he may be denounced rebel, whereby his eſcheat would fall to the King, or his life-rent-eſcheat to his ſuperior, or whereby his perſon may be taken by caption and incarcerated, or his goods or ſums may be poinded, or his lands may be appriſed upon decreets for poinding the ground, or adjudged for theſe, or for perſonal debts. The ſuſpenſion may alſo be againſt any who have obtained right to ſuch decreets, or ſummary charges. But becauſe in moſt caſes a charge of horning muſt precede the other executions, therefore the defender in the ſuſpenſion is always called charger.

IX. Suſpenſion cannot paſs but upon a bill, which muſt be preſented by the clerk of the bills of ſuſpenſion and advocation, and not by the ordinary clerks of Seſſion. The bill doth always mention that the ſupplicant is charged, or that his lands may be appriſed or poinded, and then mentions the grounds of the charge, and the reaſons he alledges againſt the ſame: and therefore craves warrant to ſummon the charger, to produce the grounds of the charge, and to hear and ſee the ſame ſuſpended by decreet of the Lords, for the ſaids reaſons. Likeas, the bill alſo contains an offer of ſufficient caution, at leaſt juratory caution, that is, that the petitioner depones, that he is not able to find caution, or if he offer a cautioner whoſe ſufficiency is doubted, he depones that he can find no better. And in caſe the ſuſpender be denounced, the bill craves relaxation, and an offer of caution for eſcheat-goods.

X. Formerly ſuſpenſions frequently paſſed upon inſufficient caution: but now the clerk of the bills is liable to the charger for the ſufficiency of the cautioner the time he was admitted; and on the other part he is liable to the ſuſpender for damage, if he refuſe a ſufficient cautioner; conform to an act of Sederunt *Feb.* 18. 1686. And therefore the clerk of the bills inquires into the condition of the cautioners offered, by ſome perſons of credit who know them; and ſometimes gets perſons to atteſt the ſufficiency of the cautioner. If the clerk of the bills refuſe a cautioner without reaſon, the Ordinary on the bills muſt judge upon the grounds alledged by the clerk and the party, and in caſe of difficulty, adviſeth with the Lords.

XI. Suſpenſions were neceſſarly introduced by the Lords, eſpecially to give hearing to thoſe who were decerned in abſence; becauſe oft-times the executions whereupon ſuch decreets proceeded, were not true, but only were made up indorſations by a forged executor, whereby no perſon was in hazard to be puniſhed as a forger; and albeit the executor were found, it was not worth the trouble the ſuſpender would be at, to improve the executions; but he would rather paſs by the ſame, and diſpute the reaſons of ſuſpenſion: yet he had this diſadvantage, that where he might have had terms to prove in ordinary actions, he behoved for the moſt part, inſtantly to verify, in the ſuſpenſion. Therefore the ordinary ſtile of ſuſpenſions bears, that the decreet craved to be ſuſpended, was for null-defence and non-compearance, the complainer never having been orderly ſummoned thereto.

XII. There

XII. There was alſo neceſſity for ſuſpenſion of ſummary charges, which paſs of courſe, where no hearing of the ſuſpender could be underſtood; as in charges upon decreets of ſummary regiſtration, without citation, or charges upon bills of exchange amongſt merchants, by act 20. *Parl.* 1681, ſee *lib.* 4. *tit.* 47. § 7. In like manner, ſummary charges are allowed by ſeveral acts of Parliament, without citation or decreet: and they are oft-times general, neither naming the perſons nor things to be performed, particularly*.

XIII. In like manner, there was a neceſſity to ſuſpend all decreets, tho' *in foro contradictorio*, or though they were decreets of Parliament (when no Parliament was ſitting) upon obedience of the ſaids decreets, and upon production of the charges, diſcharges, or other declarations of the ſatisfaction thereof: for ſeeing the Parliament is not a conſtant judicature, nor hath fixed members, nor any cuſtom that any of the members can ſuſpend in the intervals; the Lords of Seſſion, who are the ſupreme judges-ordinary, muſt give remedy by ſuſpenſion, upon obedience; which is underſtood two ways. 1. When obedience is proved by acceptation. 2. When full obedience is offered and not accepted, that being inſtructed by inſtrument, and conſignation being made of what is decerned, to be given up upon demand, without diſcuſſion, it is ſufficient obedience: for the party charger can poſſibly do no more. But if the ſuſpender add other reaſons to be diſcuſſed, the conſignation is but in place of a cautioner, and imports not full obedience, nor are theſe other reaſons competent to be diſcuſſed by the Lords.

XIV. The firſt deſign of ſuſpenſion, was not to take from the charger the benefit of legal execution, againſt a ſuſpender who had compeared in the decreet craved to be ſuſpended, and had diſputed the cauſe, without paſſing from his compearance before proponing of peremptors: and ſo was not to be paſſed upon reaſons competent and omitted, or proponed and repelled, or even upon pretence of inſtructions alledged to be new come to knowledge, or emergent; unleſs the inſtructions be after the decreet: for the new coming of inſtructions to knowledge, ought to be in ſome way proved, and the aſſertion of the ſuſpender is not ſufficient probation thereof. Neither ſhould any decreet upon compearance be ſuſpended, but upon reaſons relevant and inſtantly verified at the paſſing of the bill.

XV. Yet many abuſes did creep in, in the paſſing of bills of ſuſpenſion; ſo that if the reaſons were relevant, the offer to inſtruct the ſame at diſcuſſion, was ſuſtained: which ought not to have been done, except for cautioners; or probation of matters of fact, which the party charger might prove by witneſſes, though he were bound by writ; which is indulged to tenants for proving delivery of victual, or performance of deeds contained in their tacks; but ought not to be ſuſtained to others, without teſtificates of perſons of fame, who know that the matters of fact alledged in the reaſons were true. In like manner, the alledgance of being a decreet in abſence for null-defence, became to be ſuſtained, without inquiry into the verity thereof, by inſpection of the decreet, or teſtificate of the clerk of the proceſs. As alſo proteſtations were ſuſpended of courſe, upon conſignation of the proteſtation-money. And the clerks of the bills were not held liable for the ſufficiency of cautioners, or that they were at leaſt ſo holden and reputed when received. By all which, the effect of decreets of Seſſion became very uncertain.

XVI. And therefore the Lords have adhibited many remedies, for preventing thoſe inconveniencies. As 1. by obſerving an act of Sederunt in *anno* 1639 **, whereby it was declared, that competent and omitted ſhould thenceforth be relevant, as well againſt reaſons contrary to decreets upon ſuſpenſion, as againſt decreets upon ordinary action: whereas formerly, ſuſpenders might raiſe as many ſuſpenſions as they had ſeveral reaſons; though many points are not competent in ſuſpenſions,

* By act 13. P. 1690. General letters are diſcharged except for the king's revenue, miniſters ſtipends, and on decreets of poinding the ground.

** This act of Sederunt not found.

ſuſpenſions, which would have been competent in ordinary actions; for as *in judicio poſſeſſorio*, theſe points which require reduction or declarator, are not competent by way of exception; much leſs by way of ſuſpenſion; and in decreets of general declarator, many things are reſerved to the ſpecial declarator, which therefore are not competent in ſuſpenſions againſt the general declarator. Likewiſe points emergent after decreets on ſuſpenſion, are receiveable againſt theſe decreets: for they were not then competent. And ſeeing decreets of ſuſpenſion ought only to proceed upon reaſons inſtantly verified: therefore not only inſtructions new come to knowledge are receivable by ſuſpenſion, if rational evidences be given that they were new come to knowledge, by teſtificates from thoſe who diſcovered the ſame, but alſo if they were not, the time of the paſſing of the ſuſpenſion, in the hands of the ſuſpender, or thoſe in his power, they ſhould not be repelled, becauſe not produced at the paſſing of the ſuſpenſion, they being produced at the diſcuſſing thereof. Theſe grounds have given riſe to the cuſtom of eiking reaſons of ſuſpenſion, which were not in the bill.

There are two kinds of decreets, which paſs under the name of decreets of ſuſpenſion. The one is condemnatory, when the letters are found orderly proceeded, either ſimply, or in part; or conditionally, when the letters are ſuſpended ay and till ſuch things be performed by the charger: in which caſe the charger needs not a new decreet, to inſtruct the performance of theſe, but upon performance accepted, or offered, and upon refuſal, what is decerned being conſigned; the charger may charge again upon his decreet, by new letters bearing the inſtructions of his performance, or conſignation as aforeſaid. The other decreet of ſuſpenſion, is, when the letters are ſuſpended *ſimpliciter*, either for the whole articles charged for, or for a part thereof. And for diſtinction's ſake, we ſhall call theſe only decreets Of ſuſpenſion, which are abſolvitory *ſimpliciter*, and theſe decreets which are condemnatory, we ſhall call decreets On ſuſpenſion.

Secondly, Another remedy which the Lords adhibited againſt abuſes by ſuſpenſions, was by ordaining the clerks of Seſſion to give teſtificates from time to time, to the clerks of the bills, of decreets *in foro*; and by requiring the clerks of the bills to have an index thereof, by the names of the chargers, that the ſame might be ſhown at the paſſing of the bills: and if the agent for the charger deſired to ſee the bill of ſuſpenſion, the Ordinary was appointed firſt to conſider the relevancy and competency of the reaſons and the inſtructions, and if he found the ſame relevant and inſtructed, he was to ſign the bill of that date it was read to him, or by him: and if any deſired to ſee it, before it paſſed the ſignet, he might allow it to be ſeen, and give a ſiſt of execution for a definite time, which ſiſt (by the act of Sederunt *Feb.* 9. 1675) was not to exceed a month, from the time the bill was preſented. But becauſe ſeveral ſiſts were granted by ſeveral Ordinaries, therefore (by act of Sederunt *July* 3. 1677, and *Nov* 9. 1680.) fourteen days are only allowed for ſiſts of execution, from the date the bill was ſigned, for the clerks inquiring into the condition of the cautioner: and all other ſtops (except where cauſes were ordained by the Lords to be diſcuſſed on the bill) are declared void. Yet upon other conſiderations the ſiſt hath been continued, not exceeding a month in whole. And that it may be known, what ſiſts are granted, the clerks of the bills are ordained to make an alphabetic inventary of bills refuſed or ſiſted, that poſterior Ordinaries be not impoſed on.

Theſe ſiſts of execution being intimated to the charger, have the ſame effect during their time, as a paſt ſuſpenſion, and any tranſgreſſion thereof is receivable by complaint, as other contempts of authority.

Thirdly, Another remedy againſt the abuſes by ſuſpenſion, is, that whereas formerly, every one of the ordinary Lords, might at any time paſs bills of ſuſpenſion, albeit not preſented by the clerk of the bills; ſo that parties could not know to whom to addreſs againſt paſſing of bills; therefore the Lords (by their ſaid act *Feb.* 9. 1675) did ordain, that thereafter in time of Seſſion, no bill of ſu-

ſpenſion ſhould be preſented to any to be paſſed, but only to the Ordinary upon the bills for the time, and only by the clerk of the bills or his ſervants; and in caſe the Ordinary refuſed the bill, he ſhould mark on the back thereof with his own hand, "Refuſed, in reſpect the reaſons are not relevant or not inſtructed:" which bills the clerk is ordered to keep, and to mark with his hand on the back thereof, what writs are produced for inſtructing the bill: and if the ſame bill, or any new bill of ſuſpenſion upon that matter be again preſented, the clerk is to preſent the former refuſed bill, which the Ordinary is not to paſs, till it be preſented to the whole Lords in time of Seſſion, or three in time of vacance. And therefor in this caſe, as well as in the former of granting of ſiſts, the clerk muſt keep an alphabetic index for both.

Fourthly, the next remedy againſt the abuſes by ſuſpenſion, is, that becauſe ſuſpenſion uſes to be deſired, upon pretence that the charge given by the meſſenger is general or informal, and for verifying thereof forged copies are produced, and ſometimes other forged inſtructions, which the ſuſpender intends to make no further uſe of, but to get delay and ſuffer proteſtation; therefore the Lords (by their ſaid act *Nov.* 9. 1680.) do declare, if the charger ſhall produce ſuch a ſuſpenſion, or duplicate thereof under the hand of the keeper of the ſignet, that beſide the Ordinary expences of proteſtation, the ordinary will modify large expences to the charger for the delay: and in caſe the ſuſpenſion come to be diſcuſſed (by the ſuſpender's inſiſting) the Lords declare, that they will hold theſe writs falſe and forged, and modify large expences to the charger, but prejudice to inſiſt againſt the forgers of ſuch copies or writs.

Fifthly, Another remedy againſt the abuſes by ſuſpenſion, is, becauſe ſuſpender's ordinarly refer the verity of the reaſons to the chargers oath, therefore the Ordinary, if he find the reaſon relevant, ſhould take the oath of the charger if he be preſent, upon the verity of the reaſon, in order to the paſſing or refuſing of the bill; and if the charger be abſent, he ſhall take the ſuſpenders oath of calumny thereupon: and in either of theſe caſes, the ordinary ſhall paſs the bill, with this quality, that the ſuſpender ſhall be liable to the charger, in the expences he ſhall be at, through the purchaſing of that ſuſpenſion, and in diſcuſſing of the ſame, according as he ſhall depone upon theſe expences, without any modification thereof, if the letters ſhall be found orderly proceeded.

Laſtly, Becauſe ſuſpenſions now come in by a roll, to be diſcuſſed in order as they are ſeen, returned and preſented to the keeper of the rolls which muſt require a conſiderable time before execution can proceed; therefore the Lords do ordinarily, upon the ſupplication of the charger, appoint the reaſons to be diſcuſſed upon the bill, without paſſing the ſignet: in which caſe, the ſuſpender is not obliged to find caution; and therefore the charger hath his option, either to diſcuſs the cauſe ſummarily on the bill without caution, or not to demand the diſcuſſing on the bill, if he get ſufficient caution. This is the moſt excellent remedy, for making of the decreets of Seſſion effectual; and therefore if the chargers do only charge in time of Seſſion, they need ſuffer no delay in execution. And for that effect, ſuſpenſions ſhould not paſs in the vacance unleſs the charge had been given in vacance time, for which the copy of the charge ſhould be produced, and the oath of the producer taken, that it is true: and even in that caſe, ſuſpenſion cannot paſs in the vacance, but by the Ordinary and two other of the Lords, *viz.* the neareſt before him in courſe and the neareſt after him, that are in town for the time, if the decreet be *in foro contradictorio.*

The diſcuſſing of ſuſpenſions upon the bill, is ordinarily granted on the petition of the chargers, except in the caſe where the ſuſpenders are incarcerated, who for the moſt part are not able to find ſufficient caution; yet compaſſion and the favour of liberty may prevail with the Lords, that if the charger will not inſiſt to diſcuſs upon the bill, the ſuſpender may have ſuſpenſion paſſed upon caution, or conſignation of a general diſpoſition, if he be no further able.

And

And alſo if the ſuſpenſion contain a charge to ſet at liberty, the act of Sederunt, *July* 21. 1675, requires, that it be not paſſed till intimation be inſtructed to have been made to the charger, of the time of preſenting the bill, within the latitude of eight days, that he may anſwer for himſelf, before the liberty be granted. And in Seſſion-time, the Lords do always ordain intimation to be made to the charger's advocate, that he may be heard before the liberty be granted. For there is no reaſon to ſet debtors at liberty, after the ultimate act of perſonal execution, without a full conſignation of the charge.

XVII. Theſe remedies are ſo favourable for chargers, that the Lords have found it juſt to paſs ſuſpenſions, when the ſuſpender makes faith, that he can find either no caution, or no better caution than what he offers; he always conſigning a diſpoſition of his whole means and eſtate, in favour of the charger, ſo far as the letters ſhall be found orderly proceeded.

XVIII. This alſo is ſpecial in ſuſpenſions of proteſtations, that becauſe they do more eaſily paſs than ſuſpenſions of decreets, upon conſignation of the proteſtation-money; therefore it is ordained, that the clerk of the bills ſhall always mention in his index whether the bill for ſuſpending a proteſtation be the ſecond, third, or poſterior proteſtation: for the third proteſtation cannot be ſuſpended but *in præſentia*, or by three of the Lords met together, as aforeſaid. And to that effect the Lords do declare, that if the deliverance of the bill do not bear, that the ſame is the ſecond or ſubſequent ſuſpenſion, they will recal the ſuſpenſion, albeit the ſame be expede at the ſignet, conform to the act of Sederunt, *July* 10. 1677.

XIX. And ſeeing chargers may ſo eaſily obtain ſuſpenſions to be diſcuſſed upon the bill, they ſhould not urge the Ordinary to report their alledgeances againſt paſſing of the bill, which takes up much time, and hath no ſentence following upon it, only the bill is refuſed: whereupon nothing can be extracted, but only the clerk of the bills in his index of refuſed bills ought to expreſs that ſuch bills were refuſed *in præſentia*; which therefore three in the vacance cannot paſs upon the ſame reaſons. Yea, if a bill be refuſed by three in the vacance, it cannot be paſſed by them, or any other three.

XX. The deliverance upon a bill of ſuſpenſion, ordaining it to be diſcuſſed upon the bill, hath all the effects of a ſuſpenſion paſſed the ſignet, and this further, that it requires neither conſignation nor caution: becauſe the charger may always inſiſt to have it diſcuſſed when he pleaſes; and the Ordinary in that week when it paſſed ought to diſcuſs it at the ſide-bar, whenever the charger inſiſts. And albeit other Ordinaries ought not to go to the ſide-bar, but on the proper days aſſigned to them, yet he who was Ordinary when ſuch bills were appointed to be diſcuſſed, hath privilege at all times to go to the ſide-bar *, for diſcuſſing thereof, and report, without being hindered till the ordinary diet to report in other caſes.

XXI. If the charger do not inſiſt to diſcuſs upon the bill, the ſuſpender ought not to be put to uncertain attendance: and therefore he may apply to that Ordinary who could diſcuſs, to call the charger to inſiſt; and if he do inſiſt, and the ſuſpender appear not, the Ordinary ought to grant proteſtation as in other ſuſpenſions: or if, upon the ſuſpender's application, the charger compear not to inſiſt, if he do inſtantly inſtruct his reaſons, which are found relevant, he may remit the ſame to the Lords, and may obtain a decreet of ſuſpenſion, if the Lords find the ſame proved by the inſtructions produced; or otherwiſe he may crave proteſtation againſt the charger for not inſiſting, which will have this effect, that no ſentence ſhall paſs againſt him till he be charged of new.

XXII. Suſpenſions do paſs for diverſe ends, and accordingly are of diverſe tenors. They paſs either for giving the party *perſonam ſtandi in judicio*; or not only for ſuſpending further execution, but for relaxing the ſuſpender, who was denounced by horning, or for ſetting the ſuſpender at liberty; and that either upon

* The ſide-bar is now regulated by act of Sederunt, *June* 6. 1733.

upon the juſtice and verity of the reaſons of ſuſpenſion, for taking away the debt, or upon compaſſion and mercy to over-burdened creditors incarcerated, upon their diſponing their whole eſtate irredeemably to their creditors, for obtaining only freedom againſt perſonal execution.

XXIII. The firſt and leaſt effect of ſuſpenſion is, to give the party *perſonam ſtandi in judicio*; for when perſons are charged by the King's letters, if they give not obedience, the law holds it as rebellion, and by publick proclamation they are denounced rebels; after which they are debarred from compearing in judgment, either as purſuers or as defenders. Yet this being but a rebellion *fictione juris*, ſeeing no perſon will wilfully or contemptuouſly diſobey, but are denounced either by clandeſtine charges which came not to their knowledge, or becauſe they are not able to pay; therefore the Lords do not admit certification holding ſuch perſons as confeſt, nor grant certifications againſt their writs as falſe and feigned: becauſe the ground of theſe certifications does in theſe caſes ceaſe, *viz.* that they do wilfully forbear to appear and depone, becauſe they are conſcious they behoved to confeſs, or to produce their writs, becauſe they know they would be found forged; ſo that the other party muſt either forbear to debar them, or they cannot prevail by theſe certifications. And when perſons are incarcerated, and have reaſons of ſuſpenſion, relevant and competently inſtructed, the Lords knowing that they behoved to be denounced before they were incarcerated, do therefore paſs ſuſpenſion, for giving them perſon to ſtand in judgment, that they may inſiſt in their reaſons of ſuſpenſion, wherein they are really defenders. But this kind of ſuſpenſion requires no caution, and doth not contain relaxation, and is only given when the Lords refuſe to ſuſpend, and grant charge to ſet at liberty; which they oft-times do, tho' ſufficient caution be offered; becauſe incarceration is the laſt act of perſonal diligence: and therefore they only give the incarcerated perſon privilege to compear by his advocates, to diſcuſs the reaſons of ſuſpenſion, himſelf remaining in priſon: wherein if they prevail, the decreet of ſuſpenſion will contain relaxation, and a warrant for a charge to ſet at liberty, the ſuſpender finding caution in the ordinary way for eſcheat-goods.

XXIV. The ſecond way of paſſing ſuſpenſion is, when the reaſons are found relevant and competently inſtructed, and the ſuſpender is neither denounced nor incarcerated; for then there is no mention of giving the ſuſpender perſon to ſtand in judgment, or a warrant to relax, or to ſet at liberty: yet the common rule is, that the ſuſpenſion cannot paſs the ſignet, till either conſignation or ſufficient caution be found, that what ſhall be decerned ſhall be paid or performed. But this cautioner cannot be charged till the ſuſpenſion be firſt diſcuſſed. In finding this caution there is no exception, tho' the ſuſpender were never ſo ſolvent, yea, tho' he had ſolvent cautioners for the ſame cauſe, bound conjunctly and ſeverally, (whereby they are more eaſily reached than ordinary cautioners in ſuſpenſion; for, they being bound conjunctly and ſeverally, they have not the benefit of diſcuſſion) yet I ſee no reaſon, that if one cautioner offer another ſolvent cautioner, who is obliged to relieve him, that he ſhould be refuſed; for the charger hath thereby immediate acceſs againſt that perſon, which he hath not otherwiſe. And tho' the reaſon of ſuſpenſion were never ſo fully inſtructed, as by a regiſtrate diſcharge, yet caution muſt be found. And the clerk of the bills being liable, if the cautioner be not at leaſt holden and reputed ſolvent for performance of the charge, ſuſpenders would be very much ſtraitened, if they had no remedy by juratory caution: for tho' the Lords are judges of the clerks reaſons for refuſing the caution offered, yet they ſeldom enter in that debate, but allows him to accept of the caution as he will be anſwerable.

XXV. The clerks of the bills, for their ſecurity, do require atteſters of the ſolvency of the cautioner offered: and if theſe atteſtors be perſons of unqueſtionable credit, it liberates the clerks; but the atteſters are *ſubſidiariè* liable to the charger, by way of action, only if the cautioner, when offered, was inſufficient.

But

But it hath been always ſuſtained to liberate the atteſter, that the cautioner was holden and reputed ſolvent for the charge, the time of his atteſting; which muſt be proved by witneſſes, that it was ſo commonly reputed in the vicinity where he lived: yet this will be excluded, if the charger inſtruct by writ, that the cautioner was then under evident diſtreſſes, by regiſtrate horning long unſuſpended, or by appriſings or adjudications.

XXVI. The remedy by juratory caution hath been allowed by the Roman law, and the cuſtom of moſt civil nations: for it were hard to exclude ſuſpenders from their juſt and competent defences, becauſe they were not able to find caution. And therefore, if the cautioner be doubted, if the ſuſpender depone that he can find no better, the cautioner ought to be received, unleſs the ſuſpender himſelf be alſo doubted in his ſolvency; in which caſe the Lords, by act of Sederunt, require the ſuſpender to give a general diſpoſition and aſſignation of all his eſtate, to ſtand in place of caution: and much more if the ſuſpender can find no caution. But if the ſuſpender have a viſible eſtate in lands, or ſufficient bonds, and offer aſſignation or infeftment in place of caution, if he depone he can find no better, the ſame ought to be received, without putting him to a general diſpoſition, which carries the affront of being like a *ceſſio bonorum*, tho' it be not againſt all the creditors.

XXVII. The third kind of ſuſpenſion is, that which contains relaxation, that is a looſing from the denunciation, whereby the moveables which the ſuſpender acquires after relaxation fall not under his eſcheat, as do his other moveables; and therefore in ſuch ſuſpenſions the ſuſpender muſt not only find caution for the charger's ſecurity, but alſo for his eſcheat-goods belonging to him before the relaxation: which now is become but a mere formality: for there being no way in that ſtate of the proceſs to know the value of theſe eſcheat-goods, caution for any inconſiderable ſum is accepted as to theſe eſcheat-goods. This way of ſuſpenſion may be granted to perſons incarcerated, without a charge to ſet them at liberty, which is ſeldom granted but upon conſignation, or upon an unwarrantable incarceration, when either a ſuſpenſion is paſſed the ſignet, and intimated by citation or other intimation; or when a warrant hath been granted to diſcuſs the reaſons on the bill, and intimated before the incarceration; or even when a ſiſt is granted and not expired, if the ſame be intimated or ſhown before the incarceration. But after incarceration the magiſtrates or jaylors cannot ſet the perſon incarcerated at liberty, without a warrant from the Lords, even though the charge was ſatisfied before the incarceration.

XXVIII. Charges to ſet at liberty, albeit moſt ordinarily granted in ſuſpenſions; yet in the former or like caſes, the ſame may be granted without ſuſpenſion; yea upon evidence of any perſons being incarcerated any where, without an executed caption or act of warding; the Lords will ſummarily without citation, grant warrant for a charge to ſet at liberty.

XXIX. The fourth kind of ſuſpenſion, is, of the precepts of chancellary, upon the retours of heirs, for charging their ſuperiors to infeſt them; upon which (*charges*) no perſonal execution follows, but the ſuperior is paſſed by, and new precepts are granted againſt the ſuperiors ſuperior, to ſupply his vice. And therefore the legal remedy for ſuch ſuperiors, is, by ſuſpending the charges upon theſe precepts: but the ſuſpenſion muſt be upon reaſons inſtantly verified, as that the charger hath not performed that article of the retour, *faciendo domino ſuperiori quod de jure facere tenetur*. But if it be a reaſon to be proved, it is only competent by way of reduction of the retour or precept.

XXX. The laſt kind of ſuſpenſion, is, that which doth not proceed upon the juſtice of any reaſon of ſuſpenſion, but which the law hath allowed upon compaſſion and mercy of incarcerated debtors, who are not able to pay their debts, upon their aſſignation and diſpoſition to their creditors, of their whole means and eſtate, heritable and moveable, real and perſonal. This muſt proceed by way of action, calling the creditors, and bearing that the purſuer is incarcerated and in-

ſolvent; and that he is willing to aſſign and diſpone his whole means and eſtate, to his creditors, and to deliver to them all the rights and evidents he hath, or can command thereof: and thereupon beſeeching for liberty againſt perſonal execution only, and offering to depone upon what means and eſtate he hath, and what ſecurities thereof he is maſter of.

XXXI. This proceſs proceeding upon compaſſion of human miſery, and the deſign of the incarceration not being penal, but againſt defrauders or concealers of their eſtate; it uſes to be taken in ſummarily without going to a roll. Seeing there is no point of right to be diſcuſſed therein, eſpecially now when it is ſo long ere an ordinary action can came in by the roll. It is firſt called for taking of the incarcerated perſons oath upon his means and ſecurities; and after the oath is returned, it is called again for obtaining a decreet of liberty, containing a warrant to charge to ſet at liberty. But it can only be called and diſcuſſed *in præſentiâ*.

XXXII. The oath given *in ceſſione bonorum*, was only that the party had no other means or eſtate, than what was contained in the inventary produced, ſigned by him; and that he had made no diſpoſition nor aſſignation thereof, in prejudice of his creditors, after his incarceration. But by an act of Sederunt *Feb.* 8, 1688, the *formula* of this oath muſt be in theſe terms, "If he hath any lands, heritages, ſums of money, goods or gear belonging to him, more than is contained in the diſpoſition and inventary produced in proceſs; and if ſince his impriſonment he hath made any other diſpoſition, than that which is produced; and if he hath made any other before his impriſonment, and if he acknowledge that he hath made any other diſpoſition before his impriſonment, that he condeſcend upon the ſame: and alſo that he depone, if ſince his impriſonment he hath put out of his hands any money, goods or gear belonging to him. And the Lords do declare that if the purſuer ſhall deny, that he hath granted any other diſpoſition, and that his oath ſhall be thereafter redargued; the decreet of *bonorum* obtained by him, ſhall be void and null, and he ſhall never get the benefit of a *ceſſio bonorum* thereafter." The reaſon why the oath muſt be, "whether there be any diſpoſitions before the incarceration," is, becauſe the dyvour might have deſignedly denuded himſelf, and by colluſion with ſome one creditor, got himſelf in priſon, and ſo defraud all his other creditors (as frequently they enter only into priſon, when their oath is to be taken) and alſo becauſe the prior diſpoſition might be fraudulent otherwiſe. But the words will not extend ſo far as to exclude the benefit of *bonorum*, except in the caſe of recent diſpoſitions, and not old diſpoſitions, which it is preſumed the deponent had forgot.

XXXIII. The defences which are proper againſt this *ceſſio bonorum*, are. 1. From the oath, if it be not conform to the *formula*, Yet though he adject this quality, that he hath put nothing away during his incarceration, but what was neceſſary for his ſubſiſtance till ſentence; it will not exclude his liberation. 2. If any thing can be inſtantly verified redarguing the oath; becauſe the oath is not upon the reference of the defender, but upon the order of the judge; as if there can be any other recent diſpoſition produced, than what is acknowledged in the oath, or if the diſpoſition anterior to the incarceration be near the time thereof and ſo is preſumed colluſive. The reaſon why the defences at obtaining the decreet muſt be inſtantly verified, is, becauſe they ought to have been proponed, when the proceſs was called for taking the defender's oath; in which caſe the creditors might have had a term to prove. 3. It is a relevant defence, if the party hath not been truly detained in priſon, for a conſiderable time, that the creditors may make inquiry of any fraudulent conveyance, and that the *ſqualor carceris* may bring the debtor to ingenuity: for in that caſe only, it can be thought to be an act of commiſeration. 4. Thence alſo hath ariſen this defence, *viz.* That the creditors offer to aliment the debtor in priſon; which certainly cannot be underſtood, that the debtor, though alimented, can perpetually be kept in priſon, but only till full ſearch can be made, if any fraud be committed: and if offer of aliment

ment be made, the Lords modify the quantity, and cauſe inſert this quality, that if the aliment be not weekly paid on the day appointed, warrant is granted for a charge to ſet at liberty.

XXXIV. The law hath alſo appointed that magiſtrates, where dyvours are incarcerated, muſt not ſet them out, until they have the habit appointed to be worn by dyvours, as their outmoſt garment: and they ought to ſet the dyvour for ſome time, in the moſt publick time of the day, upon a place appointed for that purpoſe, commonly called the dyvour-ſtone. And theſe decreets bear, that the dyvour ſhall be no longer free from perſonal execution, than while that habit is upon him, when his clothes are on, and ſo viſible that all who converſe with him may ſee it. The reaſon of which ſeverity, is, to deter *Decoctores*, who laviſhly ſpend their eſtates, and continue trade, when they know themſelves abſolutely broken: and therefore the Lords exeem ſome from wearing this habit, upon their proper knowledge or famous teſtificates, that they became poor without ſuch faults.

XXXV. In all ſuſpenſions, there is a day aſſigned for the ſuſpender to cite the charger, and in the mean time the letters are ſuſpended: which day ought to be according to the diſtance of the parties, that there may be ſufficient time to uſe citation: but if a longer day be appointed, the charger may raiſe a ſummons for ſhortning that time, which therefore is called a *Prævento*, and comes in ſummarly as an incident proceſs.

XXXVI. Suſpenſion is the moſt general legal remedy againſt executorials, yet it doth not reach them all: for there is no ſuſpending of diligence for probation before ſentence, nor for ſuſpending of inhibition or arreſtment, upon account that the ground thereof is ſuſpended. Yet the ſuſpenſion has this effect, that arreſtments, though upon decreets, may be looſed upon caution; becauſe the ground of the arreſtment ſtands ſuſpended. Neither doth ſuſpenſion of the ground of arreſtment, exclude or delay the action for making forthcoming; but the party, whoſe goods and means are craved to be made forthcoming, may repeat the reaſons of ſuſpenſion, by way of defence, and may propone other defences, albeit not competent by way of ſuſpenſion, but which have the ordinary courſe of probation. Yea a decreet ordaining moveables or ſums to be made forthcoming, hath its full effect by poinding or adjudication, albeit the ground of the arreſtment was ſuſpended, whether before or after the arreſtment: becauſe the reaſons of ſuſpenſion might have been repeated, and if they were not repeated, they were competent and omitted, if the decreet was *in foro*; and though it was not, yet unleſs it be ſuſpended, execution may proceed thereon.

XXXV. Suſpenſion doth not hinder real execution by adjudication. Yet in the ſame way as in arreſtment and proceſs to make forthcoming; ſo in the proceſs of adjudication, the reaſons of ſuſpenſion may be repeated by way of defence. But if they be not inſtantly verified at the diſcuſſing of that action, albeit the reaſons be founded on other men's writs, or on matter of fact requiring no writ; the reaſons of ſuſpenſion though relevant, will be repelled *illo loco*, but reſerved *contra Executionem*; in reſpect that now adjudications within the year, come *in pari paſſu*; and in caſe of the diviſion of adjudged lands, the creditors have acceſs for chooſing where they will have their ſhares, according to the order of the dates of adjudication, in caſe in a proceſs of ſale there be not found buyers. And when appriſings were in uſe, the charges to enter heir, nor the denunciation of lands or other heretages to be appriſed, were not to be ſuſpended: but if at the meſſengers proceeding to appriſe, a ſuſpenſion of the ſums were produced, the meſſenger (unleſs he had aſſeſſors appointed by the Lords) did always repell the ſame and all other defences; unleſs appriſing were expreſly and *nominatim* ſuſpended, which was only paſt upon reaſons ſpecial againſt the appriſing, and not only againſt the debt appriſed for: and then the meſſenger ought to have forborn to appriſe, but might have adjourned the diet of appriſing, to a competent time, that the Lords might diſcuſs the ſpecial reaſons of ſuſpenſion againſt the appriſing, which they would do *incidenter*; otherwiſe the meſſengers proceeding, were puniſhable

puniſhable as for a contempt. The reaſon of all which was, that meſſengers were not ſkillful judges, but appriſed *periculo petentis.*

XXXVIII. It remains then that the proper effect of ſuſpenſion, is, to ſtop charges or denunciations of horning, or the effects of denunciation; as to give *perſonam ſtandi in judicio*; or to exclude eſcheat after relaxation; or to ſtop poinding, except on *(ſubſequent)* decreets of forthcoming; or to ſtop the entering of vaſſals by others than their immediate ſuperiors, till the ſuſpenſions be diſcuſſed.

XXXIX. So much may ſuffice as to the paſſing of bills of ſuſpenſion. As to the diſcuſſing of ſuſpenſions, the form thereof, wherein it differs from the diſcuſſing of ordinary actions, is thus. The charger againſt whom the ſuſpenſion is obtained, after the day of compearance in the ſuſpenſion is paſt, gives a ſhort copy of the ſuſpenſion to a clerk, and cauſeth call it in the Outer-houſe. If none compear for the ſuſpender, proteſtation is admitted of courſe.

XL. If an advocate compear for the ſuſpender, then the clerk aſſigns a ſhort day to him to produce the principal ſuſpenſion; and at the ſame time the charger may give him out the charge, being the decreet, or ſentence obtained. The firſt diet being come, the clerk calls the copy again, and aſſigns a ſecond ſhorter time, with certification that if he produce not, proteſtation will be admitted: and then, he calls the third time, and if the principal ſuſpenſion be not produced with the charge (if it was given out in time) proteſtation is admitted. All which is marked by the clerk on the back of the copy, and being put in the minute-book and read, it may be extracted the next day after. But during that time, the production of the principal ſuſpenſion, with the charge to the party, clerk, or keeper of the minute-book, will ſtop the proteſtation. The like order is alſo uſed for getting back of advocations, and the inſtructions of the principal cauſe, if it be given out when the copy is firſt called. *

XLI. The charger's advocate at the giving out of the charge, writeth on the back thereof, the day that it was given out, and ſets his name thereto: and is not obliged to receive the ſuſpenſion, unleſs the ſuſpender mark on the proceſs, that he hath ſeen and returned the ſame, expreſſing the date of the return, but may take out his proteſtation, as if the principal were not produced. **

XLII. According to the date of the return of the charge, the ſuſpenſion is inrolled: and when it comes to be diſcuſſed, the cauſe being called, the charger produceth the copy marked by the clerk as aforeſaid, and thereupon craveth a proteſtation from the Ordinary, which he admits, if the ſuſpender's advocate produce not. Yet ſometimes, the charger's advocate will hold the copy for a principal, and the ſuſpender will repeat his reaſons of ſuſpenſion: which though they be not admittable upon a ſhort copy, in ſtrict form (becauſe all reaſons of ſuſpenſion both principal and eiked, ought to be ſet down in writ, and given to the charger to ſee) yet frequently, the charger will rather diſpute the cauſe, than take a proteſtation, which is eaſily ſuſpended again: and therefore will anſwer to the reaſons as verbally repeated.

XLIII. But if the ſuſpender compear, and the charger do not inſiſt, he may produce the principal ſuſpenſion, and crave the letters to be ſuſpended, "Ayand till the charge be produced." Which puts him *in tuto*, that no proteſtation can be taken upon the copy, till the charge be produced. Yea if the ſuſpender extract and produce the charge, and refer his reaſons to the Lords; they will adviſe the ſame: and if they find the reaſons relevant and proved, will ſuſpend the letters *ſimpliciter*. In which caſe the decreet of ſuſpenſion is as other decreets in abſence and may be reduced upon a ſummons of reduction: wherein the Lords will reconſider the reaſons, and hear the parties debate thereupon; and may recall what they formerly did, albeit *ſuper eiſdem deductis:* which they cannot do in decreets upon

* The preſent method of forcing production of letters of advocation, or ſuſpenſion is by putting up a proteſtation in the minute-book which is extracted if the letters are not produced; and if they are, the party who called for them gives them out with the charge and inrolls after return in common form.

** After a proceſs is given out, a caption is granted of courſe, if it be kept longer than the time allowed.

upon compearance. For when the defender is abſent, the Lords do not ſo accurately conſider the cauſe; ſeeing there is a remedy: and likewiſe, becauſe, albeit they find the reaſons relevant as before, yet the party may elide the ſame by relevant anſwers and duplies.

XLIV. If both charger and ſuſpender compear, and the principal ſuſpenſion be produced; then the charger doth briefly repeat his charge or decreet ſuſpended, and declares what he inſiſts in. And if there be any thing general, he uſeth to give a condeſcendance in writ, at the beginning, to be ſeen with the charge; which therefore is called the ſpecial charge. And if the charge have in it many members, he declares what points he inſiſts in, *primo loco*: and if he do not, the ſuſpender may inſiſt upon any reaſon of ſuſpenſion he pleaſeth, againſt any of the points.

XLV. The ſuſpender in repeating his reaſon, ſhould condeſcend by the number, what reaſons it is: and whether it be libelled or eiked: for ſuſpenders may add or eike to their libelled reaſons, if they will; ſo that if the reaſon they repeat, be neither eiked nor libelled, in ſtrict form it may be repelled: or if the eiked reaſon hath not been at firſt produced, and ſeen with the ſuſpenſion, it ought not to be received. Yet many times the Ordinary will indulge that favour, and cauſe the charger either anſwer it inſtantly, or take it up till a day, to ſee: which he may do, without expunging the cauſe out of the roll; but may call the cauſe again at the day appointed: and if the charger hath ſeen the reaſons, he may proceed.

XLVI. In like manner, reaſons of ſuſpenſion ought to be inſtantly verified by writ; unleſs they be referred to the chargers oath: in which caſe, the chargers procurators to haſten the proceſs, will take a day to produce the charger to give his oath. But if the reaſon of ſuſpenſion be founded upon a writ, which is not the ſuſpenders own writ (as when cautioners ſuſpend upon diſcharges granted to the principal debtor) the ſuſpender will get a term to prove; as he alſo will, when the reaſons of ſuſpenſion conſiſt *in facto*, and are to be proved by witneſſes.

XLVII. The firſt point of debate in ſuſpenſions, is, upon the relevancy and verification of the reaſons; and the next point is, upon the competency of the reaſons: for many reaſons are competent by way of reduction, that are not competent by way of ſuſpenſion; becauſe ſuſpenſion ſtops the execution of a decreet already obtained, and therefore the execution ſhould not be delayed, except upon reaſons relevant, and of a ſhort probation; but the execution ought to proceed, and if the decreet whereupon execution paſſed, be reduced, all that hath been taken away by the execution, will be recovered. So a reaſon upon minority and leſion, is not receivable by way of ſuſpenſion, but by reduction; nor yet reaſons upon inhibition, interdiction, iniquity, nullity, or upon any clauſe irritant, not being declared (albeit it bear to take effect without declarator) except in few caſes.

XLVIII. If the reaſon of ſuſpenſion be ſuſtained, then the charger propones his anſwer to the reaſon; it is termed a reaſon, to difference it from defences proponed in ordinary actions: becauſe a reaſon of ſuſpenſion, is a defence in the principal cauſe, and the anſwer is a reply thereto. The anſwer being proponed, is firſt debated, as to the relevancy, and competency thereof (but it needs not be inſtantly verified; becauſe the charger may delay himſelf) for many things are not competent by way of anſwer, which are relevant; as upon interdictions, inhibitions, minority, and moſt nullities, and clauſes irritant, and failzies, which require reduction. But if the charger have a reduction, and will hold the production thereof ſatisfied, he may repeat the reaſons of reduction by way of anſwer to the reaſon of ſuſpenſion. If the anſwer be ſuſtained, the ſuſpender may propone his reply, which doth not conſiſt in any alledgance againſt the relevancy or competency of the anſwer; but in ſome diſtinct writ, clauſe or fact, eliding the anſwer, in the ſame way as the anſwer did elide the reaſon: and ſo the charger inſiſts

in a duply, and the ſuſpender may inſiſt in a triply, and the charger in a quadruply, *&c.*

XLIX. Albeit the ſuſpender be obliged to verify his reaſons of ſuſpenſion inſtantly; yet he needs not ſo inſtruct his reply; becauſe that riſeth upon the chargers anſwer, and therefore he will get a term to inſtruct the ſame, or his triply.

L. Some reaſons of ſuſpenſion do not conclude to ſuſpend the letters *ſimpliciter*, and ſo to take away the decreet ſuſpended for ever; but only to ſuſpend the ſame for a time: and then the decreet of ſuſpenſion bears, "the Lords ſuſpend the letters ay and while, *&c.*" Otherwiſe (when the reaſons conclude ſo, and are ſuſtained) the decreet bears, "the Lords ſuſpend the letters *ſimpliciter.*"

LI. If in diſcuſſing the ſuſpenſion, there be nothing admitted to be proved in the future; then decreet of ſuſpenſion follows (which is the common name both of decreets in favour of ſuſpenders, and of decreets in favour of chargers) whereby the Lords either find the letters orderly proceeded, ſimply, or ay and while ſuch a thing be done. And ſometimes the Lords ſuſpend the letters for a part, and find the letters orderly proceeded for the reſt; or otherwiſe the Lords ſuſpend the letters *ſimpliciter.*

LII. If any point be admitted to be proved, either of the reaſons of ſuſpenſion, or of the anſwer, reply, duply, *&c.* whether it be in favour of one of the parties only, or of both, when they have different points to be proved; then litiſ-conteſtation is made, and an act muſt be extracted, which is an act of litiſ-conteſtation: but ordinarily in ſuſpenſions there is a preſent decreet.

F I N I S.

APPENDIX.

AFTER the ſecond edition of the Inſtitutions of the Law of *Scotland*, with the alterations from, and additions to the ſame, were paſt the preſs; there was ſeveral Statutes enacted in the fourth Seſſion of this current Parliament 1693 of King *William* and *Queen Mary*, making many alterations in our former cuſtoms, partly in the matter, and partly in the manner of procedure: which occurring before this treatiſe went abroad, I thought it convenient to give a ſhort account of them.

I. Whereas formerly diſpoſitions of lands or annualrents, did contain obligements upon the diſponer, to grant infeftments to the acquirer, either to be holden of him, or from him of his immediate ſuperior, by reſignation or confirmation; and for that effect to grant procuratories of reſignation, and precepts of ſaſine, and to renew the ſame ſo oft as need were, and with all containing procuratories and precepts: yet if either the diſponer or purchaſer died before reſignation were made, or before ſaſine were taken on the precept, the procuratory and precept were eſteemed to become void, as being mandats failing with the mandant or mandatar: whereas indeed ſuch mandats do only fail, which are revokable at the pleaſure of the granter, and continue no longer than his pleaſure, and therefore expire by his death; which ought not to be extended to procuratories of reſignation and precepts of ſaſine, both which are irrevokable. Yet acquirers were put to great expences, in regard that ſuperiors were not obliged to receive upon the procuratory; and leaſt the purchaſers might be prevented, they did ordinarily take ſaſine upon the diſponers precept: and if before they agreed with the ſuperior, either the diſponer or purchaſer happened to die, there was a neceſſity of a proceſs againſt the repreſentatives of the diſponer, to enter to the fee (by being ſerved heir therein, and infeft thereupon) and to renew procuratories or precepts to the purchaſers, their heirs or aſſignies.

For remedy whereof, a Statute was made, *act* 35. *Parl.* 1693, declaring, that procuratories or precepts, made, or to be made, ſhould be effectual, though the diſponer or purchaſer were dead before reſignation were made, or infeftment taken; and that not only in favour of the heirs, but alſo of the ſingular ſucceſſors: providing their progreſs were inſert in the inſtruments of ſaſine. But there are excepted precepts of *clare-conſtat*; becauſe by keeping up theſe, the caſualities due to the ſuperior might be ſhunned.

This Statute will remedy a frequent inconveniency; for it was ordinary for buyers, though they might hold of the ſuperior, to take only infeftment holden of the diſponer; and then to diſpone agāin to others, who in the ſame manner took infeftment holden of the firſt purchaſer, and ſo forth to ſubſequent purchaſers: whereby the proprietar might have very many ſuperiors, all holding baſe. But by this Statute the proprietar might take infeftment from the firſt ſuperior, and thereby evacuate all the intermediate ſuperiors; for where there is a procuratory of reſignation for an infeftment from the diſponers ſuperior, and a precept of ſaſine to be holden of the diſponer himſelf, albeit the purchaſer take infeftment on that precept, yet ſo ſoon as he obtains infeftment from the diſponer's ſuperior, the infeftment holden of the diſponer, becomes void; ſeeing the ſame fee, cannot at the ſame time be holden of different ſuperiors. Yet if either of the infeftments be found null, the proprietar may defend himſelf with the other; becauſe in that caſe, there are not two infeftments. This Statute was prepared, and brought into the Parliament, by the Lords of Seſſion: and it does not only extend to procuratories of reſignation, and precepts of ſaſine to be granted hereafter, but to reſignations or ſaſines to be (*made or taken upon procuratories or precepts already*) granted: becauſe it is declaratory; declaring, that procuratories of reſignation, and precepts of ſaſine, do not fall under that general rule, *mortuo mandatore*,

datore, &c. *perimitur mandatum*; which ſhould only be underſtood of ambulatory mandats, enduring no longer than the pleaſure of the mandant, ſo that his pleaſure ceaſeth by his death, as well as by other ways of revocation: but procuratories of reſignation and precepts of ſaſine are irrevokable mandats, to the behove of the mandatar; and they are no more revokable than aſſignations, which by their nature and ſtile are procuratories by the cedent to the aſſigny *in rem ſuam*: for debtors are not obliged to pay to any other but the perſons mentioned in the obligation, or their heirs (which *fictione juris* are eſteemed the ſame perſons with the creditors) and therefore unleſs the obligement bear expreſsly to aſſignies, the debtor is not the aſſignies debtor; and ſo the aſſigny obtains payment as being the procurator or mandatar of the creditor; yet the mandat is not revocable by the death of either cedent or aſſigny, even by our own former cuſtom.

II. There is another important Statute, paſt in the ſame Seſſion of Parliament, prepared and brought in by the Lords, taking away the difference betwixt public and private or baſe infeftments *. For infeftments were eſteemed private latent and ſimulat *retentâ poſſeſſione*, when the perſon infeft was not put in poſſeſſion, the infeftment paſſing only between the diſponer and the perſon infeft: but if the infeftment did proceed from the diſponers ſuperior by reſignation or confirmation; then the preſumption of ſimulation for want of poſſeſſion ceaſeth; becauſe ſuperiors uſe not to grant ſuch infeftments, but upon compoſitions. And therefore infeftments granted by the diſponers ſuperior were called public infeftments, and were effectual from their dates; but the private or baſe infeftments were not effectual, till the preſumption of ſimulation ceaſed, either by natural poſſeſſion, or by uplifting mails and duties, or by proceſſes for obtaining theſe duties: for thereby alſo the preſumption of ſimulation was excluded, by a ſtronger preſumption, that the diſponer would not ſuffer his tenants to be diſtreſſed upon a ſimulat infeftment. And upon the ſame ground, baſe infeftments of annualrents, were not excluded by poſterior public infeftments, interveening between the date of the baſe infeftment and the firſt term of payment: becauſe during that time, the annuelrenter could not have payment, or action for payment of his annualrent. But this was not extended to baſe infeftments of property, in the ſame time, (i. e. *between the date and the firſt term*) becauſe thoſe gave immediate warrant to enter in poſſeſſion, though it were but by the acquirers holding of courts, as proprietar. The excluſion of ſimulation in baſe infeftments, was chiefly ſuſtained, upon diſcharges granted by the perſons infeft, to the tenants, upon infeftments of property, or by diſcharges of annualrents granted to the proprietars; which diſcharges might eaſily be made *ex poſt facto:* for diſcharges to tenants require no witneſſes, albeit they be not holograph; and holograph diſcharges of annualrent are ſufficient: and yet thereby the dates were not certain, but in either caſe they might have been antedated, or never delivered till competitions aroſe with poſterior public infeftments.

By theſe ways of validating baſe infeftments, that they might not be excluded by poſterior public infeftments; before the baſe infeftments obtained poſſeſſion, or action for poſſeſſion; the rights of lands which are of greateſt import, became very uncertain, and liable to probation by witneſſes, who might inſtruct poſſeſſion, though there were no writ to inſtruct the ſame; and thereby alſo many tedious and expenſive actions and competitions aroſe about the rights of lands or annualrents. And albeit all infeftments might have been accounted public, and neither private nor ſimulat after the act of *Parl.* 1617. *c.* 16. Ordaining all ſaſines to be regiſtrate, in manner expreſſed in that act, and declaring all ſaſines not ſo regiſtrate to be null, that not only the purchaſers, but all creditors might know the condition of their debtors, as to their rights of lands or annualrents, which are

* The act 13. P. 1693, here referred to, declares, "That all infeftments, whether of property, of annual-" rent, or other real rights, whereupon ſaſines for hereafter ſhall be taken, ſhall in all competitions, be preferable " and preferred, according to the date and priority of the regiſtrations of the ſaſines; without reſpect to the diſtinc-" tions of baſe and public infeftments, or of being cled with poſſeſſion or not cled with poſſeſſion, in all time " coming."

are the chief grounds of credit; ſo that no infeftment regiſtrate in public regiſters, patent to all the leidges, ſhould after the regiſtration, have been accounted private or latent, nor was poſſeſſion thereby neceſſary to accompliſh it: yet the act for regiſtration of ſaſines, not having at firſt attained its full effect, the diſtinction of public and private infeftments was continued until this time; and accordingly purchaſers and creditors acted and reſted upon the difference of public and baſe infeftments. And therefore a Statute could not juſtly be extended to infeftments already taken; ſo that this Statute now paſſed, doth only extend to infeftments and ſaſines to be taken hereafter. But it ſtatutes, that in all actions and competitions of infeftments, they ſhall be valid and preferable according to the dates of their regiſtration, and not according to the dates of the ſaſine; becauſe it is the regiſtration, which takes away the preſumption, of a baſe infeftment's being private, latent, or ſimulat; whereby a baſe infeftment being regiſtrate before a public infeftment, will be preferred thereto, albeit the date of the public ſaſine be prior to the date of the baſe ſaſine. The reaſon whereof is, that the ſecurity of thoſe who intend to purchaſs, or lend their money, ſhould not depend upon the dates of the ſaſines affecting their authors lands or annualrents; for theſe dates they cannot know, until they ſee the regiſters, ſeeing ſaſines are only declared null, which are not regiſtrate within ſixty days of their dates. And the time and order of their being inſerted in the regiſters, did depend upon the keepers of the ſeveral regiſters, who for their own profit, keeped the regiſters open, without inſerting the ſaſines preſented to them: ſo that it was in their power, to take in ſaſines, even though preſented after the threeſcore days, and might inſert the ſame in the regiſter, as preſented within the threeſcore days: ſo that while that power continued, no purchaſer or creditor could be ſecure, if they did not delay their bargains till the regiſters were filled up, which oft-times was for the ſpace of many months.

This Statute doth not take off all difference between public and baſe infeftments: for infeftments are called baſe, not from the preſumption of ſimulation by the latency thereof, but becauſe infeftments holden of the diſponer's ſuperior are higher and nearer the infeftments holden of the King, than the infeftments holden of the diſponer, theſe being lower, baſer, and further from infeftments holden of the King, which are the only noble infeftments, and in reſpect of which, all infeftments holden of ſubjects, are but baſe infeftments, not only lower, but ignobler than theſe holden of the King, whoſe immediate vaſſals only are called *vaſſalli ligii*.

The diſtinction of public and baſe infeftments hath ariſen of old, when moſt lands in *Scotland*, were immediately holden of the King, in great baronies or tenements, and were generally ward-holdings, and are ſtill preſumed to be ſuch, unleſs the contrary appear by their tenors; and therefore few of the Kings vaſſals could give ſubaltern infeftments, without the Kings conſent or confirmation, until the act of Parliament warranting ward-vaſſals to ſet their land in feu by infeftments: which hath received many variations, as is ſhown *lib.* 2. *tit.* infeftments of property. But then ſubaltern infeftments became frequent, by the Kings granting blench infeftments, and by conſenting to, or confirming of ſubaltern infeftments of ward-vaſſals, for by that general conſent, that ward-vaſſals might feu their lands to ſub-vaſſals, not only were infeftments holden of the King continued to be called public and noble; but all infeftments holden of the diſponers immediate ſuperior, and not of himſelf, were prefered to infeftments holden of the diſponer; and theſe were called baſe, albeit the baſe infeftment were prior in date, unleſs there had appeared ſome poſſeſſion, or action for poſſeſſion; with this incongruity, that an infeftment holden of the diſponer, was a baſe infeftment, and yet an infeftment upon that ſame purchaſer's reſignation, holden of his author, is accounted a public infeftment, and ſo more noble than the infeftment of his immediate author.

Albeit the preſumption of latency and ſimulation of infeftments holden of the diſponer, be taken away in time coming, by this Statute: yet the exception

tion of ſimulation, as being to the behove of the diſponer, is not taken away, but only the preſumption that it is ſo by want of poſſeſſion. But the being to the behove of the diſponer or any other perſon, may be proved by writ, or by the oath of the perſon infeft, and even by pregnant preſumptions ariſing, and inferred from matters of fact, by writ, oath, or ſometimes by witneſſes: amongſt which, the diſponers continuing in poſſeſſion, eſpecially if he have continued long after his diſpoſition, is amongſt the moſt pregnant evidences of ſimulation or truſt.

III. There was a third Statute prepared by the Lords, and paſt in Parliament, to prevent the inconveniency by keeping the regiſters open, and ſo being in the power of the keepers thereof, to evacuate the whole deſign and benefit of that excellent Statute for regiſtration of rights, that might affect lands. For which effect, there is an article in the act of regulations, *Parl.* 1672, *article* 32. appointing the keepers of regiſters, to have minute-books, and that the ſame be quarterly collationed with the regiſters, by the Sheriffs and Bailies, where the regiſters are keeped, and two Juſtices of Peace, under the pain of 100. *l. toties, quoties* they neglect to collation, and deprivation of the keepers, and paying damage to parties, in caſe they fail in their duty. But though this article of the act be not repealed, yet it hath been totally neglected: and though it had been obſerved, it could not have cured the inconveniency; ſeeing the keepers of the regiſters might eaſily tranſcribe theſe minute-books written by themſelves or their ſervants, yea they might tranſcribe whole books of the regiſter, and ſo take in and leave out, upon large compoſitions. Therefore the Lords by an act of Sederunt *July* 15. 1692. Printed and publiſhed at the market-croſs of *Edinburgh*, ordained that all keepers of regiſters, ſhould keep minute-books of their ſeveral regiſters: and that immediately upon the preſenting of any writs to be regiſtrate therein, they ſhould ſet down the name and deſignation of the perſon preſenting, and the day and hour when he preſented the ſame, expreſſing the general deſignation of the lands or other rights: and that the minute of each writ preſented, ſhould be ſigned by the preſenter, and by the keeper; and that the keeper ſhould inſert the writs preſented in the ſame order as they are in the minute-book, under the pain of deprivation and damages: conform to the ſaid act of regulation. And the Lords did preſent the like act to the Parliament, that it might be the more punctually obſerved, which accordingly is paſſed act 14th Parliament 1693. This act doth fully compleat the deſign of the acts for regiſtration of ſaſines, reverſions, allowances of appriſings and adjudications, hornings, inhibitions, and interdictions; all which may affect lands, not only againſt the granters and their heirs, but even againſt ſingular ſucceſſors: and it is not poſſible for the keepers of the regiſters, to alter theſe minute-books, in reſpect the minute of each right is ſigned by the preſenter thereof, which minute is to be made patent to all the leidges *gratis*; which in ſo far may ſeem an alteration of the act of regulation, giving an allowance in money, for inſpection of the regiſter; but yet this is only making free the inſpection of the minute-book.

IV. There are ſome other laws relating to the Seſſion, and the manner of adminiſtrating juſtice therein, paſſed in the ſame Seſſion of Parliament. The firſt of theſe *act 17th. Parl.* 1693. was alſo prepared by the Lords, and is to this effect: that the Lords ſhould name weekly an Ordinary, to prepare concluded cauſes, and to hear the parties condeſcend upon the points wherein they inſiſt, and the particular articles in the writs, on which they inſiſt for probation of the points admitted to probation, by the acts of litiſ-conteſtation, and of the teſtimonies of the particular witneſſes, and of the words in theſe teſtimonies, and to make a minute thereof in writ; and that according as the cauſe ſtands in the roll of concluded cauſes, and are ready to be adviſed. Which auditors, are to put the ſame in a minute, to be read in preſence of the parties and advocates, before the concluded cauſe be adviſed; whereby concluded cauſes might be the more ſpeedily diſpatched. But this act doth not extend to acts before anſwer, whereby,

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becauſe the alledgances of parties, are contrary in matter of fact, (ſo that two ſingle witneſſes might carry the cauſe, which might be of great inconveniency.) Therefore the Lords in theſe caſes, allow either party, to adduce ſuch a number of witneſſes, for proving ſuch points of fact, as the Lords appoint to be inſerted in the act: and therefore ſuch acts are not properly concluded cauſes, and ſo ought not to be in that roll; becauſe not only the probation, but the relevancy is undetermined, and muſt be diſputed before it be determined; for though there be ſome arguing in the act, yet more ought not to be excluded, after the probation adduced for the matter of fact.

V. The Lords did alſo prepare another act, as to the manner of ſigning of interlocutors by the Chancellor, or Preſident. And that in reſpect, that the clerks did draw interlocutors, as they conceived they were paſſed by the Lords, which could not be read immediately after they were written, and adjuſted to what was truly done, without giving a great hinderance to the diſpatch of interlocutors; therefore they were read to the Chancellor, or Preſident, daily after the Lords parted: and becauſe the clerks ſometimes miſtook what paſſed, ſeeing they got no informations before, as the Lords did; there was a neceſſity to adjuſt the minutes to the interlocutors, as they verbally paſſed (whereby there behoved ſeveral times to be alterations of the minutes, as the clerks had firſt drawn them) therefore the Lords reſolved to ſtay together, after the lawyers and others were parted, till they ſhould jointly adjuſt the minutes, and put them *in mundo*. This was ſo far enlarged by act 18th of Parliament 1693, that all interlocutors to be ſigned by the Chancellor or Preſident, are ordained to paſs in this manner, *viz.* that the queſtion to be voted, ſhall be drawn and read, and agreed to by the Lords before it be voted: and the interlocutor to be paſſed thereupon, is to be written on a paper apart, to be adjuſted by the Lords, and then tranſcribed on the proceſs: and that either immediately, as the interlocutors paſs, or thereafter, while the Lords are ſitting in Judgment. By this act, the Lords will be obliged to attend, till the interlocutors be adjuſted and tranſcribed on the proceſs, after the advocates and parties are diſmiſſed; and interlocutors cannot be reported the day they are made: which hath this advantage, that if any thing be repreſented for altering the ſame, it may be more conveniently conſidered before pronouncing, than after; and will alſo have this advantage, that in reductions, there will appear no deletions, or interlining of interlocutors, and they will all remain fixed upon the proceſs.

VI. There are two other acts in relation to the Seſſion, paſſed in the ſame Seſſion of Parliament, which were not prepared by the Lords, but by the committee of ſecurity; The one relates to reports, and the other to the hearing and adviſing proceſſes in the inner-houſe.

The act concerning reports *Parl.* 1693. *c.* 20. is to this effect, that in all diſputes taken to interlocutor, to be reported in preſence of the Lords, the advocates for either party, muſt ſet down their alledgeances, and ſign the ſame; and likewiſe, the reporter muſt ſign the whole. The certification in the act is, that the advocate who refuſes to attend, and prepare the report, ſhall be excluded the houſe for a month: for he that inſiſts, will not fail to attend: and if he do not inſiſt, there can be no report.

This act will put the Lords to a great deal of more pains then formerly they were at; for then the purſuers advocate, had the ſight of the minutes of the diſpute, and of the interlocutor of the Ordinary, if any were; (for if the Ordinary apprehend the point to be dubious, the minutes bear that he will give the Lords anſwer: but if he give his own interlocutor, than upon conſigning of an amand, he muſt alſo give the Lords anſwer, unleſs the alledgance be evidently impertinent, and yet the party may repreſent the ſame by bill to the Lords, if he think fit) and after the purſuers advocate had peruſed and adjuſted the minutes, as he pretended he had (*argued*,) then the defender's advocates did the like; and if they differed in the points to be reported, the Ordinary behoved to adjuſt the ſame,

ſame, which did much delay reports: and the minutes were frequently indiſtinct and large; for either party related the caſe, and repreſented the merits or favour of it, before they came to a formal and diſtinct point to be determined; yea; they related moſt of the diſpute which was at the bar, whereas they ought only to have inſiſted in the points at interlocutor. But by this act, the Ordinary muſt intimate a diet when the advocates may attend him, to adjuſt the minutes, either in the houſe in an afternoon, or at his chamber. And therefore the clerks in the Outer-houſe ought not to write on the proceſs, but on a paper apart, until the points to be reported be adjuſted. And the Ordinary ought to cauſe ſet down the formal points that are to be determined, in a larger character, and to cauſe expreſs them in the terms of law; ſpecially, and not in the general terms of alledgeances, and ſet them in the due order the law requires.

Theſe ſpecial terms of law, and the order thereof, conduce exceedingly to the diſpatch of juſtice, and to the obtaining of diſtinct interlocutors. As 1. If there be any declinator, proponed of any probability; the Ordinary ſhould go no further, till that declinator be determined. 2. If other dilators be proponed, there can be no recourſe to declinators: for *primus actus judicii eſt judicis approbatorius.* The order of proponing dilators, is, firſt, againſt the form of the executions: for if theſe be not conform to law, it is in vain to enter upon the cauſe. And ſince executions muſt be ſigned by the executor and witneſſes, which ought to be recently, that it may not depend upon their memory *ex intervallo,* there can be no altering or mending of the executions, as was ordinary before, when the advocates uſed to mend the executions at the bar, and offered to abide by the verity thereof, as amended; which was then received, but cannot now be admitted. And if the defender paſs over any defect or informality in the executions, and proceed to any other dilator or peremptor, he cannot return to quarrel the executions, nor will it be a nullity of the decreet or act, in the ſecond inſtance. 3. The next dilator in order, is upon the title of the purſuer, or of the defender. And albeit the Ordinary allow the parties to relate the caſe, and the merits of it on both ſides, before they come to this defence; yet in the minutes, nothing thereof ſhould be mentioned: for the reporter hath read the proceſs, when he reports the ſame, and relates ſummarily the contents thereof, and the points inſiſted on, which he muſt now do in preſence of parties and advocates. 4. The next dilator, is upon the concourſe of parties neceſſary to be called, if any of theſe be not called: which uſes to be expreſſed in theſe terms, "all parties having in-"tereſt are not called." 5. The next dilatory defence, is the competency of the proceſs: for many caſes may be relevant in one proceſs, that will not be competent in another. And therefore it is improper to diſpute the relevancy, if there be any objection againſt the competency: ſo that if any objections againſt the relevancy be proponed, there is no place to return to the competency. 6. The laſt dilatory defence, is the irrelevancy, whether it be of the libel, or of the reaſons of ſuſpenſion, reduction, or preference.

This defence of irrelevancy is but a dilator, albeit it may aſſoilzie from that inſtance, and it hath the effect of a peremptory defence, when the other party hath no other legal mean, to attain the concluſion propoſed.

All theſe dilatory defences, ought to be minuted and reported in the order and terms of law; and the reaſons ſubjoined to each of them ſeverally; and all the points reported, ought to have their number expreſſed, by numeral figures, whereby the clerks in ſtating the queſtion, need not reſume the words, but ſtate it thus, "whether ſuch a point, being in the 1ſt, 2d, 3d. Defence, *&c.* ſhould "be ſuſtained or repelled?" and then the interlocutor would follow clearly, "The Lords ſuſtain or repel the 1ſt, 2d, 3. defence *&c.*"

In theſe dilatory defences, there is nothing in fact offered to be proved: for they are all objections, and not exceptions; and therefore there ought to be no replies, albeit there may be many mutual anſwers, arguing the point of law. And none of theſe dilatory defences are to be admitted; unleſs they be inſtantly verified.

verified. And the order of diſcuſſing doth neceſſarily require, that after any peremptory defence proponed, there can be no recourſe to dilators: neither can dilators be ſpun out in length to make delay; but after the firſt interlocutor upon dilators, none will be admitted, but thoſe which are proponed at the next calling.

If a dilator be proponed *peremptoriè*, that is, ſo as if the proponer fail in the probation, he loſes the cauſe; then it ceaſes to be of the nature of a dilator, and becomes a peremptor, as if he offer to improve the executions *peremptoriè*.

The next kind of defences, are theſe which are called peremptory defences; becauſe they elide the libel, though it be competent, relevant, and orderly proceeded. Peremptory defences, do always conſiſt in points inſtructed, by writs produced, or offered to be proved, by ſuch probation as the law requires in ſuch matters of fact; and therefore in minutes and reports, the peremptors ought to be diſtinctly expreſſed, by larger characters.

Whence the diſpute ariſes, firſt, whether thoſe matters of fact be competent by way of exception, or only by reduction and declarator; and next, whether they be relevant to elide the libel, or the reaſon of ſuſpenſion, or of reduction, or of preference; but the anſwers made to the exceptions, ought not to be termed replies; for they are only objections againſt the exceptions; but replies are matters of fact, eliding the defence, in the ſame way as the defence elides the libel, *&c.* And the like objections are againſt the competency or relevancy of the replies, as were againſt the exceptions, and they are but objections, albeit they be anſwers to the replies; but the duplies are matters of fact, for eliding the replies: ſo that both the replies and duplies, muſt either be inſtructed by the writs produced, or terms muſt be aſſigned to either or both parties, as the matter does require. And ſo in minutes and reports, the replies and duplies ſhould be expreſſed in larger characters, and the arguments *hinc inde*, for and againſt them, ſhould be ſubjoined to each of them ſeverally; and if they be more in number, they ſhould be expreſſed by numeral figures; whereby the clerks in ſtating the queſtions, need not repeat the words, but only ſay, "whether ſuch an "exception be competent and relevant in the manner of probation offered, or "not?" Whereupon the interlocutor muſt be, that the Lords "ſuſtain the ex-"ception, or repel the ſame:" and if the exception be ſuſtained, then the reporter proceeds to the reply; and if the reply be ſuſtained, to the duply, *&c.* wherein the queſtions and the interlocutors are to be in the like terms.

The reporter may moſt conveniently, and with leaſt ground of ſuſpicion, cauſe the clerks read the exceptions in order, and ſo the replies and duplies, *&c.* But there is no neceſſity of reading the objections and arguments, but only to repeat the ſum of them; ſeeing the enlargements thereof, may be communicate to the Lords by their informations, put in their boxes the night before the report is made.

VII. The other act, *c.* 26. of this laſt Seſſion of Parliament, ordains all reports, and all bills, and the written anſwers thereof, to be reaſoned and determined with open doors, and likewiſe all diſputes *in præſentiâ*, to be with open doors: ſo that the parties and their advocates, and all others that pleaſe, may be preſent, when the Lords are arguing and voting.

This is a great alteration from the article of the inſtitution of the College of Juſtice *Parl.* 1537. *c.* 66. inſtitute by K. *James* V. ordaining, that advocates ſhall remove with the parties, after diſputing their matters at the bar, and re-enter again, at the giving and pronouncing of the interlocutors. Yet the Statute bears, that none may ſpeak, whether procurators, or parties, otherwiſe they are to be ſent preſently to priſon.

This act will make the Lords more liable to the irritation and malice of parties, when they hear them reaſon and vote againſt their intereſt; and eſpecially in the moſt dubious caſes, *in apicibus juris*, wherein parties can leaſt know what is according to law; and when their advocates will extend their abilities and elo-

quence for their clients, which will hardly ſuit the *præfervida Scotorum ingenia.* For albeit, formerly, the reaſonings and votings of the Lords, in ſo great a judicature, and ſo many attendants, could be no ſecrets, and often were miſrepreſented; yet the parties were then calm, and had no certain evidence that theſe reports were true: but when they are at the bar, they will be in much more certainty and fervor, which may make their grudges ſtick the deeper, and laſt the longer. But there will be much leſs reaſoning amongſt the Lords, than behoved to be formerly; and their prudence and generoſity, will oblige them to forbear all heats in reaſoning.

Theſe two acts may foreſlow the diſpatch of juſtice; but what is thereby diſpatched, will be much more diſtinct and clear, than before.

It was the moſt ordinary complaint of advocates, that the Lords gave them not diſtinct interlocutors, to all their alledgances, and thence they multiplied bills, eſpecially upon pretence, that ſuch points as were propoſed, had not been noticed by the Lords, but had paſſed, without ſpecial conſideration. And next, that the influence of reporters was too great, and that though parties found themſelves thereby læſed, yet the Lords were unwilling to remit the cauſe reported by one Lord to another. And albeit the Lords did both by word, and by acts of Sederunt, urge the lawyers to propone their defences, and eſpecially their exceptions, replies and duplies, diſtinctly and ſeverally, with different characters; yet they could never obtain the ſame from the moſt part of them. But when they complained by their bills, they propoſed to the Lords a number of queſtions, but not in the terms and order of law, which is abſolutely neceſſary in a formal legal debate.

But now they have no ground to ſuſpect the influence of reporters, if they follow the terms of law, and order propoſed, all being read and reported in their preſence; which if they do, they will certainly receive diſtinct interlocutors, point by point: which before could not be done, through their own fault, when their diſputes were in a maſs of law and fact, out of which the Lords behoved to pitch upon theſe points which they thought of importance, and requiſite to be determined, and gave interlocutors as to theſe; but as to the reſt, they were underſtood as repelled, or unneceſſary to be reſolved.

The difficulty is greater as to diſputes *in præſentiâ*, and the deciſions thereon: for formerly the pleaders were often ſo large, that they could hardly make a cloſe, but by the hour: for if they had diſputed every point a-part, and had been removed, they would have ſo much enlarged on each point, that thereby, and by the loſs of time in removing them and the croud, there could not have been ſo much diſpatched in a month, as was ordinarily diſpatched in a week and therefore the Lords behoved to let them ſay all they would, before they gave their interlocutor to any point. And after all, they did ordinarily preſs for liberty, to inform before interlocutor, when the diſpute at the bar was forgot, and the Lords were neceſſitated to hear the ſame reported by the Chancellor or Preſident, and to chooſe out the points that were to be determined, as was accuſtomed in reports from Ordinarys, which cannot quadrate with the act for open doors: for then no time will be loſt by removing, until a new cauſe be called; and then the parties and procurators that were in the former cauſe, muſt go out by the left hand, and paſs at the great door, and ſo go through the waiting-room to the Outer-houſe; for the counter-tide of ſome going out the way they came in, and others coming in that ſame way, conſumed a great deal of time.

The method then which ſeems will be moſt convenient and requiſite with patent doors, in diſcuſſing cauſes *in præſentiâ*, occurs in two different caſes. For firſt, ſometimes the Lords upon reports, appoint the whole cauſe to be diſputed in their preſence, and inrolled in the Inner-houſe-roll, according to the date of that interlocutor. And next, ſometimes we do not find it neceſſary to remit the whole cauſe to the roll of the Inner-houſe, but find only one ſingle point

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in jure difficult, and not clear by law or cuſtom, and therefore neceſſary to be cleared upon full debate, as a leading caſe (and when that point is determined, they leave it to the Ordinary to go on in the reſt) and for that end, the Lords appoint the pleaders to be ready againſt the next day, or the day after it, to plead that point, and that immediately after the diſcuſſing of that cauſe in the ordinary roll, which was not ended when that report was made: for when the point is remitted to a longer day, ſeveral ſuch points fall on the ſame day, or all the parties are not ready, which puts the point out of the pleaders minds. There can be no more then one ſingle diſpute this way, which breeds no uncertain attendance, ſeeing the cauſe was then diſputed in the Outer-houſe, where all parties intereſts are attended.

But when a whole cauſe comes to be diſputed *in præſentiâ*, the Chancellor or Preſident, muſt keep the pleaders to the terms of law and order, before expreſſed; and muſt not let them enlarge upon dilators, but after the firſt dilator propoſed and argued by the pleaders, muſt ſtop them. And then, if in his opinion the dilator be not ſuſtainable, he muſt aſk, " if any of the Lords be for ſu- " ſtaining that dilator, in order as they are to be proponed?" and if none of the Lords anſwer, it is thence evident, that none of them are for ſuſtaining of it: and ſo the clerk having written, " Repells the firſt dilator," the Chancellor or Preſident pronounces, " The Lords repel the firſt dilator." But if the Chancellor or Preſident's opinion be, that the dilator is to be ſuſtained, then he aſks the Lords, " if there be any for repelling this dilator?" And if none anſwer, all are underſtood to acquieſce and he pronounces the interlocutor, " The Lords ſuſtain the dilator," and ſo the cauſe is diſmiſſed. And though one of the Lords be of a different judgment, yet if he be not ſeconded by another, the point is ſtill ſuſtained, or repelled as before. But if two concur in one opinion, contrary to the opinion of the Chancellor or Preſident, preſiding for the time; then the point comes to a vote. And dilators will ſeldom require a new reaſoning among the Lords, but they will reſt on the reaſonings of the advocates, and ſo give their votes. The ſame was the cuſtom, when the doors were cloſs. And it is the cuſtom in all judicatures whatſoever, that except two at leaſt be of a different opinion from him that preſides, his opinion prevails without a vote; or otherwiſe, no judicature were able to make any diſpatch.

If the dilator be repelled, the defender's advocate is required to propone any further defence, if he have it, and in due order. And if he propone any, he cannot go back to that, which in the due order was before it; as if he propone a peremptory exception, he cannot return to declinators, or other dilators. If he then propone an exception, inſtructed by the writs produced, he ſhould mark the clauſe whereupon he inſiſts, which muſt be read; otherwiſe he muſt in the terms of law ſay, " abſolvitor, becauſe I offer to prove this relevant excep- " tion *prout de jure*, by writ, oath of party, notoriety or preſumption:" and he muſt not be permitted, to adduce arguments to confirm his exception, till he hear the purſuer's advocate, whether he contraverts the relevancy of it, or not; or if the purſuer queſtion not the relevancy, or the manner of probation, but propones a reply in theſe terms, " The exception ought to be repelled, by " reaſon of this reply, inſtructed by writ produced," and the clauſes thereof marked, or otherwiſe that he offer to prove the ſame, and condeſcend on the manner of probation; in that caſe, the purſuer is not to give reaſons to confirm his reply, till he hear whether the defender's advocate contraverts the relevancy thereof, or propones a duply; in which caſe, if he only propone a duply, and the purſuer contravert not the relevancy thereof, the diſpute is ended: and the Lords will not contravert, where the parties advocates do not contravert. Only as to the probation, if the defence preſuppoſe the verity of the libel, and the reply the verity of the defence, and the duply, the verity of the reply; then the term is aſſigned, only to prove the duply: but if the exception do not preſuppoſe the verity of the libel, either as to the matter, quantity

or

or quality; then the term muſt be aſſigned to the purſuer, to prove that point of his libel, and to the defender, to prove that part of his exception eliding the ſame. And if the reply do not preſuppoſe the verity of the defence, nor the duply the verity of the reply; then the term is to be aſſigned to the purſuer, to prove his libel and reply, and to the defender, to prove his defence and duply.

But if the purſuer contravert the relevancy of the defence, then either ſide muſt be allowed a competent time, to argue whether the ſame be relevant or not, and then muſt be ſtopped by him who preſides, who if he be of opinion that the defence is relevant, muſt move the queſtion to the Lords, " if any be for repel-" ling the defence." And if two of the Lords do not concur for repelling it, he gives the interlocutor, " that the Lords ſuſtain the exception." But if he ſhall apprehend, that the diſpute hath not cleared, whether the exception be relevant or not; in that caſe he will not propone the queſtion to the Lords, " whether " or no the ſame is clear?" but will deſire the Lords to ſpeak to the point; and after they had ſo done, if their be diverſity of judgments, he will put it to the queſtion, " Suſtain the exception, or not?"

If the exception be ſuſtained, the purſuer's advocate will be deſired to propone a reply in fact, if he any have, wherein the ſame method will be followed as in the exception. And if the reply be ſuſtained, the defender's advocate will proceed to the duply, if he any have, in the ſame manner.

But whether the exception be ſuſtained or repelled, the defender may propone more exceptions, to be diſcuſſed in the ſame manner as the firſt. And in like manner, the purſuer in his replies, and the defender in his duplies: and if more of theſe be proponed, it muſt be with numeral figures, that the queſtion may be ſummarily ſtated and voted.

This Statute doth appoint, that not only the diſcuſſing of cauſes diſputed *in præſentiâ*, and upon reports, but alſo that the anſwering of bills ſhall be with open doors; which doth not import the calling of parties, unleſs the Lords upon reading the bills, ſee fit, that a point be preſently heard *in præſentiâ:* but in all other caſes, the Lords as they have already reſolved and practiſed, will pitch upon the points in the bills, which they find deſerve an anſwer, and will appoint the reporter to hear the parties upon theſe points, whether they contain any new matter, or more pregnant arguments in law. But the advocates ought to keep the terms of law, and the order before mentioned, as well in bills, as in verbal diſputes. And it were very convenient, that no bills were read, but ſuch as had been delivered to the clerks the night before, that they might peruſe them, and have in readineſs what were neceſſary to be conſidered by the Lords, when called for; ſhewing the preſenters of the bills, that they durſt not read them, if they did not obſerve the terms and order of law, ſetting down the points to be reſolved in larger characters, and ſubjoining the reaſons to theſe points ſeverally. The points agreed upon to be heard, muſt be ſet down on the bill as an interlocutor, and ſigned as other interlocutors. If the Lords find any point in the bill not to be competent and relevant, or already determined; the interlocutor will then be, " That the Lords refuſe the deſire of " the bill, as not competent or relevant, or as already determined."

By theſe means, bills will not be inſerted in decreets, but only the diſpute upon the points remitted to be heard; unleſs the bill be wholly refuſed, in which caſe, it may be inſerted in the decreet; or if it be paſſed of courſe in matters notour, and require not an anſwer, it may alſo be inſerted; but the Lords may appoint all impertinent reflections in bills, to be deleted when they are read.

If any interlocutor written on the proceſs, be recalled, the laſt interlocutor ought only to be inſerted in the decreet.

I ſee no ground of doubt, but this order of diſcuſſing cauſes upon diſpute, in preſence of the Lords, or by report, was always moſt expedient: But now after theſe late Statutes of Parliament, it is abſolutely neceſſary: otherwiſe it were

were impoſſible for one judicature, to decide and determine all civil cauſes, which uſe to come before the Seſſion. For if every alledgeance in point of fact, or law, wherein pleaders differ, muſt come to a vote, by the concourſe of two Lords deſiring a vote, and the ſtate of the queſtion for that vote, muſt firſt be written by the clerk *in mundo*, and read and acquieſced in by the Lords (whereby the difference not only in the matter, but alſo in the wording may come to a new vote), it will then be obvious, how little diſpatch can be made upon the foreſaid points, unleſs they be diſtinctly and orderly proponed by the pleaders. And by this the Lords can have no occaſion to differ on the ſtate of the queſtion, unleſs it be as to the order of diſcuſſing: for the pleaders are to propoſe the points of proceſs, which they may ſtill reform, as they find themſelves ſtraitened by the debate, till it come to the vote, and are not obliged to ſtick at the more indigeſted points, as they were firſt propoſed.

And therefore the pleaders ought not to inſiſt for having a vote on every point of law or fact, wherein they differ; but only upon theſe points, which are the proper points of proceſs, which being determined by a vote, will either give a decreet, or an act aſſigning a term for probation: as if the point to be determined be a dilator; if it be ſuſtained, the inſtance is ended, unleſs a new dilator or peremptor be proponed: and in the ſame manner, if a peremptor exception be proponed; and if in anſwer thereto, an objection be proponed againſt the competency of that exception (which comprehends the order of proponing) if that objection be repelled, the excipient muſt have abſolvitor, if he inſtantly verify, or muſt have a term to prove, and ſo in the reply or duply: for there is always an *Ergo* expreſſed or implied, for obtaining a final ſentence, or a term: and nothing elſe ſhould be voted, except upon bills for expedients in probation.

The order by which cauſes are now to be diſcuſſed and determined, doth not only require that declinators ſhould not be proponed after dilators, nor dilators after peremptors, nor either out of their juſt order, and that dilators ſhould be proponed before the ſecond vote; but likewiſe require that all objections againſt the competency or relevancy of exceptions, replies or duplies, ſhould be proponed before the ſecond vote as to ſuch objections. Otherwiſe pleaders may multiply objections, till their invention be exhauſted: and if they ſhould crave a diſtinct interlocutor to each of them ſeverally, what diſpatch in juſtice could be expected? and therefore there ſhould be no numeral letters as to declinators, dilators, or objections; but the Lords may determine them with one or more votes as they pleaſe. None of theſe things claſh with the late Statutes, but rather are neceſſary conſequences thence ariſing.

VIII. This method of diſcuſſing, being very clear and plain as to ordinary actions; it remains to be conſidered, what difference there may be in diſcuſſing of advocations, ſuſpenſions, reductions or competitions.

1. As to advocations, the concluſion thereof, is, "to remove the proceſs from "an incompetent, intereſted, or ſuſpected judge, to the Lords, or to another "judicature," and that upon the reaſons libelled or eiked in writ. And all theſe reaſons might have been proponed as declinators before that judge; but being proponed before the Lords, they are as nullities of what he hath done or ſhall do in that proceſs, and are to be diſcuſſed as other nullities: which for the moſt part are objections againſt the juriſdiction and authority of the judge, or againſt the juſtice of his interlocutors; and therefore are diſcuſſed as objections or dilators, which muſt be inſtantly verified, in the order and manner as hath been ſaid in declinators, dilators, or objections in ordinary actions.

2. What hath been ſaid of the manner of diſcuſſing ordinary actions, will eaſily regulate the manner of diſcuſſing ſuſpenſions. The concluſion whereof is, "to "ſuſpend the execution and effect of decreets, either ſimply (which hath the ef-"fect of a reduction of the decreet) or in part, *qualificatè*, or for a time:" and that for the reaſons libelled or eiked in writ, which yet the ſuſpender may limit,

qualify, or explain in the diſpute. Theſe reaſons of ſuſpenſion are in effect the defences in the principal cauſe, and the ſuſpender is rather defender than purſuer. For he that hath right to the decreet, is in effect purſuer, and for diſtinction's ſake, is called charger; and therefore he muſt repeat and inſiſt in his charge, before the ſuſpender inſiſt in any reaſon of ſuſpenſion, ſo that the cauſe is to be treated as depending, during the ſuſpenſion. And therefore the reaſons of ſuſpenſion, are either objections againſt the citation, titles, intereſts of parties, competency, or relevancy of the action; or againſt the ſufficiency of the probation, or the nullities in not obſerving neceſſary formalities. All theſe are to be diſcuſſed in the ſame way as dilators or objections in ordinary actions. But if the reaſons of ſuſpenſion would have been proper exceptions in the principal cauſe, they are to be diſcuſſed in the ſame way as in ordinary actions. Firſt, By objection againſt the competency, that albeit the matter were intire, it would not be ſuſtained by way of exception; or if it would then be ſuſtained, it would not be now competent, becauſe it was competent and omitted in the firſt inſtance; or becauſe it is not relevant. But if they be repelled, the Lords will ſuſtain the reaſon, unleſs a reply in fact be proponed; which reply, is in a ſuſpenſion called an anſwer to the reaſon, which as a point of proceſs, is not every anſwer, but an anſwer *in facto* proved by the production, or in ſome caſes to be proved at a term; and therefore when the charger anſwers, that *res eſt judicata*, the ſame point being proponed in the principal cauſe and repelled, or in another decreet produced; againſt this, it may be objected, that the reaſon of ſuſpenſion is upon the matter emergent, or new come to knowledge after the decreet, which therefore cannot be excluded thereby.

3. The method of diſcuſſing reductions, differeth according to the divers kinds of reductions. For if it be a reduction of a decreet, the reducer is in effect defender; and he that hath right to the decreet craved to be reduced, inſiſts as purſuer, for removing theſe grounds, which might annul his decreet. If he call not for the grounds and warrants of the decreet (whether they be original writs whereupon the decreet proceeded, which parties do take up, or other warrants which remain with the clerks) but only calls for reduction of the decreet, upon what appears from the ſame, without the warrants; then there is no difference between diſcuſſing a reduction and a ſuſpenſion, but that a reduction doth not ſtop the execution and effect of the decreet: and therefore in it, terms are granted, generally, to prove the reaſons of reduction, and ſo the manner of diſcuſſing is alike in both. But if any more than the decreet be called to be produced and reduced; then the diſpute begins as to the writs which the defender is obliged to produce.

And in diſcuſſing of the production, there ſeldom occurreth any thing, but objections againſt that concluſion of the reduction, calling for production of ſuch writs. So in reductions, all the ordinary dilators are competent againſt the citation, the titles, and the not calling parties neceſſary to be called; but nothing as to the competency, or againſt the relevancy, which is only to be diſputed after the production is cloſed: but theſe objections are peculiar to reductions, that when the purſuer craves certification *contra non producta*, the defences are all objections againſt the purſuer's intereſt, by the titles he produces; as that he can crave certification againſt no writ, but that againſt which there is a reaſon of reduction libelled; or that the defender hath produced ſufficiently, to exclude all his titles produced, having produced a right anterior to all his titles, which is but *dilatoriè* proponed, in diſcuſſing the production; and if it be not ſuſtained, the defender may make a further production, and alledge the ſame upon it, but he cannot delay the certification upon any further than the ſecond production.

When the production is cloſed, the purſuer then inſiſts in his reaſons of reduction; and if there be more reaſons, his proceſs is *articulatus libellus*, and every reaſon muſt be diſcuſſed accordingly. And the defender ought firſt to propone his

his defences againſt the relevancy of the reaſons; and then his exceptions inſtructed or offered to be proved, and the purſuer his objections againſt the relevancy of the exceptions, and then his replies, and the defender his objections, *&c.* againſt the purſuer's replies, and the purſuer his objections, *&c.* againſt the defender's duplies, in the ſame manner as in ordinary actions.

4. The manner of diſcuſſing competitions of right muſt be different, according to the divers ways the competition occurs. If it occur by a double poinding, raiſed at the inſtance of a party, that may be diſtreſſed or troubled, upon the different rights of ſeveral parties; he may cite them all to diſpute their rights. And in the proceſs he is ſtill purſuer, and may inſiſt againſt any of the parties he calleth, albeit the other party ſhould not inſiſt, to the effect abſolvitor may be pronounced, from any trouble upon that right he inſiſts againſt: but if another competitor produce a prior or more valid right, the common preſumption, *prior tempore potior jure*, makes the producer to be as purſuer, both againſt the raiſer of the double poinding, and againſt the competitors. And this evites the frequent altercations, what party ſhould firſt inſiſt, and ſo he propones his reaſon of preference, whereof the relevancy muſt be firſt diſcuſſed, and the ſeveral objections againſt the ſame, muſt either be ſuſtained or repelled: and if all be repelled, the competitors muſt propone upon their rights by way of exception, yet the terms they uſe are, "that my right produced ought to be preferred;" wherein the firſt right in order of time gives the firſt intereſt to inſiſt: ſo then, if the ſecond competitor in order of time, be preferred to the firſt, it is his intereſt to inſiſt, and ſo in order till all the competitors be diſcuſſed.

If a competition of rights ariſe from the different parties called in the ſame reduction, the purſuer being *in libello*, may inſiſt againſt any of the parties who were cited, and have produced, as he pleaſeth, to reduce that party's right, in ſo far as prejudicial to the purſuer's right; and ſo he may proceed againſt all the parties called, producing ſeveral inſubordinate rights. But if any of them exclude the purſuer's right, he is out of the field: and yet the competition proceeds upon the ſeveral inſubordinate rights, and the firſt right in order of time, hath intereſt to inſiſt againſt the ſecond right in order of time; and if he be preferred thereto, may proceed againſt the reſt in order of time, while he is not excluded by any other right; but if he be excluded, he is out of the field, and he that prevails inſiſts againſt the reſt, until all be diſcuſſed. This is all requiſite to be known, for preventing the jangling of parties, contending who ſhould inſiſt and be firſt heard.

But if the competition ariſe from parties compearing for their intereſt, and producing titles; then the queſtion comes to be, whether he produces ſufficient title to give him intereſt to defend or compete; and thence frequently ariſes a competition of rights. In which caſe, the purſuer in the proceſs, ought to be firſt heard, and may inſiſt againſt any of the parties called, or compearing for his intereſt, till he be excluded: and then the competition proceeds according to the anteriority of the rights produced. If the proceſs whereon the competition ariſeth be a reduction; the purſuer muſt proceed differently againſt the parties called, and the parties admitted for their intereſts. For the party called can make uſe of no right, againſt which certification is admitted, as to the purſuer in the reduction and obtainer of the certification; but he may propone upon any right againſt the parties compearing for their intereſt, for preferring him to them: for albeit the purſuer hath prevailed againſt him by the certification, yet if any compearing for their intereſts be preferred to the purſuer, he who is excluded by the certification, may found upon any right againſt him that prevails, becauſe the certification was only in favour of the purſuer of the reduction. If the competitors be many, the competition is remitted to an auditor.

The reaſon why parties are admitted for their intereſts, tho' they be not called, is, to prevent pleas and the unneceſſary multiplication of proceſſes; and therefore it is not ſufficient to exclude an intereſt, to offer to reſerve it to another

ther proceſs; but the party muſt be admitted, and may inſiſt in the proceſs, as if it had been raiſed at his inſtance, and ſhould get terms thereupon to prove, not only as a defender, but as a purſuer.

IX. Seeing by the above-mentioned act, it is peremptorly ſtatute under a high penalty, "That in all points to be voted by the Lords of Seſſion hereafter, the "queſtion being ſtated, ſhall be firſt written by the clerk *in mundo*, as it ſhall be "agreed to by the Lords, and read immediately before they go to the vote;" it is evident how great weight is laid upon the ſtating of the vote, which if it be not clear and ſhort, it will exceedingly retard the diſpatch of cauſes: and therefore if the point in diſpute be clear in law, whether it be dilator or peremptor, the Chancellor or Preſident may aſk the Lords, whether any of them be for ſuſtaining it; and if none anſwer, may repell it. Or he may aſk, if any of them be for repelling it; and if none anſwer, may ſuſtain it, without neceſſity to write the ſtate of the queſtion, which is only to be done in caſe the matter come to a vote. But if he apprehend the point propoſed to be dubious, he ought to move the Lords to ſpeak to it, that it may appear whether they be unanimous in it, or not.

But if the diſpute be upon the relevancy or competency of the libel, or upon the relevancy or competency of the exception, reply or duply; which can only conſiſt in matters of fact, preſumed, inſtructed, or offered to be proved; in that caſe, the queſtion may muſt conveniently be, "Suſtain the libel or not? ſuſtain "or repell the exception, reply, or duply, *&c.*?

But in all queſtions concerning the competency or relevancy of exceptions, replies or duplies, *&c.* the queſtion propoſed, muſt bear the kind of the point propoſed, whether it be exception, reply, or duply, *&c.* Or if the diſpute be upon a reaſon of ſuſpenſion, the terms may be, "whether the anſwer *in facto* to the "reaſon," or "the reply *in facto*, are to be ſuſtained or repelled?" But if the diſpute be in a reduction or competition, the reaſons are parts of the libel, and the defences *in facto* are proper exceptions, and likewiſe the replies, and duplies, and may in the ſame way be put to the vote, as in ordinary actions.

In this way there can be no occaſion of difference among the Lords, concerning the ſtating of the queſtion: ſeeing it doth only relate to the points as proponed by the pleaders, expreſſing nothing particularly, but the ſpecial kind of the alledgeance: for ſeeing judges ought to proceed *ſecundum allegata*, the pleaders ſhould have liberty to frame their own alledgeances, expreſſing the ſeveral kinds of them.

This method for the Inner-houſe, will likewiſe be a rule for the Outer-houſe, that every point to be reported be ſet down in the minutes, in the due order, and as the ſame is proponed, leaving a diſtance between every point, for writing therein the ſtate of the queſtion, and the interlocutor.

X. Albeit, by the 20th act of the ſame laſt Seſſion of Parliament 1693, advocates are allowed "to make their alledgeances as they think fit;" it imports only, that it belongs to them to form the matter, but ſtill they muſt keep the terms and order of law, *in* expreſſing the ſeveral kinds of their alledgeances. Neither ſhould they be permitted to repeat the matter of fact, which is in the libel and charge, at the adjuſting of the minutes. But they ſhould have liberty to argue ſhortly what they have to ſay, in which they may make anſwers *hinc inde* ſeveral times before the clerk write any thing: and then the ſubſtance of what they have argued, muſt be briefly dictated to the clerk; firſt by the defender or ſuſpender, obviating what in the verbal reaſoning the purſuer or charger's advocates ſaid; who then may dictate their anſwers to the defences, and their reaſons for the ſame ſeverally, ſo as they think they may take off the purſuer's objections or replies againſt the ſame. If this order be not followed, the dictating of many mutual anſwers, will make the minutes ſo large, that it will take up more time in adjuſting them, than can be allowed to the Ordinary, by reaſon of his other affairs, or to the advocates, becauſe of their conſulting with their clients, drawing

their

their informations, and reading of Statutes and Doctors. And much more time will be unneceſſarily ſpent in making reports conform to the minutes.

XI. By what hath been ſaid, it will be evident to every judicious lawyer, that the diſcuſſing and determining of proceſs, is regularly by ſuſtaining the libel or charge as relevant or competent, or by refuſing to ſuſtain the ſame, which terminates the inſtance: for all dilators are only objections againſt the libel or charge, ſeeing the relevancy imports, that the concluſion is juſtly to be inferred from the premiſſes, if they be true; and ſo relieves or helps the purſuer in his right: ſo that if the due order of citation, or the titles to be produced *in initio*, or the calling of parties neceſſary to be called, *&c.* be wanting, the libel will not relieve or help the purſuer. And in the next place, if the libel be ſuſtained, the defender's exceptions come to be diſcuſſed, whether relevant or not, and ſo in the replies and duplies. But there is exception from that rule in improbations, reductions upon fraud, or declarators of truſt *, that parties are allowed to adduce all the adminicles and evidences they can, before anſwer to the relevancy, that the Lords upon the whole matter may determine according to the ſtrongeſt evidences; or in other caſes before anſwer, wherein evidences and adminicles are allowed to be adduced.

* Truſt can now be proved, only by writ or oath, Parl. 1696. c. 25.

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E R R A T A.

P. 5. l. 14. for *degrees* read *degree*; and at the foot of the page, dele MS. A. B. and H. and add, See below I. 4. 4.

P. 19. (in the note) after *Parl.* 1606. *c.* 11. add, *and Parl.* 1661. *c.* 56.

P. 21. l. 22. after *children*, add, from the MS. *the obligations betwixt*

P. 84. dele note ** except the reference at the end of it

P. 254. l. 37. after *Service*, add, **. And in the note ** l. 3. for "*in money, only the*" read, "*in money only, the*"

P. 256. l. 49. after *ward*, add ss; and at the foot of the page, add ss See below III. 2. 12.

P. 381. for *lateri præſentium* read *latori præſentium*.

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467	487,8	527	549,	586	608,9	645	667,8
468	488,9	528	550,	587	609,10	646	668,9
469	489,90	529	551,	588	610,11	647	669,70
470	490,1	530	552,	589	611,12	648	670,1
471	491,2	531	553,	590	612,13	649	671,2
472	492,3	532	554,	591	613,14	650	672,3
473	493,4	533	555,	592	614,15	651	673,4
474	494,5	534	556,	593	615,16	652	674,5
475	496,	535	557,	594	616,17	653	675,6
476	497,	536	558,	595	617,18	654	676,7
477	498,	537	559,	596	618,19	655	677,8
478	499,	538	560,	597	619,20	656	678,9
479	500,	539	561,	598	620,1	657	679,80
480	501,	540	562,	599	621,2	658	680,1
481	502,	541	563,	600	622,3	659	681,2
482	503,	542	564,5	601	623,4	660	682,3
483	504,5	543	565,6	602	624,5	661	683,4
484	505,6	544	566,7	603	625,6	662	684,5
485	506,7	545	567,8	604	626,7	663	685,6
486	507,8	546	568,9	605	627,8	664	686,7
487	508,9	547	569,70	606	628,9	665	687,8
488	509,10	548	570,1	607	629,30	666	688,9
489	510,11	549	571,2	608	630,1	667	689,90
490	511,12	550	572,3	609	631,2	668	690,1
491	512,	551	573,4	610	632,3	669	691,2
492	513,	552	574,5	611	633,4	670	692,3
493	514,15	553	575,6	612	634,5	671	693,4
494	516,	554	576,7	613	635,6	672	694,5
495	517,	555	577,8	614	636,7	673	695,6
496	518,	556	578,9	615	637,8	674	696,7
497	519,	557	579,80	616	638,9	675	697,8
498	520,	558	580,1	617	639,40	676	698,9
499	521,	559	581,2	618	640,1	677	699,700
500	522,	560	582,3	619	641,2	678	700,1
501	523,	561	583,4	620	642,3	679	701,2
502	524,	562	584,5	621	643,4	680	702,3
503	525,	563	585,6	622	644,5	681	703,4
504	526,	564	586,7	623	645,6	682	704,5
505	527,	565	587,8	624	646,7	683	705,6
506	528,	566	588,9	625	647,8	684	706,7
507	529,	567	589,90	626	648,9	685	707,8
508	530,	568	590,1	627	649,50	686	708,9
509	531,	569	591,2	628	650,1	687	709,10
510	532,	570	592,3	629	651,2	688	710,11
511	533,	571	593,4	630	652,3	689	711,12
512	534,	572	594,5	631	653,4	690	712,13
513	535,	573	595,	632	654,5	991	713,14
514	536,	574	596,	633	655,6	692	714,15
515	537,	575	597,	634	656,7	693	715,16
516	538,9	576	598,	635	657,8	694	716,17
517	539,40						

Old Edit.	New Edit.	Old Edit.	New Edit.	Old Edit.	New Edit.	Old Edit.	New Edit.
695	717,18	717	739,40	738	760,1	759	781,2
696	718,19	718	740,1	739	761,2	760	782,3
697	719,20	719	741,2	740	762,3	761	783,4
698	720,1	720	742,3	741	763,4	762	784,5
699	721,2	721	743,4	742	764,5	763	785,6
700	722,3	722	744,5	743	765,6		
701	723,4	723	745,6	744	766,7	765	787,
702	724,5	724	746,7	745	767,8	766	788,
703	725,6	725	747,8	746	768,9	767	789,
704	726,7	726	748,9	747	769,70	768	790,
705	727,8	727	749,50	748	770,1	769	791,
706	728,9	728	750,1	749	771,2	770	792,
707	729,30	729	751,2	750	772,3	771	793,
708	730,1	730	752,3	751	773,4	772	794,
709	731,2	731	753,4	752	774,5	773	795,
710	732,3	732	754,5	753	775,6	774	796,
711	733,4	733	755,6	754	776,7	775	797,
712	734,5	734	756,7	755	777,8	776	798,
713	735,6	735	757,8	756	778,9	777	799,
714	736,7	736	758,9	757	779,80	778	800,
715	737,8	737	759,60	758	780,1	779	801,
716	738,9						

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